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IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

JUNE—SEPTEMBER, 1890.

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# CASES

ARGUED AND DETERMINED

IN THE

## United States Circuit and District Courts.

UHLE *et al.* v. BURNHAM *et al.*

FISCHL *et al.* v. SAME.

(Circuit Court, S. D. New York. April 14, 1890.)

### REMOVAL OF CAUSES—CITIZENSHIP.

Under the act of March 3, 1887, an action pending in a state court may be removed by defendant to the federal court, although neither party is a resident of the district. Following *Kansas City & T. R. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 8.

At Law. On motion to remand.

The plaintiffs in both actions are aliens, and the defendants are residents of the state of Missouri. Both actions were commenced by the service of a summons in the supreme court of New York. Within the 20 days allowed by the law of New York for defendants to answer or plead, they removed the cases into this court. Plaintiffs move to remand.

*Chas. Putzel*, for plaintiffs, cited: *Denton v. International Co.*, 36 Fed. Rep. 1; *Galvin v. Boutwell*, 9 Blatchf. 470; *Meyer v. Herrera*, ante, 65; *Halstead v. Manning*, 34 Fed. Rep. 565; *Harold v. Mining Co.*, 33 Fed. Rep. 529.

*David A. Sullivan*, (*Don M. Dickinson*, of counsel,) for defendants, cited: *Kansas City, etc., Ry. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 5; *Burck v. Taylor*, 39 Fed. Rep. 581; *Cooley v. McArthur*, 35 Fed. Rep. 372; *First Nat. Bank v. Merchants' Bank*, 37 Fed. Rep. 657; *Gaines v. Fuentes*, 92 U. S. 10; *In re Schollenberger*, 96 U. S. 369; *Sayles v. Insurance Co.*, 2 Curt. 212; *Barney v. Bank*, 5 Blatchf. 107; *Bushnell v. Kennedy*, 9 Wall. 387; *Green v. Custard*, 23 How. 484; *Wilson v. Telegraph Co.*, 34 Fed. Rep. 561; *Loomis v. Coal Co.*, 33 Fed. Rep. 353; *Fales v. Railroad Co.*, 32 Fed. Rep. 673.

LACOMBE, J. It seems unnecessary to add anything to the full discussion of the questions raised on this motion which will be found in  
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*Kansas City, etc., Ry. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 3, (by Judge BREWER,) and *Burck v. Taylor*, 39 Fed. Rep. 581, (by Judge MAXEY.) The motion to remand is denied. See, also, *First Nat. Bank v. Merchants' Bank*, 37 Fed. Rep. 657.

BARHORST *et ux.* v. ARMSTRONG *et al.*

(Circuit Court, S. D. Ohio, W. D. March 29, 1890.)

1. EQUITY—MARSHALING ASSETS—JUDGMENT.

On injunction to restrain the enforcement of a judgment on a note, against the maker, it appeared that the payee, before maturity, transferred it to a bank as collateral; that the maker, in ignorance of the fact, paid it to the payee, without receiving the note, upon his representation that he had forgotten to bring it. After maturity, the bank, pursuant to an agreement with a person who knew that it was up as collateral, obtained judgment on it, and assigned the judgment and all other collateral paper to him, on his paying the principal debt. Among the collaterals were notes, on which this person was a surety, for a greater amount than the principal debt. Held, that equity required the bank to resort first to the other collaterals which it held, and this equity was not changed by reducing the note to judgment, and that the assignee got no greater rights than the bank had, and therefore could not collect the judgment, whether the transaction be considered as a purchase by him, or as a part payment of his own obligation.

2. INJUNCTION—NEGLECT OF ATTORNEY.

The fact that an attorney engaged to defend a suit neglects to do so is no ground for enjoining the enforcement of the judgment; the only remedy of the judgment debtor, if he was damaged, is against the attorney.

In Equity.

Bill for an injunction filed by Harmon Barhorst and Mary Barhorst, his wife, against David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Moses F. Brown, L. F. Brown, and Alfred Hill.

C. H. Blackburn, for complainants.

Hill & Stricker and Paxton & Warrington, for defendants.

SAGE, J. This suit is upon an ancillary bill filed by complainants to restrain further proceedings upon a judgment for \$500, recovered in this court by David Armstrong, receiver of the Fidelity National Bank, against the complainants, upon their promissory note dated June 9, 1887, and payable 10 months after date to the order of Moses F. Brown. The complainants set forth that they fully paid said note before its maturity to Moses F. Brown, and that Brown, with intent to defraud, failed to deliver it to them upon its payment, and transferred it to David Armstrong, as receiver of the Fidelity National Bank, as collateral security; that Armstrong, with knowledge that the note had been paid before maturity, after it had become due entered into an agreement with L. F. Brown, who had notice of the payment of the note, whereby he was to assume and pay the indebtedness of Moses F. Brown to the Fidelity National Bank for the payment of which the note above referred to and other notes were held by Armstrong as collateral; that it was further agreed that said

receiver was to recover judgment against complainants on said \$500 note, and assign the same to L. F. Brown, and that the suit was accordingly brought in this court by the receiver against the complainants and Moses F. Brown; and that the complainants had a complete defense, of which the receiver and said Brown had due notice. The complainants further aver that they employed Edwin J. Franks, an attorney at law, to present their defense, and relied and depended upon him to represent them in the case; that they had no knowledge that they were in default, or that the judgment was rendered against them, until after the term at which it was rendered, and after their property had been seized in execution; that after the rendition of the judgment, and the issuance of the execution thereon, to-wit, about the 8th day of October, 1888, Armstrong assigned said judgment to Alfred Hill as attorney for L. F. Brown; that said L. F. Brown is a brother of said Moses Brown, and in his action herein was in concert with said Moses Brown with intent to cheat and defraud the complainants, and that said Alfred Hill, attorney, had full and complete notice of the equities of complainants in the bill set forth. The complainants further aver that, unless prevented, said Hill will sell their property seized in execution as aforesaid, which is all the property owned by them, and if thus taken will leave them destitute; also, that said L. F. Brown and Moses F. Brown are insolvent and pecuniarily irresponsible. Wherefore complainants pray that the defendants be enjoined from further proceedings upon said judgment, and from selling said property; that the judgment be declared and held to be null and void as to complainants, and their property be released from said execution. The answer of the defendants denies payment of the \$500 note, or notice thereof to L. F. Brown or Alfred Hill, or that the complainants had a defense to the action brought thereupon by Armstrong, or that they were acting with Moses F. Brown in any attempt to cheat or defraud complainants. It further avers that the complainants were notified by defendants, before said note was due, that the same was held by David Armstrong, receiver; and that before the maturity of said note L. F. Brown agreed with said receiver to purchase the collateral and principal notes held by him as receiver, and pay the indebtedness of Moses F. Brown upon the principal notes, said Armstrong agreeing to recover judgment upon said \$500 note, and assign said judgment to L. F. Brown. They further answer that on the 8th day of October, 1888, L. F. Brown purchased the judgment upon said \$500 note from Armstrong, receiver, and they deny that L. F. Brown is insolvent, and aver that he is reasonably worth the sum of \$30,000, over and above his debts and liabilities.

Upon the hearing it appeared from the record that, when Armstrong assumed the duties of receiver of the Fidelity National Bank, Moses F. Brown was indebted to the bank upon his discounted notes in the sum of \$3,000; that in September, 1887, in response to the demand of the receiver, Moses F. Brown hypothecated as additional security for the payment of his indebtedness to the bank, the \$500 note made to him by the complainants, with other promissory notes. From time to time, by

the sale of collateral notes and by payment on the original discounted notes, the indebtedness was reduced to about \$1,400, in April, 1888; at which time Hill, as attorney for L. F. Brown, agreed with Armstrong to purchase all the discounted notes and collaterals, and pay the indebtedness of \$1,400, Armstrong agreeing, in consideration therefor, to put the Barhorst note for \$500 into judgment, and assign the judgment to Hill as attorney for L. F. Brown. This agreement was carried into effect. The judgment was rendered upon the note in August, 1888, which was in the April term of the court. On the 8th day of October, 1888, Alfred Hill, for L. F. Brown, paid to Armstrong the sum of \$987, the balance then due from Moses F. Brown to the Fidelity National Bank, including the costs in the action upon the Barhorst note, and on the same day the receiver assigned said judgment to Alfred Hill, as attorney for L. F. Brown. It further appeared that while the \$500 note was in the hands of Armstrong, as collateral security, it was paid by Barhorst and wife to Moses F. Brown, as is evidenced by his receipts. When the last installment of the payment was made, Mrs. Barhorst, who conducted the transaction for herself and husband, demanded the note, and was answered by Moses F. Brown that he had forgotten it, and left it in the city, but would bring it out to her the next day, whereupon she paid him the balance due. The next day he informed her that the note was in the hands of Armstrong as collateral, which was the first intimation which she or her husband had of that fact. Shortly afterwards Barhorst and wife learned that another note, purporting to be signed by them, for the sum of \$207.50, was in the hands of Armstrong, also as collateral for the notes upon which Brown was indebted. That note was forged. Brown was charged with its forgery and arrested. The forged note was indorsed by Moses F. Brown and by L. F. Brown, and was turned over to Hill as attorney for L. F. Brown, by Armstrong, in pursuance of the arrangement between them. Among the collaterals held by Armstrong was also a note for \$750, made by L. F. Brown to the order of Moses F. Brown, and indorsed by him. This note bore interest, and at the time of the payment of the \$987, by L. F. Brown to Armstrong, as above set forth, about 15 months' interest, at 6 per cent., had accrued upon it.

With reference to the employment of Franks as attorney for Barhorst and wife, to defend the action upon their \$500 note, the evidence is not satisfactory. The complainants themselves did not testify positively to such employment. But it does appear that Franks looked into the case, and came to the conclusion that there was no defense, and therefore did not undertake to make any answer. It is clear that Franks was right in his view of the case. There was no defense to the action. It is true that the amount due upon the note had been paid to Moses F. Brown. That was a full acquittance as between Barhorst and wife and Moses F. Brown, but it did not affect the rights of Armstrong, to whom the note had been transferred, and, as Barhorst and wife paid the note without having it delivered up to them, they did so at the risk of having to pay it over again to Armstrong. Whether or not Franks attempted a defense to the action upon the note is wholly immaterial. The judg-



ment upon the note could not have been prevented by any defense. Barhorst and wife might, by bill in equity, have compelled Armstrong to exhaust all the other collaterals he held before resorting to the \$500 note, which they had in good faith paid to Moses F. Brown. But, even if the failure of Franks to make any defense had deprived Barhorst and wife of the opportunity to prevent a judgment against them, that fact would not avail them at law or in equity against Armstrong. Their only remedy would have been against Franks, if he was in fact their attorney, for damages. If they did not employ him, and by reason of their own neglect allowed judgment to be taken by default, they would have to suffer the consequences. The averments that Armstrong had notice of the payment of the \$500 note are negatived by the testimony. That note was transferred to him as collateral before its maturity, and before the first installment of the payment was made to Moses F. Brown, and he had no notice, at any time before the note was reduced to judgment, of its payment. The charges of the bill that L. F. Brown was a party to any fraud upon Barhorst and wife, or that he had knowledge or notice of the payment of the \$500 note to Moses F. Brown, or that his attorney, Hill, had any such notice, are wholly unsustained by the evidence in the case. On the contrary, it appears that L. F. Brown and his brother, Moses F. Brown had quarreled, and were not on speaking terms at the time of the purchase and transfer of the judgment and notes from Armstrong. The charges of fraud against L. F. Brown and Hill, and of notice, may therefore be dismissed without further consideration.

This cause was submitted without argument. It seemed to be regarded by counsel as depending upon proof of notice and of fraud, as above referred to. But let us examine it a little more closely. That the collection of the \$500 note by Moses F. Brown from Barhorst and wife was a gross fraud is not open to doubt. His statement when he received the last payment, and when the note was called for, that he had forgotten it, and left it in the city, was a false pretense as to an existing fact, which made the obtaining of that payment not only fraudulent, but criminal, and punishable under the statutes of Ohio by imprisonment in the penitentiary. As has been already stated, the payment of the note created an equity in favor of Barhorst and wife, which entitled them to require Armstrong to resort first to the other collaterals which he held. That equity was not destroyed by the reduction of the note to judgment. Armstrong's interest in the note was only to secure the principal notes. He had the right to take judgment upon the \$500 note, but if the balance due on the principal note was paid without its being necessary to apply the judgment upon the \$500 note, in whole or in part, the judgment would inure to the benefit of Moses F. Brown, for whom Armstrong would hold it in trust, and as against Moses F. Brown the equity of Barhorst and wife was complete.

Now, what was the transaction, so far as L. F. Brown was concerned? His contention is that he purchased the claim of the bank against Moses F. Brown. But can there be any doubt that the purchase was subject

to all equities that could have been asserted against the receiver? All the paper was past due. L. F. Brown knew that the collateral notes were held as such, and he can assert no claim which could not have been asserted by Armstrong. Let us go a step further. L. F. Brown and his brother, Moses F. Brown, were indorsers of the forged note for \$207.-50, which was among the collaterals, and they thereby guaranteed the genuineness of the forged signatures. He was therefore indebted upon that note. His own note for \$750, with 15 months' interest, was also among the collaterals. His entire payment to Armstrong was \$987, being less than the amount due by him upon the two notes last above referred to. What he calls a purchase was therefore secured by the payment of less than the amount due upon collaterals held by Armstrong on which he was personally liable, and which Armstrong might have been compelled by Barhorst and wife to exhaust before resorting to the \$500 note which they had paid to Moses F. Brown. It has the look of a thrifty expedient to pay off his own indebtedness at less than its face, and to get in addition a judgment for \$500 against Barhorst and wife, secured by a levy upon all their property, and they the intended victims of his own brother's most outrageous fraud, proven by conclusive and uncontradicted evidence. If it was a purchase it was subject to equities. If the transaction be treated as nothing more than a payment, in part, of his own obligations which were held by Armstrong as collateral, the transfer of the judgment placed him in no better position than Armstrong occupied. In either view, the equity of the complainants against his claim upon the judgment is strong enough to extinguish it. Conceding that L. F. Brown was free from fraud in the transaction, it results, nevertheless, that he has taken nothing against Barhorst and wife by his purchase of the judgment against them, and that, so far as they are concerned, the judgment must be canceled. The decree will find the facts in accordance with this opinion, and will direct the cancellation of the judgment as against Barhorst and wife, leaving it to stand against Moses F. Brown. L. F. Brown will be required to pay all the costs which have been incurred upon that judgment since its rendition, as well as the costs of this proceeding.

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FARMERS' LOAN & TRUST CO. *v.* CHICAGO & A. RY. CO. *et al.*

BIPPUS *v.* SAME.

(Circuit Court, D. Indiana. December 24, 1889.)

RAILROAD MORTGAGE—CAR-TRUST LEASE—PRIORITIES.

An intervenor in proceedings to foreclose a railroad mortgage was the owner of cars in hands of the company under a car-trust lease which reserved to it a right to reclaim its property upon default in payment of rent. Upon the appointment of a receiver, the company being then in default, it petitioned the court, and demanded of the receiver that its cars be returned within 30 days. They were not returned, but were continuously used by the receiver, without objection of the bondholders

or trustee, and payments were made on the rental by the application thereto of the freight earned by transportation for the petitioner. After a lapse of three months, intervenor filed a second petition, stating the facts, and asking that the receiver be directed to pay the amount due under the car-trust contract, and that the same be declared a prior lien upon the earnings, as well as on the property embraced in the mortgages. *Held*, the retention and use of the cars by the receiver, and the non-action of the bondholders, did not amount to a conversion; that petitioner was not entitled to payment of the rental according to the terms of the car-trust lease, out of the *corpus* of the estate, but only to a return of the cars within a reasonable time, if so demanded, and a *quantum meruit* for the use thereof.

In Equity.

*James L. High*, for petitioner.

*Baker & Daniels*, for the receiver.

GRESHAM, J. This is an application by the United States Rolling Stock Company for payment of the amount claimed by it under a lease of rolling stock executed to the defendant prior to the appointment of the receiver. On April 11, 1883, the Rolling Stock Company leased to the defendant the Chicago & Atlantic Railway Company 1,000 box cars, 400 gondola cars, and 100 stock cars, under what is known as a "car-trust lease," in the usual form of such instruments. The agreed rental was \$723,500, of which \$72,000 was paid in cash on delivery of the cars. For the remaining sum, of \$651,000, car-trust bonds were executed, drawing interest at 6 per cent. per annum; the final payment of principal maturing July 1, 1889. At the same time an equipment lease was executed between the parties, in the usual form. By this lease it was provided, among other things, that upon payment in full of all installments of principal and interest, and upon performance of all other covenants of the lessee, the legal title to the rolling stock should vest in it upon the payment of a nominal consideration. The lease also provided that upon default in payment of principal and interest as it matured the lessor should have the right to reclaim the property, and the lessee should deliver it at the shops of the lessor in Chicago, or at such other point upon the line as the lessor might direct. The cars continued in the possession and use of the company until the receiver was appointed, since which time they have been in his possession and use.

On February 26, 1886, the Farmers' Loan & Trust Company filed its original bill of foreclosure. The bill averred execution of the first mortgage by the railway company on June 13, 1881, to secure 6,500 bonds of \$1,000 each, the mortgage containing a provision that upon six months' default in the payment of coupons representing semi-annual interest, after demand made for the payment of the same, the trustees, upon the request of a majority of the bondholders, might declare the entire principal to be due, take possession of the property, and institute proceedings for the foreclosure of the mortgage and the appointment of a receiver. The bill also averred that the coupons representing the semi-annual interest, due, respectively, November 1, 1884, May 1, 1885, and November 1, 1885, were in default and unpaid, demand having been made for the payment thereof; that the company was insolvent; that the continued operation of the road was necessary for the protection

of the bondholders; and that a receiver should be appointed. It further averred the execution of a second mortgage by the railway company on September 15, 1883, upon which there had been defaults similar to those under the first mortgage. The prayer was for foreclosure of the mortgages and the appointment of a receiver. To this bill a demurrer was filed; the principal ground of demurrer being that the bill did not show any request by a majority of the bondholders for the trustees to declare the principal indebtedness due, and to institute foreclosure proceedings. In an opinion, filed April 8, 1886, (27 Fed. Rep. 146,) the court overruled the demurrer, holding, in effect, that any bondholder was entitled to foreclosure for unpaid interest, although no such demand had been made by a majority of the bondholders as to mature the principal indebtedness. The suit was brought at the request of the holders of past-due coupons, but against the wish and protest of a majority of holders of the bonds, who in open court moved that the suit be dismissed. The court declined to appoint a receiver at that time. On February 2, 1887, the complainant filed an amended and supplemental bill. This bill averred that a meeting of the first mortgage bondholders was held in New York August 17, 1886, at which a majority requested the trustee, in writing, to declare the principal due, and to take such steps as might be necessary for foreclosure and the protection of their interests. It also averred the insolvency of the railway company, and that if the operation of the road should be suspended the security of the bondholders would be greatly impaired; and it contained averments similar to the averments in the original bill as to action taken to mature the principal indebtedness, and prayed foreclosure and the appointment of a receiver. On February 25, 1889, a decree of foreclosure was entered; the amount of principal and interest found due under the first mortgage being \$8,874,000, and the amount of principal and interest found due under the second mortgage, \$6,500,000. From this decree an appeal was taken in behalf of the second mortgage bondholders, or a portion of them, and a *supersedeas* bond was filed. Pending the appeal, on the application of the trustee and a so-called "purchasing committee," representing, substantially, all the first mortgage bonds and a large amount of the bonds secured by the second mortgage, Volney T. Malott was appointed receiver. This appointment was made May 18, 1889. On July 24, 1889, the rolling stock company filed its petition of intervention, reciting the history of the car trust as above set forth, alleging its ownership of all the car trust bonds and coupons described in the lease and remaining unpaid, default in the payment of principal and interest, and its right, under the terms of the lease, to immediate possession of all the cars in question. The petition prayed that the receiver be directed to deliver the cars to the petitioner, within 30 days, at Hegewich, Ill., where the tracks of the railway company connected with the petitioner's yards. Demand was also made upon the receiver for the cars. On the day previous to the filing of this petition the receiver presented to the court a report in which he stated the various claims upon the property in his possession, the history of the car trust,

substantially as above set forth, default of the railway company in payment of rentals; that there was due under the lease in May, 1889, \$423,000; that after such default the rolling stock company and the railway company entered into an agreement collateral to the car trust, in which the railway company was to do all the freight business of the rolling stock company to and from the town of Hegewich, and the freight so earned by the railway company, as well as advance charges to connecting lines on such freights, which it agreed to pay, should all be credited upon the amount due under the car-trust agreement; that this agreement was kept by the parties prior to his appointment, and afterwards by him, in part, and that, in addition to the cars of the rolling stock company embraced in the lease, he had in his possession, belonging to the railway company, less than 500 freight-cars. Upon submission of this report the receiver asked the instructions of the court. On November 4, 1889, the rolling stock company filed its amended and supplemental petition, in which it averred that no part of the equipment had been surrendered to it under the demand made in its original petition upon the court, or under its demand upon the receiver; that after default in the payment of interest on the first and second mortgage bonds, and from thence to the date of the appointment of the receiver, the railway company continued to make payments on the car-trust bonds, such payments being in cash, and by the application upon the indebtedness of the amounts due the railway company from month to month for freight earned by it in the business of the petitioner; that, since the appointment of the receiver, payments had been made from time to time by applying thereon amounts due the receiver for freight transported in like manner as before his appointment; that, both before and since the appointment of the receiver, such payments had been made, and the cars embraced in the lease had been continuously used, without objection from any of the bondholders or the trustee in either of the mortgages; and that there was due the petitioner on November 1, 1889, including interest, \$414,289.74. This petition prayed that an order be entered directing the receiver to pay to the petitioner the amount due it on the basis of the car-trust contract, and that such indebtedness be decreed a prior and paramount lien or charge upon the earnings, as well as the property embraced in the mortgages.

It is insisted by the petitioner's counsel that by reason of the matters above stated the receiver, as well as the holders of bonds secured by the mortgages, through their agent, the railway company, converted the cars to their own use, and ratified and affirmed the car-trust bonds and leases, and thereby became liable to pay the petitioner the entire amount remaining due and unpaid. In the first petition it was claimed that the cars covered by the car-trust agreement were the property of the petitioner, and on that ground their possession was demanded. In that petition it was not claimed that, by reason of what had previously occurred, the equipment had been converted by the railway company as the agent of the bondholders. The petitioner was not ignorant of the action of the railway company, and the non-action of the bondholders and their

trustees, when possession of its cars was demanded. When the receiver presented his report to the court, the day before the first petition of intervention was filed, the petitioner was present by counsel, and urged no objection to it. The title asserted by the petitioner to the equipment has never been disputed. Neither the action of the railway company, the non-action of the bondholders, nor the action of the receiver, amounted to a conversion of the property embraced in the car-trust agreement. The receiver is the mere officer or instrument of the court in the preservation and operation of the property, and any acts of his not within the scope of the authority conferred by the order appointing him, and not otherwise authorized by the court, do not bind the court. The receiver did his full duty in connection with the car-trust property by submitting his report to the court and asking its direction. He was placed in possession of property by the court, his possession was the court's possession, and he could not have surrendered the property on demand of the petitioner without the court's consent or authority. It does not follow, because the railway company was permitted to continue in the use of the cars after default, and was thus enabled to maintain its business and earning capacity, that if the petitioner had demanded and received its cars, as it might have done, the railway company could not have obtained equipment elsewhere; nor does it follow that, because the bondholders failed to exercise their right at an earlier day to foreclose for the principal indebtedness, and in that connection ask for the appointment of a receiver, they thereby constituted the corporation their agent for all purposes in the operation of the railway.

The supreme court has never gone to the extent contended for by the petitioner. Neither before nor after the appointment of the receiver was the petitioner prevented from enforcing its undisputed right to the equipment; and it cannot now claim that, by permitting the insolvent railway company to continue in the possession and operation of the property, the bondholders, in effect, pledged the mortgaged property as security for the car rental in advance of the mortgages. Indeed, there is nothing in the record which justifies the petitioner in saying that the bondholders could have caused a receiver to be appointed at an earlier day. Such appointments are always in the discretion of the court, and on the first application the court refused to appoint a receiver. The claim asserted in the supplemental petition was obviously an afterthought.

In *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. Rep. 675, the receiver diverted earnings from the payment of current expenses; and a claim for coal furnished to the receiver was given priority over the first mortgage bonds. In *Miltenberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140, a receiver was appointed in a suit brought to foreclose the second mortgage. The holders of bonds secured by the first mortgage made no effort to foreclose that mortgage until more than a year afterwards; and the receiver, with full knowledge of the last-named persons, continued to operate the road, including a leased line. The circuit court directed payment in full of the rental for the use of the leased line

by the receiver, which action was affirmed by the supreme court. Neither of these cases justify the contention of the petitioner. In *Union Trust Co. v. Illinois Midland Railway Co.*, 117 U. S. 479, 6 Sup. Ct. Rep. 809, it was held that car rentals which accrued before a receiver was appointed were not entitled to be first paid out of the *corpus* of the property.

The equipment embraced in the car-trust agreement is the property of the petitioner, and on its demand possession will be surrendered within a reasonable time; and, if the amount which the receiver has thus far paid for his use of the equipment is not a fair rental on a *quantum meruit*, the court will order further payment on proper showing.

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BOOTH *et al.* v. WELLES.

(Circuit Court, N. D. Iowa, E. D. April 16, 1890.)

**BANKS AND BANKING—NATIONAL BANKS—INSOLVENCY.**

The comptroller having notified a national bank that its capital was impaired, it was agreed that it might continue business on the directors putting in \$100,000 in cash, and retiring that amount of objectionable securities. That sum was contributed; the account being opened with trustees appointed by the directors to manage the fund, with full power, as far as the bank was concerned, and to account therefor to the contributors in such manner as to protect the equities of each individual and the bank, in relation to the bank and its legal rights. It was understood between the trustees and the examiner that the securities to be retired were to be designated by the comptroller or examiner, but there was no such understanding with the comptroller. The full amount of objectionable securities had not been selected and given to the trustees when the bank was closed, the receiver taking and proceeding to collect the whole assets. *Held*, that the receiver was not required to account for the balance of the \$100,000 as a special trust fund, but merely as a debt.

**In Equity.** Bill to enforce the proper application of an alleged trust fund.

*McCeney & O'Donnell, Henderson, Hurd, Daniels & Kiesel, Fouke & Lyon, J. H. Shields, R. W. Stewart, and Adams & Mathews*, for complainants.

*Wm. Graham*, for defendant.

**SHIRAS, J.** Upon the filing of the opinion of this court in the case of *Welles v. Stout*, reported in 38 Fed. Rep. 807, the present bill in equity was filed, in accordance with the suggestion therein made; and the question left undecided in that case is now presented for determination.

The evidence in this cause shows that the complainants herein contributed the sum of \$100,000 to be used in restoring the solvency of the Commercial National Bank, which was placed in the bank; the account being opened upon the books in the names of J. K. Graves and John R. Waller, trustees. When the bank closed its doors, in March, 1888, the account showed a balance in favor of the trustees of \$35,811.41, and it is claimed on behalf of complainants that this balance was held by the bank as a special or trust fund; that it did not form part of the assets of the bank; that the receiver is chargeable with notice of the nature of the

fund; that, when the receiver was placed in control of the bank, this balance came into his hands impressed with the trust originally pertaining thereto; and that he must account therefor to the complainants.

To properly determine the rights of the parties, it must be ascertained for what purpose and under what circumstances this fund of \$100,000 was contributed by the complainants. The evidence shows that in 1887 the comptroller had notified the bank that its capital was impaired, and on the 1st day of July, 1887, he addressed a letter to the bank setting forth various items which it was claimed should not be counted in the statement of assets, and further notifying the bank that an assessment of 45 per cent. upon the capital stock had been ordered for the purpose of making good the losses enumerated. To avoid the necessity of making this assessment upon the stockholders, the directors assumed the raising of the sum named, the larger part of which was subsequently paid in. This contribution, however, proved insufficient to fully restore the impairment of the capital and standing of the bank; and on the 3d day of January, 1888, the comptroller again wrote to the bank, calling attention to the large amount of overdue and uncollected paper, and stating that—

"The relation between your bank and the Graves family interests are such as should not exist, and must not continue. I must respectfully insist either that the management of your bank be confined to the law, or that you give up the benefits and privileges of the national banking system. These loans are now reported to amount to \$267,149. \* \* \* The examiner reports that you contemplate putting \$100,000 in cash into the bank during this month, and retiring an equal amount of objectionable securities. On this account, he recommends that you be granted the time mentioned in which to get the affairs of the bank in proper condition. In acting upon his suggestion, you are respectfully informed that I cannot allow such flagrant violation of law to continue, and you will be expected to use your best efforts to place the affairs of the bank in proper condition within that time."

To this letter the directors replied, under date of January 25, 1888, as follows:

"In reply to your letter of 8d inst., we would respectfully state that, of the \$45,000 contributed, as advised you, July 11, '87, the sum of \$30,000 has been paid in cash. The directors have, since the receipt of your letter, contributed \$100,000 in cash, and as good paper as can be made to the bank, with which to retire objectionable securities; Mr. H. L. Stout acting for his son F. D. Stout in his absence. You will recall that it was our own suggestion, made to Examiner Stone, that we would contribute \$100,000 to put the bank in sound condition, and much more than covers possible loss. \* \* \*"

It further appears that, in carrying out the proposition for contributing the \$100,000 for the purpose named, J. K. Graves and John R. Waller were selected to act as trustees in connection with said fund; and on the 24th of January, 1888, the following resolution was adopted by the directors:

"Resolved that, in carrying out the recommendations of the comptroller of the currency in contributing \$100,000 to take up objectionable assets of this bank, Messrs. J. R. Waller and J. K. Graves are hereby appointed, jointly, to act as trustees in the handling and management of said \$100,000 fund, with



full power, so far as this bank is concerned, according to their best judgment, and to account therefor to the parties contributing said fund as individuals in such manner as to protect the equities of each individual and the bank, in relation to the bank and its legal rights, and without other responsibility on their part than to act as their judgment dictates."

As already stated, the parties named deposited the \$100,000 in the bank, and an account was opened with them as trustees. From the testimony of J. R. Waller and George A. Stone, the bank examiner, it would appear that, while there was no express agreement to that effect, it was understood that the objectionable securities to be retired were to be designated by the comptroller, or by the examiner in his stead. It thus appears that, as between the comptroller and the contributors of the fund, the understanding was that if, during the month of January, 1888, the sum of \$100,000 should be contributed to put the bank in sound condition, there being retired, in place thereof, an equal amount of objectionable securities, the comptroller would not then put the bank into liquidation. As between the bank and the contributors to the fund, the agreement was that the retired securities should be held for the benefit of the contributors. But, as part of the objectionable securities was paper of some of the contributors, it was not intended that the retirement thereof should release the parties liable thereon; and hence, in the resolution of January 24th, the trustees were charged with the duty of protecting the equities and rights of the bank, and of the individual contributors. The trustees were thus charged with a double duty in regard to this matter. On the one hand, they were to appropriate the \$100,000 to the purpose for which it was raised, according to the understanding between the comptroller and the directors; and, on the other, they were to receive and properly manage the retired paper according to the rights and equities existing between the bank and the individual contributors to the fund. The trustees, in fact, placed the \$100,000 in the bank, and thereby performed their duty in that particular. The account was opened with them as trustees, but the mere form of the account did not affect or change the relation of the parties to the fund, or their rights therein. The money was placed in the bank for the purpose of strengthening it, according to the understanding with the comptroller, and thereby a further lease of corporate life was secured. In placing the money in the bank, the trustees did not make it a special deposit, nor in any manner restrict the use thereof by the bank. There was no agreement or understanding with the comptroller that he was to select out, and furnish to the contributors for their protection, any of the objectionable paper. The rights of the contributors in that regard grow out of the arrangement between the bank and the contributors, which it does not appear was ever made known to the comptroller. There is nothing, therefore, shown in the evidence, which justifies the conclusion that the fund went into the bank charged with any condition or trust whatever, so far as the comptroller was concerned, other than that it was a fund raised to strengthen the bank. As between the bank and the contributors, the latter had the right to demand the turning over to the trustees of the ob-

jectionable paper that was to be retired, to be by them managed for the protection of the parties contributing the fund.

Primarily the fund was contributed for the purpose of making good the impaired condition of the bank, and thereby securing the opportunity of continuing the business, instead of being forced into immediate liquidation. The payment into the bank would secure this lease of life; and when this payment was made, and the lease of life was secured, all control over the fund so contributed on part of the contributors or their trustees was at an end. The money became part of the assets of the bank, and was no longer subject to the control of the trustees. The bank did not receive the fund to be held in trust, but received it just as it would an assessment of an equal amount upon the stockholders; that is, as money paid in as part of the general capital of the bank. By the force, however of the agreement between the bank and the contributors, the latter were entitled to have delivered to the trustees named the objectionable paper that was retired to offset the fund contributed. This is a right and equity which the contributors have not lost, or been in any way deprived of. It is immaterial, in this respect, whether it was the duty of the bank officials or of the comptroller to select out and designate the particular paper to be retired. It appears from the evidence that some \$54,804 of objectionable paper had been selected out and delivered to the trustees before the final closing up of the bank. When the bank closed its doors the trustees were entitled to receive some \$35,000 in the objectionable paper. If, before the bank ceased its business, this amount in objectionable paper had been delivered to the trustees, the full duty of the bank to the contributors would have been performed. Having failed to deliver over this paper, the bank has not relieved itself from liability to account for the \$35,000 contributed to it. The receiver having taken entire possession of the assets of the bank, and having proceeded with the collection thereof, it is now impossible to carry out the agreement with the contributors by delivering the full amount of the objectionable paper. This leaves the bank liable for the balance of the fund not thus accounted for, but this liability is in the nature of a debt. It cannot be construed to be a trust which reaches the fund itself as originally paid in. To so treat it would defeat, instead of effectuating, the purpose for which it was originally contributed. In effect, the only trust created was with relation to the objectionable paper, and this was not of such a nature as to prevent the bank from using the fund as part of the assets of the bank as soon as it was paid in; nor does it now entitle the complainants to charge the proceeds realized from the assets in the hands of the receiver with a trust, so as to claim a preferential right of payment therefrom over other creditors. It follows that complainants' bill must be dismissed, and it is so ordered.

## THE EDMONDSON ISLAND CASE.

FURGUSON v. HAMLIN.

(Circuit Court, D. Maryland. February 4, 1890.)

## 1. RIPARIAN RIGHTS—IMPROVEMENTS IN NAVIGABLE STREAMS.

The United States, for the use of the fish commission, rented an island in the Chesapeake bay from the plaintiff, who was the owner by mesne conveyances from the grantees under a patent from Maryland. The United States was already the owner in fee by deed of a small area of the island, on which it maintained a light-house. During the tenancy certain extensions and improvements were constructed by the United States for the use of the fish commission, extending out into the water on the north and west of the island, consisting of about half an acre, which was solidly filled in, and of certain wharves, crib-work, and inclosures. Upon the termination of the lease the United States removed, onto this newly-made land and extensions, all the buildings which it had erected on the island for the use of the fish commission, and refused to give up possession thereof, claiming title thereto as a structure built in the navigable water of the Chesapeake bay to protect the light-house, and also contended that the plaintiff had no title on which he could recover in ejectment, because of the restrictions of Act Md. 1835, c. 99, limiting the extent to which the island might be extended. *Held*, that by the Maryland act of 1862 (article 54, §§ 44, 45, Code Md.) the patentee of an island in navigable waters of the state has a right to improve out in front of his lands, provided the improvements do not interfere with navigation; that improvements and extensions made by such owner, or by his tenants, belong to him, although they may extend further than the law permits; they may be abated, to the extent that they are unlawful, by proper proceedings, but the ownership cannot be wrested from him, and the premises usurped and used by another; that the same rule is applicable to the limitation imposed upon the extension of Edmondson's island by the Act of 1835, c. 99.

## 2. SAME—IMPROVEMENTS MADE FOR PROTECTION OF LIGHT-HOUSE—TITLE TO THE FEE—EJECTMENT.

As to the title set up by the United States to the *locus in quo*, as a structure made by it in navigable water required for the protection of the light-house, *held* that, as the right of the United States to use the bed of a navigable water without compensation is restricted to the uses of commerce and navigation, it can use the extensions of this island made by it only so far as their use is necessary to maintain the light-house, and not for the purpose of the fish commission; and that, as it appears that the only use of the extensions and structures in question, in connection with the light-house, is to defend it against freshets and ice, the United States is entitled to maintain them for that purpose, and for no other; and that the plaintiff, as the owner of the island, is entitled to such reasonable use of them as can be made without interference with the enjoyment of that easement by the United States. *Held*, that the plaintiff, as the owner of the fee subject to this easement in the United States, is entitled to maintain an action of ejectment, and is entitled to a verdict in his favor for the *locus in quo*, subject to the easement in the United States.

(Syllabus by the Court.)

Ejectment.

Fisher, Cabell &amp; Fisher, for plaintiff.

Thomas G. Hayes, U. S. Dist. Atty., for defendant.

Before BOND and MORRIS, JJ.

MORRIS, J. This is an action of ejectment originally instituted in the circuit court for Harford county, Md. The defendant, William Hamlin, is the agent of the United States, and upon his filing a petition in that court, alleging that the title to the premises was in the United States, and that he was in possession as its employe, and that the United States claimed by a paramount title under the constitution and laws of the United States, the case was removed to this court. The premises

now in dispute are a portion of a small island called "Shad Battery" or "Edmondson's Island," situate in the Chesapeake bay, near the mouth of the Susquehanna river, three or four miles from Havre de Grace, and a little to the eastward of the channel for vessels. In 1834 a patent was granted by the state of Maryland to Donohue & Gale for this island, in which it was described as containing 2 acres 2 roods and 10 square perches of land, although from the testimony it would appear to have then been merely a shoal spot in the river or bay, upon which a mound of stones had been deposited to make it useful as a fishing station. In 1835 it was represented to the Maryland legislature that the island might be filled up and improved without prejudice to the navigation of the river and bay, and, there being then no general law permitting riparian owners to improve out into navigable waters of the state, it was enacted (Laws Md. 1835, c. 99) that the patentees might fill up and improve the island, provided they should not exceed the limits described in the patent; and, to prevent the filling up from being extended so as to impede navigation, it was enacted that certain commissioners should lay down and mark the lines and bounds to which the island might be filled up without impeding navigation. And it was enacted that the filling up might go to the extent fixed by the commissioners, and no further, and the commissioners were directed to return their proceedings to the county court, together with a plat of the lines and bounds as defined by them, to be recorded among the land records of said county. In 1836 the commissioners made their return, which was duly recorded, in which they gave the metes and bounds and a plat of the premises, which they had determined might be filled up without impeding navigation, describing a rectangular space 321 feet long by 154 feet wide, containing 1 acre and 18 square perches of land, which they certified was within the limits described in the original patent. In 1853 a small portion of the area laid out by the commissioners, about 45 feet square, was deeded by the then owners to the United States for a light-house site; the deed stipulating that the United States should have free egress, ingress, and regress through and over the residue of the island, to and from the part conveyed, the use of the part conveyed to interfere as little as practicable with the use of the residue as a fishery. The light-house was built, and prior to 1879 the area of the island was about three-quarters of an acre, which had been inclosed by stone riprapping, with openings for the passage of boats; the space inclosed by the riprapping being some of it bare at low water, but overflowed at high water.

In 1879 the plaintiff, Major Ferguson, had purchased the island, except the portion deeded to the United States. He was then assistant to Prof. Baird, the United States fish commissioner. It was thought that the place was a desirable one for the propagation of fish, and it began to be used, with Ferguson's assent, by the fish commissioner for that purpose. On June 29, 1883, a formal lease of the island was executed by Major Ferguson to Commissioner Baird, as the agent of the United States, at one dollar a year, renewable from year to year, for three years, for use in catching and propagating fish. The lessee agreed not to use or

permit the island to be used for gunning or ducking, and not to sublet, and it was stipulated that the lessee might, during the term or within six months afterwards, remove all buildings, machinery, or materials placed thereon by the lessee. This lease continued in force until terminated by notice from Major Ferguson, in 1888. During this period the island was used by the fish commission, and, to facilitate its operations, considerable changes and improvements were made by the United States with the sanction of Major Ferguson. The northern portion of the riprapping was removed, and about one-third of the island excavated, and a fish basin inclosed by crib-work was constructed. Additional crib-work was put down to partly inclose two other fish-basins. Crib-work of considerable length was run out westerly from the north end of these constructions, to act as a defense and protection against the ice coming down the river, and an area of about half an acre was filled in solidly, lying to the north-west, adjoining and connected with the improvements constructed within the lines fixed by the commissioners of 1835, but lying outside of those lines, to the west and north. When by the notice of November 28, 1888, the lease was terminated, the fish commission removed all the buildings it had erected on that part of the island inside of the lines designated by the commissioners of 1835, and placed them upon the half acre made by filling up along-side those lines to the north-west, and the United States now has exclusive possession of and claims title to that made land, and the crib-work surrounding and protecting it. The United States disclaims in this suit any title to any made land and cribs, except that which lies outside of the lines of the commissioners of 1835, and except the 45 feet square light-house site conveyed to it by deed. By written stipulation, a jury has been waived, and the issues are to be determined by the court. The parties have contended for the rulings contained in the following propositions of law submitted by them:

*Plaintiff's Prayers.* (1) The plaintiff's first prayer asks the court to rule that if the land declared for, and not embraced within the disclaimer, was made by the United States for the use of the fish commissioner, while let into possession of the island as the tenant of the plaintiff, then the plaintiff is entitled to recover. (2) The plaintiff's second prayer asks the court to exclude all the testimony offered by the defendant (under exception) tending in any way to impeach the title of the plaintiff to the island.

*Defendant's Prayers.* (1) The defendant's first prayer asks the court to rule that the plaintiff has proved no title to the *locus in quo* sufficient to entitle him to recover. (2) The defendant's second prayer asks the court to rule that the riparian rights granted by the Maryland Code (article 54, §§ 44, 45) to owners of land bounding on navigable waters of Maryland give the plaintiff no right of possession or title to the *locus in quo*, provided it is found to be outside the lines defined by the commissioners of 1835. (3) The defendant's third prayer asks the court to rule that the Maryland Code (Id. §§ 44, 45) gives no title or right of possession to the plaintiff, provided the court finds that the leased premises was originally an artificial island, constructed by the deposit of stone and earth on a shoal in the waters of the Chesapeake, and provided the court finds the *locus in quo* was constructed by the United States on the bottom of said waters, outside of ordinary high-water mark of the fast land, as it existed at the date of the lease. (4) The defendant's fourth

prayer asks the court to rule that, if the *locus in quo* was built by the United States at the bottom of the waters of the Chesapeake outside the ordinary high-water mark of the fast land as it existed at the date of the lease, and that one of the necessary uses of said land and structures is to protect the light-house of the United States on the island from the waters and ice which at certain seasons is liable to overflow the island and light-house, as well as to protect a channel leading from the main channel to the island, then the plaintiff cannot recover.

It is urged by counsel for the United States that the fact that Edmonson's island was originally an artificially made island of itself materially affects the riparian rights of the plaintiff; but, in our opinion, whatever may be the general rule with respect to artificially made islands in navigable waters, after the state by its patent recognized this island as land, and granted it to the patentees as so much land, it became, except as restricted by legislation, like any other land or natural island granted out by the state to private owners. Starting with this proposition, it may be convenient to consider, first, what would be the rights of the parties if the title of the plaintiff was not affected by the act of 1835, c. 99, and the return of the commissioners thereunder limiting the area to which the island might be extended to less than the area of the original grant. In that case, being a riparian owner of land bounding on navigable water, (independently of the fact that his patent covered adjacent land covered by water,) the plaintiff is declared by the Maryland law first enacted in 1862, and now article 54, §§ 44, 45, Code, to be entitled to all accretions to his land by recession of the water, whether made by natural causes or otherwise, in like manner and to like extent as such right might be claimed by the proprietor of land bounding on water not navigable, and as such proprietor he is also declared to be entitled to the exclusive right of making improvements into the waters in front of his land, such improvements and other accretions to pass to successive owners of the land to which they are attached. "But no such improvement shall be so made as to interfere with the navigation of the stream of water into which the said improvement is made." And it is declared that no patent thereafter issued shall impair or affect the riparian rights of such proprietors, and that thereafter no patent shall issue for land covered by navigable waters. *Goodsell v. Lawson*, 42 Md. 371; *Garitte v. Mayor, etc.*, 53 Md. 432, 433.

In our opinion, therefore, if the restrictive act of 1835 had never been enacted, there could be no doubt but that the improvements made out into the water from the island, if made by a private person, would belong to the plaintiff, and the defense of the United States to this action would have to rest entirely upon its being able to establish that the exclusive possession of the premises in dispute is required to protect and maintain the light-house. It does appear from the testimony that there is at times a considerable flow of ice from the Susquehanna river against the north side of the island, and that after the riprapping and part of the island on that side had been removed by the United States, and the fish-basin constructed where the riprapping had been, the fish-basins and inclosing cribs did suffer from the ice and floods, and that the present

more extended cribbing and the filling in of the new solid area became a proper precaution against a recurrence of the damage. These structures do also necessarily protect the light-house, which needs protection of some sort from the same dangers, particularly on the northernmost side.

But these structures, although built under the direction of the engineers in charge of the improvement of the navigable channels of the Chesapeake, and of the officials in charge of the maintenance of the light-house, were constructed primarily to facilitate the purposes of the fish commission, and so far as they are now used, in the sense of being occupied and held in exclusive possession, they are used solely by the fish commission. The houses removed from the other portions of the island at the termination of the lease, and re-erected on this new-made area, have no use whatever in connection with the light-house, or with commerce or navigation. It was held by this court in the *Hawkins Point Light-House Case*, 39 Fed. Rep. 77, that the United States might erect a necessary light-house in a navigable stream in front of the land of a riparian proprietor who had not only the rights which the Maryland law of 1862 had given him as riparian proprietor, but had also a patent from the state for the submerged land itself, without making him any compensation. But it is a necessary qualification of that rule that the United States can exclude the owner, without making him compensation, to no greater extent than is reasonably necessary for the maintenance of the light-house; and that the United States would have no right to forbid such an owner from making any use of the premises which did not interfere with the easement asserted by it for the public use of commerce and navigation.

If, for example, the riparian owner had, under the state law, an exclusive right to plant and take oysters in the waters surrounding the light-house, he could do so, unless it was injurious to the light-house structure, or interfered with navigation; but the United States could not exclude him from that privilege upon the ground that it interfered with the light-house or navigation, and grant the same privilege to the fish commission. So in this case, if these structures are such that, if made by any private person, they would become appurtenant to the island, and belong to the owner of it, if the United States justifies the construction of them on the ground that they are aids to commerce and navigation, it can only exclude the owner of the island from them to the extent required by the use which is relied upon as the justification of their construction. After erecting the light-house upon the parcel 45 feet square, to which the United States acquired title by deed, it might have discovered that the safety of the light-house required that a heavy wall should be built out in the water so as to surround the island. If such a wall had been built, could it be contended that the United States might say to the owner of the land, "You must not make any use of the wall for landing or drawing seines because it is injurious to the structure," and then proceed to grant that privilege to the fish commission.

It seems to us that, if this was a case of ordinary riparian ownership, the owner of the island would be entitled to the additions to the island

made by the United States, subject only to the easement vested in the United States for the aid of commerce and navigation. But in this case it is urged by counsel for the United States that by the act of 1835, c. 99, and determination of the commissioners under it, the plaintiff is debarred from acquiring any title to any extension of the island beyond the outlines fixed by those commissioners. It is urged that with regard to this island the special law of 1835, restricting its limits, controls the general law of 1862, which allowed riparian owners to extend their lands into the water, subject only to the restriction that they shall not interfere with navigation, and that as to this island it had been authoritatively determined to what extent the extension might be made without interfering with navigation. But if, under the general law, an extension should be made in such manner as to interfere with navigation, the riparian owner would be none the less the owner of the improvement. He might be liable to indictment for maintaining a nuisance, or to some appropriate proceeding instituted by the state to have the unlawful structure abated, and would no doubt be liable to private actions at the instance of any one who suffered special damage, but meanwhile we do not think he could be ousted by a stranger, or by his own tenant, but might maintain his possession against unauthorized intruders. So with regard to this island, it appears to us that, although the owner had improved out beyond the lines fixed by the commissioners, and had rendered himself liable to similar proceedings requiring its removal, yet, while the improvement or extension remained, he would be under the general law the owner, and could maintain his possession against any private person who attempted to turn him out. *Yates v. Milwaukee*, 10 Wall. 497. In *Browne v. Kennedy*, 5 Har. & J. 206, the court of appeals of Maryland said:

"All islands, relict lands, and other increase arising in navigable rivers, belong, in England, to the king, here to the state, where the property in the soil has not been appropriated; but where it has become private property, either by grant or prescription, the same rules do or should apply to it that govern other private property of the same nature. It is subject to the same law of descents, and liable to be transferred by the same mode and form of conveyance, and is subject to none of the rules applicable to lands not granted or distributed out."

See, also, *Giraud's Lessee v. Hughes*, 1 Gill & J. 249.

It would appear that, as a fact, the extensions made to the island do not interfere with navigation as they have been constructed by those having charge of the improvement of navigation, and, although, as against the plaintiff, they might, at the instance of the state, be adjudged unlawful, because of the restrictions of the act of 1835, still until that is done, in our opinion, the legal title is in the plaintiff.

With such a legal title to the *locus in quo*, although it is subject to an easement, we think there is no doubt that the plaintiff may maintain this action of ejectment. In *Adams v. Emerson*, 6 Pick. 57, it was held that the owner of the soil over which a turnpike road was laid out might maintain trespass against the turnpike corporation for taking the herbage. In deciding this case, the Massachusetts court said:



"The *locus in quo*, although a part of a turnpike road, is the soil and freehold of the plaintiff. He has the exclusive right of property in the land, subject, however, to the easement or rights incident to a public highway, such as the right of passage over it, and the right which the turnpike company has to construct a convenient pathway, and to keep it always in good repair. To accomplish these purposes, the corporation may dig and remove, from place to place, within the limits \* \* \* for the road, any earth, sand, and gravel, and may dig or cut up sods and turf; but it by no means follows that the corporation has the right of herbage which is the exclusive property of the owner of the soil, as well as all trees, mines, etc. The corporation has no right of property in the land, but only a servitude or easement, and this does not clash with the plaintiff's exclusive right of property in the land. \* \* \* It was once doubted whether ejectment or other real action would lie for the soil of a road or highway, because it was said full seisin could not be delivered, and a dictum of Lord HARDWICKE was quoted to that effect, in the case of *Goodtitle v. Alker*, 1 Burrows, 133; but that doubt was removed by the decision in that case, and very clearly it had no foundation in principle."

The same doctrine had been previously held by the same court in *Robbins v. Borman*, 1 Pick. 122, and was reaffirmed in *Perley v. Chandler*, 6 Mass. 454, in which the court said:

"The soil and freehold remain in the owner, although incumbered with a way; and every use to which the land can be applied, and all the profits which may be derived from it consistently with the continuance of the easement, the owner may lawfully claim. He may maintain ejectment for the land thus incumbered, and, if the way be discontinued, he shall hold the land free of the incumbrance."

In our judgment, the plaintiff is entitled to a verdict and judgment for the premises declared for, subject to the easement in the United States to make such use thereof as is necessary for the protection of the light-house. Having reached this conclusion without reference to the questions growing out of the relation of landlord and tenant, we do not find it necessary to rule upon the prayers in which the contentions of the plaintiff based upon that aspect of the case are stated, but it is evident that the familiar rule that a tenant cannot be held to dispute his landlord's title must, so far as it is applicable, strengthen the plaintiffs' case, and tend to support the conclusions at which we have arrived.

BOND, J., concurs.

## UNITED STATES v. GARRETSON.

(Circuit Court, S. D. Alabama. March 20, 1890.)

## 1. PUBLIC LANDS—RESERVATIONS—LAND SUBJECT TO ENTRY.

The general public domain is open to private entry, and lands cannot be said to be reserved for such entry. The lands reserved are those severed from the mass of public lands, and appropriated for governmental purposes.

## 2. SAME—OFFENSES AGAINST LAND LAWS—CUTTING TIMBER—INDICTMENT.

The last clause of section 2461, Rev. St., forbids the cutting or removal of timber from lands open to private entry with the intent to use it for any other than United States naval purposes; but such intent must be alleged in the information or indictment.

## 3. SAME—CONSTRUCTION OF STATUTES—GENERAL AND PARTICULAR WORDS.

It is a general rule in the construction of statutes that general words preceded or followed by particular words in the same or another clause are qualified or restrained by them.

## 4. SAME—CUTTING TIMBER—TURPENTINE BOXING.

Rev. St. § 5388, makes the wanton destruction of timber on lands reserved for public uses a crime, but does not cover turpentine boxing or wanton destruction of timber on lands open for pre-emption, homestead, and cash entries.

## 5. STATUTES—CONSTRUCTION—PENAL STATUTES.

Penal statutes cannot be extended beyond the obvious meaning of their terms on any plea of failure of justice; and, if there is a fair doubt whether the act charged is embraced in a criminal prohibition, that doubt is to be resolved in favor of the accused.

At Law. On demurrer to criminal information. The opinion covers points made on original hearing and rehearing.

*L. H. Faith*, for demurrant.

*M. D. Wickersham*, Dist. Atty., for the United States.

TOULMIN, J. The first, second, and third counts in the information charge the defendant with unlawfully cutting, and procuring to be cut, timber on lands of the United States, which, in pursuance of law, have been reserved for pre-emption, homestead, and cash entries; and the fourth and fifth counts charge him with wantonly destroying, and procuring to be wantonly destroyed, timber on the same lands of the United States, with the same averment that they were lands which, in pursuance of law, had been reserved for pre-emption, homestead, and cash entries, and that the cutting and wanton destruction of the timber was by boxing and chipping the same for turpentine purposes. The demurrers are, in substance, that the information fails to aver that the timber alleged to have been unlawfully cut and to have been wantonly destroyed was on lands of the United States which, in pursuance of law, had been reserved or purchased for the use of the navy of the United States, or for military or other public purposes, and that it fails to aver the intent with which the alleged cutting was done. It is conceded by the district attorney that the information is not good under section 2461, Rev. St., under the latter clause of which it is necessary to aver the intent with which the cutting was done. But the contention is that the information is good under section 5388, Rev. St., which provides, as

<sup>1</sup>Reported by P. J. Hamilton, Esq., of the Mobile, Ala., bar.

amended by act of June 4, 1888, that "every person who unlawfully cuts \* \* \* or wantonly destroys \* \* \* any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, \* \* \* shall pay a fine of" etc. "May be reserved" here means "have been or shall be reserved," which are the words used in the original act. See 11 St. at Large, 408.

Now, can the information be maintained under this section, 5388, Rev. St.? This inquiry suggests two questions: *First*. What lands of the United States was this section designed to protect? All the lands, or certain lands, of the United States? *Secondly*. If certain lands, viz., lands reserved for particular purposes, do they include lands that are subject to pre-emption, homestead, and cash entries? It is a general rule, in the construction of statutes, that general words preceded or followed by particular words in the same or a subsequent clause, are qualified and restrained by the particular words. Or, to state it somewhat differently, "when general words follow, in a statute, words of particular and special meaning, if there be not a clear manifestation of a different legislative intent, they are construed as applicable to persons or things, or cases of like kind, as are designated by the particular words." Bish. St. Crimes, §§ 245, 246; Dwar. St. 69, 79; *Chapman v. Forsyth*, 2 How. 202; *Woolsey v. Cade*, 54 Ala. 385; *Amos v. State*, 73 Ala. 501. The more general words "or other purposes," following the more specific or particular words "for military," upon a settled rule of construction, larger legislative intention not being clearly expressed, must be construed as extending only to purposes *ejusdem generis* with military purposes; that is, governmental or public purposes. A military purpose is a public purpose. Public land directed by the president to be reserved for use as a military post is not liable to entry under a pre-emption claim because appropriated for a public purpose. *Wilcox v. Jackson*, 13 Pet. 496; *Leavenworth Railroad Co. v. U. S.*, 92 U. S. 742. "Land lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands." *Kansas Pac. Ry. Co. v. Atchison R. Co.*, 112 U. S. 414, 5 Sup. Ct. Rep. 208; *Railroad Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. Rep. 112; *U. S. v. Payne*, 2 McCrary, 289-306, 8 Fed. Rep. 883. That is to say, land consigned to or set apart for any particular purpose, whether by reservation or purchase, becomes thereafter severed from the mass of public lands. Lands are appropriated by reservation for the establishment of trading houses, for fortifications or military posts, for light-houses, for cemeteries, for the use of schools, and the like; and, when thus appropriated, they become thereafter severed from the mass of public lands. See authorities, *supra*. "Legislation which reserved it [land] for any purpose excluded it from disposal as the public lands are usually disposed of." *Leavenworth Railroad Co. v. U. S.*, 92 U. S. 742, 748. And the court say that "every tract of land set apart for special uses is reserved to the government. \* \* \* There is no difference \* \* \* whether it be appropriated for Indian or for other purposes."

Now, if congress had intended by this section (5388) to protect the timber on all lands of the United States, and to provide for the punishment of depredators thereon, then why enumerate specially lands reserved for military purposes, Indian reservations, etc.? I think it is clear that congress intended by this provision of law to protect the timber on certain lands of the United States,—lands reserved for special purposes. This, however, is virtually conceded by the prosecution; for it is averred in the information that the lands on which the alleged depredation is said to have been committed were lands reserved for pre-emption, homestead, and cash entries. Now, do the reserved lands referred to in section 5388 include lands subject to pre-emption, homestead, and cash entries? Are there any lands of the United States reserved for any such purposes? Sections 2257 and 2258 of the Revised Statutes provide that all lands belonging to the United States are subject to the right of pre-emption, except "lands included in any reservation, by any treaty, law, or proclamation of the president, for any purpose;" and section 2289, Rev. St., provides that lands subject to homestead entries are such "unappropriated public lands" as may be subject to pre-emption. In the case of *Wilcox v. Jackson*, 13 Pet. 498, the court say that "lands which may have been appropriated for any purpose whatsoever are exempt from liability to the right of pre-emption," and that "all lands are exempt from pre-emption which are reserved from sale, pursuant to law, for any purpose." When lands reserved to the United States for any public purpose are again put in the market so as to become subject to entry at private sale, they lose their character as reserved lands, and become subject to pre-emption. *Clements v. Warner*, 24 How. 394. In the case of *Clements v. Warner*, *supra*, the court say that, whenever lands "become subject to entry at private sale, they lose their character as reserved lands, and will then be subject to the privileges of pre-emption in favor of settlers." In *Newhall v. Sanger*, 92 U. S. 761, the court say that "the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. \* \* \* To them alone could the order withdrawing lands from pre-emption, private entry, and sale apply." The court in this case, as in all the other cases cited on the subject, clearly draw a distinction between lands reserved and lands to which a pre-emption or homestead claim may attach. See, also, *Aurerecochea v. Bangs*, 114 U. S. 381, 5 Sup. Ct. Rep. 892. There is no doubt that the government can dispose of the public land by grant for public purposes, or reserve it from sale for such purposes; and, from the time this is done, such land is not subject to pre-emption entry. *U. S. v. Yoder*, 18 Fed. Rep. 372; *U. S. v. Brandestein*, 32 Fed. Rep. 738; *Atherton v. Fowler*, 96 U. S. 513; *Railroad Co. v. Whitney*, *supra*. It is severed from the mass of public lands to which alone a pre-emption or homestead claim could attach, or on which such entry could be made. From the authorities referred to, and under sections 2257-2289, Rev. St., it seems very clear to me that lands subject to homestead, pre-emption, and cash entries cannot be said to be lands reserved for any purpose. Such lands comprise the general

public domain,—unappropriated lands,—lands not held back or reserved for any special governmental or public purpose. *U. S. v. Payne, supra; Turner v. Union*, 5 McLean, 344.

But the district attorney contends that section 5388 should be liberally construed, that is to say, so construed as to cover the unlawful cutting and wanton destruction of timber in any manner on all the lands of the United States; otherwise, this public mischief could not be prevented. The rule is that the evident intention of the legislature ought not to be defeated by a forced and overstrict construction, but it has been long and well settled that penal statutes must be construed strictly; that the courts will not extend them beyond the obvious meaning of their words. *U. S. v. Morris*, 14 Pet. 464. Penal statutes cannot be extended beyond the obvious meaning of their terms on any plea of failure of justice. *Sedg. St. & Const. Law*, 279; *Remington v. State*, 1 Or. 281; *U. S. v. Reese*, 5 Dill. 405, 414. If there is a fair doubt whether the act charged in the indictment is embraced in a criminal prohibition, that doubt is to be resolved in favor of the accused. *U. S. v. Reese, supra; U. S. v. Whittier*, 5 Dill. 35; *U. S. v. Clayton*, 2 Dill. 219; *U. S. v. Sheldon*, 2 Wheat. 119; *U. S. v. Willberger*, 5 Wheat. 76. And I think we have seen that the obvious meaning of the words "reserved for other purposes" in the statute, construed in connection with the context, is reserved for other special public purposes. That this was the intention of congress, I have no doubt; and it is still clearer, I think, that land subject to pre-emption, homestead, and cash entries are the "public lands" of the United States,—those not reserved for any purpose. But section 2461, Rev. St., was designed for the protection and preservation of these lands as a part of the public domain, and prescribes penalties for the cutting or removal of timber on or from the same. As was said by the court in the case of *U. S. v. Schuler*, 6 McLean, 28:

"Section 2461 constitutes part of the land law of the United States, and was designed for the protection and the preservation of \* \* \* the national domain. \* \* \* The term 'other land' in the statute has reference to its surveyed divisions, and contemplates the lands known and described in the public surveys as distinct from those reserved for naval purposes."

And in *Leatherbury v. U. S.*, 32 Fed. Rep. 780, Judge PARDEE says:

"The object of the section [2461 Rev. St.,] was and is to preserve the timber on all the public lands, where the lands have not been reserved," etc.

And he says that "trespasses other than the cutting or removing of the trees or timber, with the intent to export, dispose of, etc., were not contemplated nor provided for." Hence the contention that, unless it is held that the cutting of timber by boxing it for turpentine purposes, and the wanton destruction of timber, on all public lands, can be prosecuted under section 5388, Rev. St., such public mischiefs cannot be suppressed, and there would be a failure of justice. The answer is, it is the business of the courts to expound, not to make, the law; and, if congress has not thought proper to make the cutting of timber by boxing it for turpentine purposes, and the wanton destruction of timber on all lands of

the United States, indictable, I have no discretion, but am bound to declare the law as I understand it, let the consequences be what they may. In my opinion, the demurrers to the information are well taken, and they are sustained.

### EMMONS v. UNITED STATES.

(Circuit Court, D. Oregon. April 18, 1890.)

#### 1. PUBLIC LANDS—VOID ENTRIES—ACTION TO RECOVER PRICE.

Actions are maintainable in the national courts, against the government of the United States, to recover the purchase price paid upon void entries of public land, under the provisions of the act of congress of March 3, 1887, authorizing suits against the United States.

#### 2. SAME—ACTIONS BY ASSIGNEES.

Such actions cannot be maintained by assignees of the parties who made the void entries; assignments of all claims against the government being declared void by section 8477, Rev. St., unless made with prescribed formalities, after issuance of warrants to pay the claims.

#### 3. SAME—PLEADING.

A petition to recover the purchase money paid to the United States for land, which shows an allowance of the proposed entry by the register and receiver of the proper district land-office, and the issuance of a certificate to the entry man, and fails to allege a surrender of such certificate, or to account therefor, or to allege a relinquishment of all claims to the land under such entry, is insufficient.

(Syllabus by the Court.)

At Law.

Zera Snow, for plaintiff.

U. S. Dist. Atty. May, for the United States.

HANFORD, J. This cause has been argued and submitted upon a demurrer to the petition, based upon two grounds, appearing, it is alleged, upon the face of the petition, viz., insufficiency of the facts to justify the action, and want of jurisdiction in the court of the subject-matter of the action. The allegations of the petition, in brief, are to the effect that three persons, each of whom was entitled to the benefits of the provisions of the act of congress providing for the sale of timber lands in the states of California, Nevada, and Oregon, and in the territory of Washington, approved June 3, 1878, in good faith, and in due conformity to the requirements of said act, and the rules and regulations of the department of the interior, made their respective applications to purchase 160 acres of timber land in Oregon, and made the required payments therefor, including fees amounting to the aggregate sum in each of the three cases of \$410; that the said applications were allowed by the register and receiver of the proper district land-office, and final certificates of purchase were issued by the receiver; that afterwards the commissioner of the general land-office, claiming that the lands were not timber lands subject to entry under said act arbitrarily canceled the several entries so made, and directed such cancellation to be entered in the records of the district

land-office, which directions have been complied with, and ever since the lands have been listed as vacant public lands subject to further entry, and in consequence the said entry men have not received, and cannot receive, patents for the land; that the government has neglected and refused, and now refuses, to refund the money paid for the land by the entry men; that the said entry men, respectively, before the signing of the petition, sold, assigned, and transferred the land sought to be entered, and their interests therein, and their several claims against the government, for the money paid as aforesaid to the plaintiff, who is still the holder and owner thereof; that the rights upon which the action is founded accrued within six years from the time of filing the petition, and that the same have not been heretofore adjudicated by any court, department, or commission authorized by law to hear and determine the same.

The plaintiff seeks in this single action to recover the full amount of purchase money and fees paid by the three entry men; the particular facts of each of the three assigned claims being separately set forth in the petition. The plaintiff assumes that the right to maintain this action in this court is given by the act of congress of March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States." Section 1 of this act enumerates the several kinds of claims against the government made cognizable in the courts, as follows:

"*First.* All claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable: provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same. *Second.* All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States, against any claimant against the government in said court: provided, that no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."

By the second section of the act, jurisdiction concurrent with the court of claims of suits founded upon the above enumerated matters is given to the district courts where the amount of the claim does not exceed \$1,000, and to the circuit courts where the amount exceeds \$1,000 and does not exceed \$10,000. In the argument in support of the demurrer, counsel for the government contends that this act, authorizing the prosecution of certain classes of suits against the government in the national courts, must be so construed as to not include a suit or action upon a claim for repayment of the price of land erroneously sold or entered, and in support of this contention cites that part of the opinion of the supreme court of the United States in the case of *U.*

*S. v. Jones*, 131 U. S. 1, 9 Sup. Ct. Rep. 669, in which the idea is suggested that the management and disposal of the public domain has always been regarded as more appropriately belonging to the political department of the government than to the courts, and more a matter of administration than judicature. To this contention, I cannot yield. The positive provisions of the statute, expressed in language free from all ambiguity, authorize suits to be brought and prosecuted against the government, in its own courts, in all cases founded upon claims for the mere payment of money other than those particular classes of claims which are by the act specifically excepted, in which excepted classes the claims set forth in the petition in this case are not included. In the case of *U. S. v. Jones* the supreme court decided that the statute authorizes suits against the government only when founded upon mere money demands, and no other point was decided. The reasons given for the decision do not support any such rule of construction as would, in effect, so limit the statute as to add other classes of mere money demands to those which the statute itself, in terms, excepts from its provisions. In a case where an application to purchase part of the public domain has been disallowed after payment of the fixed price therefor by the applicant, a demand for repayment of the money, if not a matter of absolute right, free from all question, can only involve questions proper for judicial determination, and which cannot be regarded as being in any sense political.

It is further urged that section 2362 of the Revised Statutes of the United States, and the act of June 16, 1880, providing for the repayment of certain fees, purchase money, and commissions paid on void entries of public lands, provide an adequate remedy for all cases of this character, and the exclusive remedy. I agree that the statute referred to provides a method of procedure to obtain repayment of the purchase money in cases like the one at bar, and, in my opinion, the conditions therein prescribed upon which repayment can be made are just and reasonable, and must necessarily be complied with before any repayment can be lawfully made or adjudged. But I do not agree that the remedial provisions of the act of 1887 can rightfully be so abridged by construction as to preclude the courts from taking cognizance of any case merely because, by another law, an officer of the executive branch of the government is authorized, though not compellable, to satisfy the claim by directing payment thereof. To so hold would practically nullify the statute in its entire scope.

This act contains certain exceptions of cases which, because thus excepted, cannot be litigated in the courts; but no case is thus excepted because authority is given by some other law to the executive branch of the government to adjust and satisfy the claim. I do not understand the proviso attached to the first subdivision of the first section of the act to bar an action upon a claim by reason of a decision of a department authorized to pass upon it adverse to the claim, unless such adverse decision was rendered prior to the date of the act, although, in the argument, counsel on both sides seemed to assume that it does, and the pe-



tion was evidently drawn with that idea in mind. The word "heretofore," as it is used in this proviso, can have no other office than to limit the application of the exception to cases which had been determined and closed in accordance with the provisions of existing laws prior to the enactment of this law.

The next proposition advanced in support of the demurrer is that the act of 1887 does not authorize suits to be brought against the government by the assignee of a claim, and that the privilege of suing the government is personal to the original party to a claim, and not assignable. I recognize that there is considerable force in the argument on this point; but I should hesitate to sustain the demurrer, or hold that an assignee of a claim cannot sue the government, on these grounds alone. However, section 3477 of the Revised Statutes makes all transfers and assignments of any claim upon the United States, whether absolute or conditional, whatever may be the consideration therefor, and all powers of attorney, orders, or other authority for receiving payment, absolutely null and void unless executed, with certain prescribed formalities, after the allowance of the claim and the issuance of a warrant for the payment thereof. By this statute the assignments alleged in the petition of the several claims sued on are made void, and therefore the plaintiff cannot maintain this action. If he can collect the money claimed at all, it can only be by an application to the secretary of the interior, made in conformity to the requirements of the statute of 1880, or section 2362 of the Revised Statutes, which authorizes payments to assignees. These statutes, being special, providing for relief in particular cases, to be obtained in a prescribed manner and upon specified conditions, can be invoked only for the benefit of him who observes and conforms to their requirements.

If the plaintiff could maintain the action, I should still feel bound to sustain the demurrer for the reason that the petition does not show that the receiver's certificates issued as therein alleged have been surrendered or accounted for, nor that there has been any relinquishment of claims to the land by the original entry men or the plaintiff. There can be no valid claim for return of the purchase money while yet the land itself is claimed, especially as in this case it is not shown that the entries were invalid. The petition alleges that the commissioner of the general land-office, in making the orders canceling the entries, did so claiming that the lands were not timber lands subject to entry as such under the act of congress authorizing the sale of such lands. This is ambiguous. It is not an assertion that the commissioner ever claimed or decided, as a matter of fact, that the lands are not timber lands, unfit for cultivation, and chiefly valuable for the timber thereon. If, in fact, the commissioner did find all the facts to be favorable to the entry men, and only disallowed their entries in consequence of an error in a matter of law, such ruling would not be inconsistent with what is alleged in the petition; and yet, in such a case, the plaintiffs' vendors would not necessarily lose their lands, for, upon the issuance of patents to the lands to other parties, the lawful claimants, by appealing to a court of equity,

could have the errors corrected, and acquire perfect titles, by compelling conveyances from the patentees. It is, therefore, necessary that all claim and controversy under the entries should be finally terminated, and that the fact of such termination be evidenced by matter of record, or acknowledged by the party by a surrender of the certificate of purchase and a relinquishment of the land, before a party can place himself in a position to maintain an action for the purchase money. The petition may be cured of its imperfection in this regard by an amendment, if the facts are such as to warrant it; and this is my reason for calling attention to a defect not referred to in the argument. An order sustaining the demurrer will be entered; and, unless leave to amend the petition shall be asked, a judgment will be given for the defendant.

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SAWYER *et al.* v. EQUITABLE ACCIDENT INS. CO. OF CINCINNATI.

(Circuit Court, E. D. Wisconsin. March 25, 1890.)

LIFE INSURANCE—APPLICATION—ANSWER BY AGENT.

Insured was not asked as to his income, but after he had signed his application, the statements in which were warranted, the agent, without his knowledge, inserted a statement that it was not less than \$100 a week. This statement was in a different handwriting from the rest of the application, and the policy was issued by the home office. *Held*, that the company was liable, though insured was practically insolvent, and his income was much less than \$100.

At Law. On motions for judgment on verdict and for new trial.

Action by Edgar P. Sawyer and John N. Kiel, executors of the will of Julius H. Kiel, against the Equitable Accident Insurance Company of Cincinnati, upon a policy of insurance.

*Weisbrod, Thompson & Harshaw*, for plaintiffs.

*Gary & Forward*, for defendant.

JENKINS, J. The action is upon an accident policy of insurance issued by the defendant upon the life of Julius H. Kiel, the plaintiffs' testator, for the sum of \$10,000. One of the defenses to the action, and the only one necessary to consider at this time, is that, in the application upon which the policy was based, the assured stated as a fact which he warranted to be true, but which was in fact false, that his weekly income was not less than \$100. At the trial the jury returned a general verdict for the plaintiffs, and, in answer to two special questions submitted, found that at the time of the application, and for a year prior thereto, the weekly income of Julius H. Kiel did not exceed \$50; but that the statement in the application respecting his weekly income was not contained in the application when signed, nor inserted therein at any time with the knowledge or consent of the assured. Upon this verdict, both parties now move the court for judgment; the defendant coupling therewith a motion for a new trial.

The facts established by the verdict, so far as they are essential to the proper determination of the question involved, may be thus summarized: The assured, a resident of Oshkosh, on the 18th of April, 1888, at Milwaukee, applied to W. H. Craft, the Wisconsin state agent of the defendant, for accident insurance to the amount of \$10,000. He was a stranger to Craft, who required references. He informed Craft that he was president and treasurer of the Ingalls, White Rapids & Northern Railroad, a logging railroad in the northern woods, and referred Craft to the office of the Wisconsin Central Railroad. Craft said to him that the agency could not write a policy in excess of \$5,000, but he would take his application, and, if the references proved satisfactory, would forward the application to the company with a recommendation that the policy issue. Thereupon Craft's son, in his presence and in the presence of the assured, propounded the questions and wrote the answers in the blank application, so far as the blanks were filled at the time. The application was then signed by Kiel, who left with Craft his check for \$50, the required premium, with the understanding that the policy when issued should be forwarded to him at Oshkosh, or, if the application should be rejected, the check was to be returned. At no time was Kiel interrogated as to his income, nor did he make any statement respecting it. Craft, upon inquiry, satisfied himself respecting the desirability of the risk, and, in the absence of Kiel, and without his knowledge or consent, upon the margin of the application, added to the occupation stated by Kiel the word "capitalist," and in the space in the prescribed blank, which had not been filled, erased the printed word "wages," and inserted in writing "income not less than \$100.00," so that the statement would read, "my weekly income not less than \$100.00," and thereupon forwarded the application to the defendant with a letter strongly recommending the acceptance of the risk. The policy was issued and sent to Craft, who in turn forwarded it to Mr. Kiel by mail, and used the check left with him for the premium. The application was a printed blank furnished by the defendant company to its agents, and contained the usual warranty that the statement of facts therein contained, and upon which the policy was to be based, was true. The company was not informed of the action of Craft in respect to his alteration of the signed application until the last trial of the action, when it timely tendered and paid into court, to the use of the plaintiffs, the amount of premium, with accrued interest to the date of such tender and payment. The alterations were manifestly in the handwriting of Craft, the agent, with which the company must be assumed to have been familiar, and exhibit a marked contrast to the handwriting of the son who filled the blank, with the exceptions stated. The printed instructions to agents required them, in case of application for insurance in excess of \$5,000, to apply to the home office, giving full answers to each question in the application, and stating the salary or weekly wages of applicant. Mr. Craft, at the trial, insisted that, in insuring professional men, merchants, and those having no fixed income, it was the custom to ignore that ques-

tion, or to insert such an amount as the agent thought reasonable; but he could not say that any of the general officers of the company had ever so instructed him. The rule of the company at that time was that weekly indemnity from all sources should not exceed weekly wages, and the amount of death benefit, when coupled with weekly benefit, was adjusted upon the basis of weekly indemnity. Mr. Kiel had during the fall previous invested in a logging railroad and logging business that was largely incumbered. The incorporation owning it at the time of this application was insolvent, and on the verge of bankruptcy, to the knowledge of Mr. Kiel. Within a few weeks thereafter the railroad and business passed into the hands of a receiver. Mr. Kiel had some considerable real estate, yielding income, but was indebted to an amount in excess of all his property, and was at the time of this application, to his knowledge, practically insolvent, although still in receipt of rentals. His death occurred soon after, as found by the jury, from accidental drowning. The policy of insurance professes to be issued in consideration of the representations, agreements, and warranties made in the application, and contains an agreement by the assured that such declarations are warranted to be true in all respects; and said application is referred to and made part of the contract, although no copy of the application accompanies the policy. It is also conditioned in the policy that, if any statements in the application are false, the policy shall be void.

The question presented is whether the company is bound when its agent wrongfully changes the application after it is signed, and before its transmission to his principal; the insured being guiltless of participation in the wrong. It was held in *Insurance Co. v. Wilkinson*, 13 Wall. 222, that insurance companies acting through agents at a distance from the home office were bound by their acts within the general scope of the business intrusted to them, and that parties dealing with them are not bound by any limitation of authority not brought to their knowledge; that, when such agents prepare the application, and insert therein an untrue statement not given by the applicant, the company is bound, although the application be signed by the assured. The decision of that case was affirmed in *Insurance Co. v. Mahone*, 21 Wall. 152, where it was ruled that the proposals and answers prepared by the company's agent must be regarded as the act of the company, which they cannot be permitted to set up as a warranty by the assured when truthful answers were given to, but other and untruthful answers were substituted by, the agent. The court further held that it was of no consequence that the answers as written by the agent were read to and signed by the applicant; that, having answered truly, the applicant had the right to assume that the answers he did make were accepted as meaning, for the purpose of obtaining a policy, what the agent stated them in writing to be. These cases were followed and approved in *Insurance Co. v. Baker*, 94 U. S. 610. There the agent of the company undertook to construe and interpret the answers of the applicant, and inserted in the application his construction and interpretation of the answers, but not the answers themselves. It

was held that the statement, although signed by the applicant, was one prepared by the company, for which it was responsible, and could not be asserted to defeat the policy.

The counsel for the defendant strenuously contests the correctness of the rule thus laid down. They claim it to be in antagonism to settled principles of law: that the signer is conclusively presumed to know the contents of the instrument signed, and that, by signing it, he adopts every erroneous statement therein, and warrants its correctness. They further insist that the signer of an erroneous statement going to the basis of a contract of insurance has by that act fraudulently or negligently colluded with the agent, and become the active participant in an imposition upon the company, to its injury; and that to allow him thus to escape his warranty is to permit him to take advantage of his own wrong. They further insist that the cases cited are substantially overruled by the case of *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837, and that the latter case presents the only logical principle by which such cases should be ruled, and is authoritative here to effectuate the defense and avoid the policy. Since some of the language of Mr. Justice FIELD in the latter case is said to antagonize the reasoning upon which the previous cases are based, the facts of the latter case should be carefully looked to, to ascertain the precise situation to which the argument is addressed. The printed application contained the usual warranty with respect to the answers, and the further agreement—wanting in the previous cases—that, “as only the officers at the home office had authority to determine whether or not a policy should issue on any application, and as they relied only on the written statements and representations referred to, no statements or representations made or information given to the persons soliciting or taking the application for the policy should be binding on the company, or in any manner affect its rights, unless they were reduced to writing, and presented at the home office in the application.” To the policy was attached a copy of the application, with notice to the assured that, if corrections were desired respecting any unintentional errors or omissions in the application, when satisfactory to the company, a certificate to that effect would be issued by the proper officers. The agent falsely stated in the application the answers of the applicant signing the application, there being no evidence, as the court states, that the application was not read by him before he signed it, or that there was any imposition practiced upon him, or that, after receiving the policy, which he retained until death,—a period of over two years,—he applied to correct his answers, which, as written down, were conceded to be false. The opinion distinguishes this case from that of *Insurance Co. v. Wilkinson*, and kindred cases, upon the ground that in those cases no limitation upon the power of the agent was brought to the notice of the assured, and asserts that “in such cases it may well be held that the description of the risk, although nominally proceeding from the assured, should be regarded as the act of the company,” while in the case then under consideration the power of the agent was expressly limited, and notice thereof embodied in the application which the assured signed, and which he

must be presumed to have read. So that the false statement in the application was in law the adopted act of the assured, who thereby became, through his own negligence, an instrument and participant in the fraud of the agent, barring the right to assert the validity of a policy thus procured. The decision proceeds upon the further ground that the retention of the policy with a copy of the application attached was a ratification and approval of the false statements in the application, and of the fraud perpetrated, equally barring any right of recovery. I find no conflict or want of harmony in these decisions, the peculiar facts of each being considered. In the *Mahone* and *Baker Cases* the assured made truthful statements to an agent clothed with apparent authority to deal with the subject, and without notice of any limitation of authority. The answer written by the agent, and signed by the applicant, was the interpretation and legal effect given by the agent to the truthful answers of the applicant. In such case it may well be said that the agent, being possessed of the facts, might determine for his principal what interpretation should be given to ascertained facts as affecting the subject inquired of. *Insurance Co. v. Chamberlain*, 132 U. S. 304, 312, 10 Sup. Ct. Rep. 87. In the *Wilkinson Case* the erroneous information came from a third party to the agent, touching a fact of which the applicant was ignorant, and which was accepted by the agent as satisfactory. With no notice of limitation of the authority of the agent to deal with the matter for his principal, the assured could rightfully assume from such act that the company was content with the information obtained. In such case the answer was the act of the company by its agent, and not that of the assured. In the *Fletcher Case*, on the contrary, there was express limitation of authority of the agent. The assured signed the application with knowledge, or means of knowledge, of such limitation. If he failed to read the paper signed, that was his own negligence, operative to work a fraud upon the company. He was prevented by no fraud or deceit of the agent from knowing the limitation of authority, or the statements to the company which he verified by his signature. He was therefore held to have adopted the acts of the agent in excess of authority as his own, and thereby to have become a participant in the fraud perpetrated upon the principal. The distinction between the cases is clearly stated by Mr. Justice FIELD, and rests upon notice to the assured of the limitation upon the power of the agent. I have been thus careful to verify the facts and grounds of decision in *Insurance Co. v. Fletcher*, as counsel have insisted that the first paragraph in Mr. Justice FIELD's opinion is in direct antagonism to, and practically overrules, the previous decisions of the court, notwithstanding the distinction between the cases stated in the opinion. I do not so read the meaning of the paragraph. Standing alone, the language is, undoubtedly, quite comprehensive; but it would be manifestly unfair to construe it without reference to the facts of the case to which it was addressed. So interpreted, it is to the effect only that, when assurer and assured have both been deceived by the fraudulent act of the agent, and the assured, from neglect to read the application, when reading would have disclosed both the fraud and the limitation of author-

ity of the agent, was placed in the position of making false representations inducing a contract not otherwise obtainable, justice would require that the contract be canceled, and the premiums returned. So construed, there is no lack of harmony in the line of decisions referred to. It cannot be presumed that the court designed to overrule the doctrine of prior cases which they were careful to distinguish from the case then before it.

Coming now to the case in hand, it is clear that the defense of breach of warranty on the ground of false statement of income must fail, for the plain reason that the assured executed no such warranty. The paper signed was a blank as to that subject. The filling of that blank was subsequent to the signing, and was the act of the agent of the company, and without authority of the assured. He cannot be bound upon a warranty of which he was ignorant. Nor does the case fall within the rule applicable to negotiable and other instruments executed in blank, and intrusted to the custody of another for use for the benefit of the signer or others, that, as between such party and innocent third parties, the person to whom the document is intrusted is deemed the agent of the party to fill the blanks necessary to perfect the instrument; and this for two sufficient reasons: The application was written by the agent, who was apparently clothed with authority to do all acts needful in the premises. He propounded the questions which he deemed proper, and received and noted the answers thereto. He made no inquiries touching the income of the assured, nor was any statement demanded upon the subject. In all this he acted for the company, and was *pro hac vice* the corporation. His silence as to the question was equivalent to an assertion to the assured that the question was not material, and was waived. Under such circumstances, the signing of the application with the blank unfilled cannot be claimed as an authority to the agent to fill the blank. The rule applies to instruments intrusted to one who represents the signer, and thereby clothed with power to impose upon innocent third parties. But here the instrument was delivered to the agent of the company; and delivery to him, as respects the assured, was delivery to the company. In such case the assured is not estopped to deny the warranty. The company may, in fact, have relied upon the statements filled in the blank by its agent; but that is unavailing, because, to work an estoppel, the misconception as to the state of facts must have been induced, and the company must have been misled, by the words or conduct of the assured. But here the imposition was the act of its own agent, enabled by its authority, and not by the act or conduct of the assured, to work imposition. His acts with respect to the preparation and receipt of the application must be deemed the acts of the company. The principal should, therefore, bear the consequences of the conduct of a negligent or fraudulent agent intervening between the assurer and the assured, the latter being guiltless of fraud or collusion; and this upon the familiar principle that, when one of two innocent persons must suffer by the fraud or negligence or unauthorized act of a third, he who clothed the third with power to deceive or injure must suffer the loss.

Nor do I think the position to be tenable that here was a failure of contract because the minds of the parties had not met, by reason of the alleged fraud perpetrated by Craft. There was a meeting of minds upon a contract of insurance, and a policy issued and accepted. The most that can be asserted is that the minds of the parties did not meet upon one of the inducements to the contract. That was, however, touching a matter which might be waived by the company, and, as to the assured, was waived by the act of its agent.

This opinion has thus far proceeded upon the theory that the question not asked of nor answered by the assured, and answered incorrectly by the agent, was material to the risk, and relied upon by the company, and that the home office was not negligent in the premises. I have preferred to so treat the question for the reason that, upon that postulate, I think, as matter of law, that judgment must go to the plaintiffs upon this verdict. But it may well be doubted whether the question was pertinent in any case except where the assured was under fixed salary. The book of instructions to agents, as well as the printed application, invariably speak of weekly wages or salary, never of income, until the adoption of the rule that weekly indemnity must not be granted for more than two-thirds of the weekly wages or income of the applicant, which, as the secretary states, was adopted since this policy was issued. This lends support to the statement of the agent, Craft, that the question was only applicable to those having fixed wages or salary, and that it was the custom of the company to insure merchants, professional men, and those having no fixed income, without respect to their earnings. This may explain, and in a measure qualify, the seemingly tortuous and unfair action of the agent. If the question and answer were as essential as claimed, it seems singular that diligent officers of the company could have been misled to its prejudice. The alteration was patent upon the face of the paper, and in a handwriting so different from that in which the body of the application was filled that one would suppose the company would have been warned upon bare inspection. The difference was so striking that the attention of the court was attracted thereto at a previous trial of the cause, when no question was suggested, and counsel on neither side supposed that the paper had been tampered with. Unless blinded by overconfidence in its agent, the most casual scrutiny of the paper by an officer vigilant to discharge his duty would have put the company upon inquiry. In such case, when the company ignores patent irregularities, issues the policy, and accepts the premium, it cannot be heard to insist that the wrong of its agent shall be visited upon others. Even holders of negotiable securities taken before maturity, in the usual course of business, are held chargeable with notice when the marks on the instrument are of a character to apprise one to whom the same is offered of the alleged defect. *Goodman v. Simonds*, 20 How. 365.

It cannot be said that the assured was a party to the fraud, if fraud there was. Assuming, as found by the jury, that this death was accidental, and that the insurance was otherwise effected in good faith, the



were fact of non-disclosure of his financial embarrassments was not wrongful. He was not inquired of upon that subject. Silence under such circumstances is not fraudulent. Most men engaged in large enterprises meet with financial embarrassments, and their incomes are fluctuating. If no false statement is made, inducing insurance which could not otherwise be obtained, there exists no obligation to disclose one's financial condition. If the information be deemed essential, it should be insisted upon, not waived, and the assured should not be persuaded to silence by the active negligence or fraud of the agent of the assurer.

The conclusion to which my mind is impelled is in accord, as I conceive, with the rulings of every court that has spoken to the precise question involved. *Mowry v. Rosendale*, 74 N. Y. 360; *Grattan v. Insurance Co.*, 80 N. Y. 281; *Donnelly v. Insurance Co.*, 70 Iowa, 693, 28 N. W. Rep. 607; *Schwarzbach v. Union*, 25 W. Va. 622, 661. There must be judgment for the plaintiffs upon the verdict.

### CARTER v. KANSAS CITY CABLE RY. CO.

(*Circuit Court, W. D. Missouri, W. D. March, 1890.*)

#### 1. CARRIERS OF PASSENGERS—PRESUMPTION OF NEGLIGENCE.

The injury of a passenger raises a presumption that the carrier was negligent.

#### 2. SAME—EVIDENCE—SUBSEQUENT PRECAUTIONS.

Evidence that after the injury a skilled mechanic connected with defendant's road devised a patent to prevent similar accidents is immaterial, unless by reasonable diligence defendant could have discovered the new device before the injury.

#### 3. SAME—DEFECTIVE APPLIANCES.

If defendant, a cable-car company, procured the best grip it knew of, after due investigation, and subjected it to the best tests known, and thoroughly examined all the machinery of its cars each night by competent men, it is not liable for an injury occasioned by the breaking of the shank of the grip from some latent defect, causing the car to run rapidly down hill and collide with another car, it having diligently applied all known brakes to hold the car on the hill.

At Law.

*Jettmore & Son*, for plaintiff.

*Johnson & Lucas*, for defendant.

PHILIPS, J., (*orally charging jury.*) This is an action for personal injuries alleged to have been sustained by plaintiff while a passenger on defendant's cable-car at Kansas City. The plaintiff took passage on the car at the Union depot station to come up into the city. From that point to the summit of the hill there is a steep incline of several hundred feet in length. Just as the car reached the summit of the incline it suddenly stopped, and then began to run backward, to the foot of the incline, with great velocity, where it collided with another of defendant's cars. The plaintiff received by this collision injuries to one of his ankles and hands.

The defendant contends that the accident was from inevitable casualty, without any inculpatory act on its part; that the retrograde movement of the car was occasioned by sudden breaking of one of the shafts of the grip; and that, owing to the slippery condition of the rails from frost and snow, the downward movement of the car could not be stayed by the brakes.

There are certain general principles of law applicable to this case to be kept in mind by you for your guidance. The defendant, in contemplation of law, is a common carrier of passengers for hire. As such, it undertook, in consideration of the fare paid by plaintiff, to safely carry him over its road to his point of destination. It did not undertake, however, to insure the life and limbs of such passenger. But as the public has an interest in the lives and limbs and health of its citizens, no less than the individual himself, the law exacts of a carrier of passengers a high degree of caution and vigilance to prevent accidents, and consequent injury. So, when the passenger is injured in the progress of the trip, the law presumes that the carrier has been guilty of negligence. In other words, when the plaintiff proves, as has been done in this case, that he took passage on defendant's train of cars, paid his fare, and received an injury, he has made out a *prima facie* case, and the burden of proof then shifts to the defendant to explain the circumstances of the injury. If it appears from its evidence that the injury was not attributable to the neglect of any duty which the law imposes upon it, then the *prima facie* case of the plaintiff is counterbalanced, and the jury, without more, should find for the defendant. The law requires that such carrier of passengers should exercise the highest degree of care. Care, diligence, and negligence are more or less relative terms. They cannot always be defined arbitrarily, applicable indifferently to every state of facts. They cannot always be determined abstractly. Care and negligence must necessarily be judged of by the nature of the work to be done, the instruments to be used, the hazard and danger to life and limb from the character of the service to be performed by the carrier. "Ordinary care" means simply that caution and vigilance which a reasonable and prudent person should exercise under like circumstances. So the term "utmost care," which it is said the carrier of passengers must exercise to prevent injury to his passenger, must often be considered relatively, in the sense above indicated.

You must look to the pleadings to see what are the issues of fact you are to try, for those are the only matters you are called here to determine. The allegations of this petition are that, in carrying plaintiff up said incline, "the said defendant, by its agents and employes, suffered and permitted said car in which plaintiff was being so carried, when at the summit of said incline, to become detached and precipitated with great velocity and violence down said incline many hundred feet, and to violently collide with and crash into another car of defendant, then standing on said railway; thereby, and in consequence thereof, plaintiff was greatly frightened, bruised, injured," etc.; the simple meaning of which is that, after the car had made its ascent of the hill, and had reached a

point near its summit, the defendant was guilty of some act of commission or omission by which the car ran backward instead of going forward. This is the question you are to try.

The defendant has undertaken, by evidence, to show that it had employed in the construction of its cars the best appliances known to the business, and the best machinery attainable. If you find from the evidence that defendant, in the construction and equipment of its track and cars for operation, had exercised the highest degree of care and circumspection known to it; that it had employed, as its evidence tends to show, the best material which it could ascertain by inquiry and experiment to be needful for such use; that it had employed the best brakes, grips, and appliances for running, stopping, and operating such cars, at such a point; and had exercised great care and caution in inspecting and testing such appliances, in a mechanical and skillful manner,—then there would remain another question in the case, and that is, did the defendant also exercise due care in the selection of competent servants to run the car, and put them in charge thereof, on this occasion? If it did that, there remains but one other fact for you to find, in this connection, and that is, did the servants on this occasion exercise care and put forth their best efforts to prevent this accident? If you should find these facts for defendant, the plaintiff has no case, and your verdict should be for the defendant.

Gentlemen of the jury, there has been some evidence, forced upon your attention before the court could control it, to the effect that, a few months after this accident, some one of the skilled mechanics or engineers connected with this road devised a patent or plan by which it is supposed such an accident as the one in question could not occur, or could be prevented. In respect of this, I charge you that such subsequent discovery would not necessarily make the defendant liable in this action. It devolves upon the plaintiff to go further with his proof, and show that such new device was known to the defendant prior to this accident, or that its discovery could have been made by the exercise of diligence on its part, as heretofore defined. A jury in the box should always exercise its common sense, and be controlled by reason, experience, and observation. You know, without any witness telling you, that new inventions and new devices in applied mechanics are being discovered; that new principles are being developed, or old principles are constantly being rearranged, combined, and applied, to produce new results in the use of machinery, to improve forces in propelling cars, both by steam and cable, and to secure greater safety in their operation. The fact, therefore, that after an injury occurs some man of genius, by the exercise of his gifts and experience, or by experiments, discovers some superior method for the prevention of accidents, and its application to this road might have prevented the accident in question, ought not to make the defendant liable for not applying a thing not in existence at the time, and not known to it.

The law tries to be reasonable and just. It only exacts of the defendant in this case that degree of care, vigilance, and effort which pru-

dent and sensible men should exercise under like circumstances; that is, the best exercise of its talents and skill and exertion, with the lights then before it, or reasonably accessible to it. The evidence in this case shows that the operation of railroads by an endless cable in this country is of comparatively recent experience. The first was operated in San Francisco; next, in the city of Chicago, and contemporaneously in the city of New York and the defendant city; and all within a few years past. The method is of comparatively recent discovery or application. Therefore it is not in a state of perfection. Men of science and mechanical education are yet experimenting on the subject of the best and safest methods of their operation. All the law requires is that the defendant should use the best machinery and methods known to or attainable by it to secure success and safety.

If, therefore, gentlemen, you are satisfied from the evidence that the defendant, in operating this road, obtained and used the best appliances known to and obtainable by it; that it bought or procured the best grip it knew of, after inquiry and investigation, and subjected it to reasonable tests to discover its strength and fitness,—then it had done all the law demands in that respect. The evidence shows that defendant, through its officers and agents had taken every reasonable precaution, in the choice and selection of grips and brakes, that men of experience and skill in such matters could suggest and devise. Defendant had brought from San Francisco, where cable roads were first built and run, and over inclines quite as abrupt as the one in controversy, Mr. Lawless, a mechanic and civil engineer, who had operated roads in California, and defendant had the assistance of his experience and judgment in selecting its grips and brakes, and after careful examination into like machinery in Chicago and New York. If you find such to be the fact,—and there is nothing in evidence to contradict it,—then it had done all in that particular the law demands.

The evidence tends to show, without contradiction, that, before defendant used the grip in question, it subjected it to the best known methods for determining its strength and soundness; that the force applied in making such test exerted a power or tension far greater than was necessary to accomplish its work on the road. It had been in use on this road successfully for quite a time. The evidence further shows that it was the rule of the company that the grips, brakes, and every part of the machinery of the cars should be thoroughly examined each night after the cars were run into the round-house; that the car-inspectors were men of experience and competency; and that they did each night so go over the cars, and make minute examination of the grips, the brakes, etc., to discover any defect or misplacement; and that they never allowed a car to go out in the morning without repair. If you believe these men, that is all the law requires to complete defendant's defense in this respect. If, therefore, you find from the evidence that the breaking of the shank of the grip, as testified to by the witnesses, occurred from some latent, hidden defect, not apparent to the eye, and not discoverable after the examinations and tests, by striking it with the hammer,

as testified to by the inspector, the defendant would not be liable in this action for an accident resulting from such hidden and undiscovered defect. The shaft may have had an internal defect or flaw undiscoverable by reasonable tests, and which suddenly developed under unforeseen circumstances of pressure or exposure. If the accident in question resulted from that, the defendant ought to have a verdict.

There is no contradiction in the evidence that this car, with said grip, had been on the road for some time. It had been running all that day, making its customary round of trips, which were frequent. It had successfully ascended and descended that incline the day long. If you believe from the evidence that the shank broke suddenly, then, as has been demonstrated before you by the presence of the grip in court, the inevitable defect of such breakage was to detach the grip from the cable, and, in obedience to the law of gravitation, the car must go to the bottom of the incline, unless it could have been otherwise checked. And this brings before you another matter: When the grip did break, the law comes in, and says it became the duty of the servants in charge of said train to put forth every effort possible on their part to save the passengers harmless, by stopping the car by every other appliances therefor at their command. The evidence shows that the car was provided with every known brake to stay it on the hill-side; and that the gripman, the extra hill-brakeman, and the conductor seem to have done their whole duty in this particular; but, on account of the slippery condition of the track, the car slid, notwithstanding the application of the brakes. The gripman showed his fidelity to duty, as he stood at his brake until his leg was broken in the collision.

Now, gentlemen of the jury, you are the sole judges of the weight of evidence and the credibility of the witnesses. There are certain legal methods of discrediting witnesses, either by showing that they are of bad character, that their reputation for truth among their neighbors is bad, by showing that they have made contradictory statements about something that is material, or by contradicting them with the weight of testimony, or from the internal improbability of the truth of their statements. There has been no impeachment, in any essential, of any of the witnesses in this case. So you should find that the shank was broken, unless you can find that the three witnesses have committed perjury on this trial. The plaintiff is a citizen of the state of Kansas, and the defendant is a citizen of this state. Justice, in the universality of its spirit, recognizes no state lines. The plaintiff has the same standing—the same right—in this court as if he were in his home court. You are to regard the person of no man; but, as the representative of justice itself, you are to be blind to all such matters of locality. On the other hand, the defendant is a corporation. I trust it is not necessary that I should remind this jury that a defendant corporation is entitled to the same respect and consideration in court as an individual litigant. In short, gentlemen, you are to try this case under the solemnity of your oaths, on the law and the evidence, and not otherwise. If you believe from the whole evidence that the defendant was not guilty, on the occasion in

question, of the imputed negligence, you ought to find the issues for it. If you are able from this evidence to find that the injury is attributable to the negligence of defendant, the verdict should be for the plaintiff. Should you find for the plaintiff, in assessing his damages you may take into consideration his physical pain, and mental anguish, if any, resulting from such pain and injury; his loss of time, medicines, and medical bills for attendance of physician. This is not a case for punitive damages,—that is, exemplary damages,—but you will allow only compensatory damages,—such as, under all the facts and circumstances in evidence, seem to you to be reasonable and just, not exceeding the sum of \$10,000 sued for.

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GOLDBERGER v. PHILADELPHIA GROCER PUB. Co.

(Circuit Court, S. D. New York. April 15, 1890.)

**LIBEL.**

A published statement to the effect that plaintiff was not actuated by patriotism or love of his guild in soliciting subscription for a world's fair from the tradesmen in his line of business, but by the desire to earn a salary of \$2.50 per day, is not libelous *per se*.

At Law. On demurrer to complaint.

*Isaac N. Falk*, for plaintiff.

*Henry Galbraith Ward*, for defendant.

SHIPMAN, J. This is a demurrer to the plaintiff's complaint in an action at law to recover damages for an alleged libel. The complaint alleges that "plaintiff is a grocer, doing business in the city of New York, and is also president of the 'New York Retail Grocers' Union,' an organization devoted to the interests of New York grocers and their trade, and is also, by appointment" of the mayor of the city of New York, a member of the "Committee for the International Exposition of 1892," an honorary committee, appointed by said mayor to institute and operate an international exposition in the city of New York, and is the person referred to in the libelous matter as the "presiding officer of the New York union." The article which is alleged to be libelous is as follows:

"I heard the other day a story in relation to the subscriptions of the retail grocers to the World's Fair fund, which, while it may be all right, since every laborer is worthy of his hire, does seem very much out of place under the circumstances. It appears that the presiding officer of the New York Union was not actuated by patriotism or love of his guild in obtaining these subscriptions, but that the main spring of his exertions was a *per diem* allowance of \$2.50; for, though I saw no report of the matter, I am creditably informed that he presented a bill for \$22.50 for eighteen days' service at the rate mentioned. I do not know what disposition was made of the matter, but hope that the pay was increased to at least five dollars a day, since that kind of work is worth certainly the figure we mention. *O tempora! O mores!* What

a pity that the grocers of this city could not find one so unselfish as to do such a work without the hope of gain giving birth to activity."

No special damage is alleged. The demurrer is upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and the position of the defendant is that the publication is not libelous *per se*, and is not the ground of an action, unless special damages are alleged to have resulted from the publication. The definitions of a libel are well known. The one given by Chief Justice PARSONS, in *Com. v. Clap*, 4 Mass. 168, which is succinct, clear, and probably as precise as the subject will permit, is as follows:

"A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. Any words will be deemed defamatory which expose the plaintiff to hatred, contempt, ridicule, or obloquy; which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbors." *Odger, Sland. & Lib.* 19.

There is nothing in the publication of which the plaintiff complains which reflects upon his integrity, upon his business, moral, or social character, or which imputes conduct of a fraudulent or dishonorable kind. It is, however, claimed that the article holds him up to contempt or ridicule, because, although president of the New York Retail Grocers' Union, he obtained subscriptions for the World's Fair from the retail grocers for a small compensation, to be paid by the union for the time which was spent in this service. This claim calls for the consideration of the question whether any published sneer or pleasantry which may create a smile at the expense of a plaintiff, but which criticises his conduct in no important particular, is libelous *per se*. In the case of *Stone v. Cooper*, 2 Denio, 293, the defendant had said, in a contemptuous article in regard to the plaintiff, that "we are not disposed to allow him to put it [the amount of an award against the defendant] into Wall street for shaving purposes before" the last day allowed by the award. Chancellor WALWORTH, in giving his opinion in the court of errors upon the question of the libelous character of the publication, said:

"Still, it is not every false charge against an individual, even when the same is deliberately reduced to writing and published to the world, which is sufficient to sustain a private action to recover a compensation in damages as for libel. \* \* \* But to sustain a private action for the recovery of a compensation in damages for a false and unauthorized publication, the plaintiff in such action must either aver and prove that he has sustained some special damage from the publication of the matter charged against him, or the nature of the charge itself must be such that the court can legally presume he has been degraded in the estimation of his acquaintances or of the public, or has suffered some other loss either in his property, character, or business, or in his domestic or social relations, in consequence of the publication of such charge. Where, from the nature of the charge, therefore, in connection with other facts stated in the plaintiff's declaration, no such injury or loss will necessarily, or even probably, result to him in consequence of the publication of such charge, he cannot recover damages as for a libel, without averring and proving that special damage has been in fact sustained by him in consequence of the publication of the false and unfounded charge."

This language virtually says that a sneer in the columns of a newspaper is not sufficient to sustain a private action for damages, when it conveys or insinuates no charge from which a court can infer that the plaintiff has been, or ought to be, degraded in the estimation of the public, and when no special damage is averred. In somewhat the same line of thought, it has been held that it is not actionable to publish of a man that he pleaded the statute of limitations against a debt theretofore admitted to be just, or that he shielded himself against the payment of a debt for liquors by the defense that the sale of liquors was prohibited by statute. The article in question asserts, in substance, that the retail grocers' union had promised to pay the plaintiff, who was their president, a small compensation for the time which he spent in collecting subscriptions among the members of the union for the World's Fair, and that he was prompted to spend his time and obtain subscriptions by this *per diem* allowance, and that he had presented a bill of \$22.50 for 18 days' service, and that in thus doing he was not actuated by patriotism or love of his guild, but by the stimulus of this compensation. The correspondent says that the action may be all right, but seems very much out of place. All that is charged is that the society thought proper to offer a slight remuneration for the services and expenses of a person who was to spend his time in a cause which it considered important; that he entered upon the service under that promise; that he presented a bill which the correspondent considers very small; that the correspondent is of the opinion that the transaction was unpatriotic; and that it was a pity that the grocers could not have obtained a person so unselfish as to do such work for nothing. The action of the society and of the plaintiff was legal and proper. They each recognized that the plaintiff could not be called upon to give up considerable time without some compensation for the outlay. He charged less than he was authorized to do, for he had a right to an allowance of \$2.50 a day, while for 18 days' services he charged \$1.25 per day. The article is a sneer at the plaintiff, but I cannot perceive, special damage not being averred, that it says anything which can properly dishonor or degrade or injure him in the estimation of his acquaintances or the public, or cause him to suffer loss in property, character, business, or in his social relations.

The demurrer is sustained.



UNITED STATES *ex rel.* MORAN *et al.* v. CITY OF ELIZABETH *et al.*

(Circuit Court, D. New Jersey. March 25, 1890.)

## MANDAMUS—NOTICE—ALTERNATIVE WRIT.

An alternative writ of *mandamus* commanding a city, and certain of its officers, to perform certain acts necessary to the raising of a tax to satisfy relators' judgment against the city, and "such persons as may be elected to fill vacancies in the board of revision and assessment" to accept that office, qualify, and assess a tax, is bad on demurrer, it showing that some against whom it is directed have had no notice, and are not ascertained.

*Mandamus.*

*Strong & Mathewson*, for relators.

*Mr. Beryen*, City Sol., for defendants.

GREEN, J. This matter comes before the court upon a demurrer interposed by certain of the defendants to an alternative writ of *mandamus* directed to "the city of Elizabeth, the comptroller, the treasurer, the president and members of the city council, and the board of assessment and revision of taxes, of said city, and to such persons as shall be elected, in pursuance hereof, to fill vacancies in said board of assessment and revision of taxes." The writ recites the recovery of the judgment against the city of Elizabeth; the issuing of the writ of execution thereon; the return of that writ, wholly unsatisfied, by the marshal of the district, there being no property belonging to the city whereon to make levy; the service of a copy of the writ by the marshal according to law, but upon whom such service was made not being stated; that the board of revision of taxes in said city consists of one person from each of the eight wards of the city, which board acts as the assessor of said city; that, ever since rendition of relators' judgment said board has not been in existence, on account of the resignation of its members and the failure to qualify of the persons elected thereto; that the said board is required by law, and it is its duty, to assess the taxes in and for said city, and of such persons as are elected to fill such vacancies to accept said office, and to qualify to fill the same, and of said board of assessment and revision of taxes to meet and assess taxes, and do and perform each and every other act required by law to be performed by them in relation thereto; that it is the duty of the city of Elizabeth to levy, assess, and collect a tax sufficient to discharge the relators' said judgment; that it is the duty of the city council of said city to levy, raise, and collect said tax, and to fill any vacancies in said board of assessment and revision of taxes of said city; that it is the duty of the comptroller of said city, upon the levying and the assessment of said tax, to collect, or cause the same to be collected, as provided by law, and paid to the treasurer of the city; that it is the duty of the said treasurer, upon receiving said tax, to pay the same to the marshal of this district; that the said defendants have failed, neglected, and refused to perform the said several respective duties; that the persons elected to fill vacancies in the board

of assessment and revision of taxes have not accepted said office, or qualified to fill the same, and have not forthwith met and assessed said tax. The mandate of the writ is that the said city of Elizabeth, as a municipal corporation, and the said other defendants, do perform the various acts recited in said writ as duties owing by them, respectively, and that "such persons as may be elected to fill vacancies in the board of revision and assessment of taxes do accept such office, and forthwith qualify to fill the same, and forthwith do meet and assess said tax directed to be levied by the city council, or show cause why they have not so done." To this writ the defendants have demurred.

An alternative writ of *mandamus*, being regarded as the foundation of all the subsequent proceedings in the cause, is in its nature analogous to a declaration in an ordinary suit at law, and is subject to the same rules of pleading. *Rader v. Union*, 43 N. J. Law, 518. It must show upon its face a clear right to the relief demanded, and the material facts on which the relator relies must be distinctly set forth. *People v. Westchester*, 15 Barb. 607. Especially must the matter of inducement stated in the alternative writ include everything necessary to show jurisdiction over the subject of the writ, and to warrant its mandate. High, Extr. Rem. § 537. Applying these principles to the writ in question, it becomes apparent that it cannot be sustained. A court, before it grants a *mandamus*, must be convinced that there has been a demand, made by a party having a right to make it, for the performance of the duty sought to be enforced, and a refusal to perform it by the party against whom the application is made. If a writ fails to show clearly and convincingly such a state of affairs, it is bad. Now, upon examination of this writ, it is found that it commands certain persons, not named, who may hereafter, perchance, be elected by the common council of the city of Elizabeth to membership in the board of assessment and revision of taxes in that city, to take the steps necessary, after such election, to qualify themselves to become members of that board, and to perform the duties such membership casts upon them. Just how the relators became vested with a right to demand the enforcement of such a duty, alleged to be owing by persons unknown and unidentified, and who certainly have never had cast upon them, to the knowledge of the court, the burden of the performance, is very difficult to conceive. How can there be existent a right to the performance of a "duty," so called, if the duty itself be non-existent? It is true that circumstances may cause such duty to arise in the future, but we are dealing with the present; and, up to this time, it will not be contended that the duty whose performance is sought to be enforced by this writ has become due from any person. There are, admittedly, certain precedent formalities which must be complied with. The common council of the city of Elizabeth must exercise its prerogative of choosing members of the board of assessment and revision of taxes before the duty of qualifying for such office can be owing by any one. Until such choice is made, the duty lies dormant—is in abeyance—as to every person eligible for membership in that board. Where one is chosen by the

council, for the first time does this duty arise. Then, for the first time, is he who has been chosen placed under an obligation of performance; and then would the failure to perform, authorize and empower the court to compel performance by its *mandamus*; for not until then could a demand for performance be made, nor could a refusal of such demand be interposed. This writ, therefore, plainly demands more than the relators are entitled to have awarded to them. In such case it is held, without exception, that the writ is bad upon demurrer, and that judgment must be given for the defendants; for the court cannot be called upon to distinguish and separate the good pleading from the bad, and treat the latter as mere surplusage, and of no weight or effect. On the contrary, the fault taints the whole writ, and it must be set aside in its entirety.

This conclusion makes it unnecessary to consider other objections to the writ which were urged upon the argument. But I think it proper to say that the effect of Judge NIXON's opinion in *Moran v. City of Elizabeth*, 9 Fed. Rep. 72, was to adopt as the practice of this court in causes, similar to this, involving the collection of judgment debts from municipal corporations, the practice which obtains in the state of New Jersey, as prescribed by the act entitled "A supplement to an act entitled 'An act respecting executions,'" approved March 27, 1878, (Laws N. J. 1878, p. 182.) And, therefore, to entitle judgment creditors to a pre-emptory writ of *mandamus* to enforce the payment of their judgment, the requirements of that act must be strictly complied with. The defendants are entitled to judgment upon demurrer.

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*In re* CORTES.

(Circuit Court, S. D. New York. April 17, 1890.)

**EXTRADITION—EMBEZZLEMENT OF PUBLIC FUNDS.**

Under the Penal Code of Cuba, art. 401, which makes it a crime for a public employe to take public funds of which he has charge by virtue of his office, a public officer who, by falsely certifying the invoices in which certain coupons are inclosed, obtains possession of money paid out by the Spanish bank, which could not pass from the bank's possession to his own except as a consequence of his official act, is guilty of an extraditable offense.

Application for Extradition.

*Olcott, Mestre & Gonzales*, for the Spanish Government.

*S. Mallet-Provost*, for relator.

LACOMBE, J. If, when abstracted by the prisoner, the coupons were not perforated, but were in such condition that *bona fide* holders for value could recover on them, they were, undoubtedly, public funds. If they were canceled or imperfect when he took them, his subsequent action in preparing and certifying the invoices in which they were inclosed, and

in auditing the same as a claim against the Spanish government, caused the intendant to indorse the same, and the Spanish bank to pay. The affixing of the prisoner's signature to his certificate or audit was an act done by virtue of his office, deriving its sole force from the confidence placed in it by other officials as the act of a public officer in the line of his official duty. By discharging, therefore, falsely, and with corrupt intent, the functions of his office, he got possession of certain moneys paid out by the Spanish bank which could not have passed from the bank's possession to his own except as a consequence of his official action. Of these moneys, therefore, he obtained charge by virtue of his office, and thereupon converted them to his own use. That the moneys thus paid out by the Spanish bank were public funds admits of no doubt. They were either moneys standing to the credit of the Spanish government by reason of the circumstance that that government had theretofore deposited cash or its equivalent with the bank, or if, under some contract, (referred to upon the argument, but not in proof,) they were advanced by the Spanish bank from time to time upon drafts of the government, which, at the time such drafts were presented, had no moneys standing to its credit in the bank, then, at the moment when the bank advanced the money to cash the draft, the money so advanced became cash, the proceeds of a loan made by the bank to the government, and therefore public funds. Defendant's acts, therefore, seem to be within the terms of article 401 of the Spanish Penal Code of Cuba, which reads, according to the translation submitted by prisoner's counsel, as follows:

"Art. 401. A public employe who, having charge, by virtue of his office, of public funds or effects, takes, or allows others to take, the same, shall be punished," etc.

Acts such as his are also made criminal by express statutes of the United States and of the state of New York. Rev. St. U. S. § 5438; Pen. Code, N. Y. § 165. It is true that the complaint does not refer to the moneys thus obtained from the bank, but, under the peculiar language of the eleventh and twelfth articles of the treaty, this court will look into the warrant of arrest issued in the country from which the prisoner has fled for a specific statement of the offense which it is claimed he has committed; and the prisoner can certainly not object that he is not sufficiently informed of the offense with which he is charged, when he is apprised of the contents of that document. The prisoner may be produced on Friday morning for further disposition.

GATES IRON-WORKS v. FRASER *et al.*

(Circuit Court, N. D. Illinois. April 5, 1890.)

## 1. PATENTS FOR INVENTIONS—EXTENT OF CLAIM—ORE-CRUSHERS.

A claim for a mill constructed of a conical shape, and having an eccentric motion in the manner set forth, is not a broad claim for any mill having such shape and motion, irrespective of its other features of construction and operation.

## 2. SAME.

Words of limitation in claims are not to be disregarded, and claims cannot be broadened by eliminating or disregarding such words.

## 3. SAME—PATENTABILITY—PRIOR STATE OF ART—CHILLED BEARINGS.

Chilling bearings and wearing parts are old in the arts, and it does not require invention to chill any known bearing. Gates did not make any invention in chilling Brown's bearings.

## 4. SAME.

Bearings similar in construction and operation cannot be differentiated from each other by chilling one of them.

## 5. SAME—BABBITTED SEGMENTS.

Babbitting the wearing portions of bearings does not involve invention, and a claim for a bearing piece having a segmental babbitted portion is not infringed by a babbitting entirely around the bearing part.

## 6. SAME—COMBINATION—IMPROVEMENT OF PARTS.

The improvement of one of the elements in a combination of all old parts, which does not change the character or operation of such combination, does not make a new one. Such changes relate to the part improved, and not to the larger combination.

## 7. SAME—GYRATING SHAFT MACHINE.

It does not amount to a new improvement or to invention to apply common devices to a gyrating shaft machine, such machine being old in the art.

## 8. SAME—EXTENT OF CLAIM—BREAK-PINS.

Break-pins being old and common in the arts, the Rusk and Raymond patents cannot be extended beyond the limits of their claims; and when not so extended the defendants do not infringe.

## 9. SAME—ISSUE OF LETTERS—AMENDMENT OF CLAIMS.

Amendments made upon requirement of the patent-office, or in view of references, are not to be disregarded in construing claims.

In Equity. Final hearing.

Suit was brought for alleged infringement of eight patents, and proofs made as to seven, to-wit; Nos. 56,793, to H. Pierce; 201,646, to C. M. Brown; 243,343, 243,545, 246,608, 250,656, to P. W. Gates, known in the record as Gates' patents Nos. 1, 2, 3, and 4, respectively, all of which were for improvements in stone or ore-crushers; Nos. 110,397, to J. H. Rusk, and 237,320, to G. & A. Raymond, for improvements in break-pins for grinding-mills.

*Coburn & Thacher*, for complainant.

*West & Bond*, for defendants.

GRESHAM, J. The single claim of the Pierce patent reads: "The construction of a conically shaped crushing-mill, with an eccentric motion as herein described, for the purposes and in the manner substantially set forth." The claim is not broadly for the construction of a conically shaped crushing-mill with an eccentric motion. The very language of the claim limits it to a mill constructed in the manner substantially as set forth, and the claim, thus construed, describes a mill, or machine,

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radically different from the defendants' machine. The latter does not have the rocking wedge section of the Pierce machine, without which it would not operate, to say nothing of other differences.

Claims 2, 3, and 4 of the Brown patent are involved in this suit. The fourth claim is limited to a shell, inclosing at its upper end a concave breaker, and provided with an oblique trough, "integral with the frame, the inner edge of which extends upward and within the concave base of the breaker, C, all around." This claim was allowed, on the ground that this feature of the combination was an improvement on anything in the prior art. One element in the combination covered by the second claim is "the breaking-head, C, constructed with a concave base, as shown." Both the drawing and the specification show a concave breaking-head into which the shell or trough, *n*, extends. The trough or shell, *n*, is cast integral with the case shell. These claims cannot be broadened by eliminating or disregarding any of their language. The breaking-head of the defendants' machine is not concave, and it follows that this machine has no trough extending upward, and within the concave breaking-head. The defendants' machine, therefore, infringes neither the second nor the fourth claim of the Brown patent. The defendants' machine does not contain the spindles with the sliding bearing mentioned in Brown's third claim, or any other sliding bearings, and the adjusting screw or step embraced in the third claim is not found in the defendants' machine.

Gates' patent No. 1 relates to an improvement in the upper ball and socket bearing of the machine. The interior bearing surfaces are not required to be chilled by the Brown patent, while the Gates patent No. 1 is for chilled interior bearing surfaces. This change involved no invention. Gates did nothing more than take the bearings of the Brown patent, and chill them. The testimony in the record shows that Brown and Scoville chilled segmental bearings in 1877, which was prior to the application filed by Gates for his patent. The chilling of wearing surfaces to avoid friction was well known in the art long before the date of the Gates patent. Even, if that patent is valid, the defendants' bearings are not chilled. The efforts made to differentiate the machines made in accordance with Gates' patent No. 2 from the Brown and Scoville machines are unsatisfactory. The defendants' machine is, in substance, the old No. 2 Brown & Scoville machine. The chill in Gates' No. 2 machine is the chill in Gates' No. 1 patent, and the collar, E, of Gates' No. 2 patent is shown in a drawing of one of Brown's prior machines. The first claim in Gates' patent No. 3, (the chief claim in controversy,) is for a new article of manufacture, namely: "A segmental portion of the bearing-box, babbitted, so that when it becomes worn it may be removed, and a new segmental bearing substituted in its place." The alleged invention consists, not in the box cavity, but in the babbitted segmental portion of the bearing-box. There was no invention in thus babbitting part of a box cavity, and, if there was, the defendant babbitted the entire inner surface of the bearing-box, as such bearings had been treated before.

The alleged invention in Gates' patent No. 4 is summed up and embraced in the fourth claim which reads: "The shaft of an ore-crushing machine provided with a hard metal plate on its lower end, in combination with an adjustable sliding step-block, an oil-step box, and a bearing for the shaft, substantially as and for the purpose specified." Before this claim was allowed, the patentee was required to amend his application by inserting the words, "the adjustable sliding," and the alleged infringing machine contains no such sliding block. The mere attachment of a hard metal plate on or in the lower end of the shaft, admitting that Gates was the first to do it, involved no invention. But if it did, it consisted in the improvement of one of the elements of the combination, namely, the shaft, and did not affect the combination claim. Steel wearing, or hard metal plates, were old, and Gates did nothing more than any intelligent mechanic skilled in the art might have done. The shaft with the in-set plate operated in the combination just as it did before. No new or improved result was produced. With the exception of the inset of the wearing plate, the drawings of the Brown & Scoville No. 1 machine show the combination described in the Gates No. 4 patent. Indeed, the Brown drawings of the old Brown & Scoville machines show Gates' patent No. 4 to be worthless. I find that the Brown drawings anticipate the Gates patents No. 1, No. 2, and No. 3, and that Gates' patent No. 4, contains no claim for the inset of the plate, and that that patent, too, is anticipated by the same drawings. In connection with the Gates patents, complainant's counsel and experts have failed to give proper weight to the Rutter patent, the Brown patent, and the two Brown & Scoville machines, especially the two latter machines. Gyrating shafts were in use before the date of any of the patents owned by the plaintiff. The patentee simply took the old gyrating shaft, and applied common devices to it.

The first claim of the Rusk patent reads: "The combination, substantially as described, of soft metal pins or plugs, C, with the driving gear of the grinding-mill." Rusk expressly limited himself to a soft metal pin, and his claim cannot be enlarged by construction. Thus limited, the claim is not infringed for the defendants' use, not a soft metal pin, but a hard cast-iron pin, and their machine does not show the Rusk driving gear. Break-pins were in use in machines of different kinds before the date of the Rusk patent. The idea of the break-pin, broadly, was not original with Rusk. With the exception of the pin being somewhat more accessible, the Raymond patent is not different from the Rusk patent.

Briefly, these are my reasons for dismissing the bill. Later, I may give a more formal opinion.

STUDEBAKER BROS. MANUF'G CO. v. ILLINOIS IRON & BOIL CO. *et al.*

(Circuit Court, N. D. Illinois. April 21, 1890.)

## PATENTS FOR INVENTIONS—WANT OF NOVELTY.

Thimble skeins of sheet metal for wagon axles, having been previously well-known, and made of cast metal of any shape, a bill for infringement of letters patent No. 256,744, issued to Joshua Sandage, April 18, 1882, for a wagon-axle skein, is demurrable for want of novelty; the alleged invention consisting in cutting a blank sheet of metal in such shape that, when rolled into cylindrical form, it will fit not only the spindle section of the axle, but also extend over the shoulder, with a wing along the under side of the axle, back of the collar.

In Equity. Demurrer to bill.

*Coburn & Thacher*, for complainant.

*J. H. Raymond*, for defendants.

BLODGETT, J. This is a bill in equity charging defendants with the infringement of patent No. 256,744, granted by the United States to Joshua Sandage, April 18, 1882, for a "wagon-axle skein," and praying for an injunction and accounting. Defendants have demurred to the bill on the ground that the patent in question, on its face, shows no patentable novelty in the device covered by the specifications and claims. The device described in the specifications and claims is a thimble skein for wagon axles produced from plate metal, and the specifications give instructions as to the shape into which a blank of plate metal like boiler iron is to be cut, so that, when bent or rolled around a mandrel or former of the conformation of the axle upon which the skein is to be used, its edges will come together where they may be either butt-welded or lap-welded. The skein described is so formed as to cover not only the spindle section of the axle, but to extend back so as to cover the shoulder of the axle, with a wing extending along the under side of the axle. There is no claim or statement in the patent that this shape for a thimble skein is new; and hence it will be assumed, for the purposes of this case, that the shape is old. It may also be assumed that it is part of the common knowledge that axle skeins have for many years been made of cast metal of such shape as was deemed desirable for their use, and that there was no difficulty in casting skeins which reach onto or cover the shoulder of the axle, or extend along the under side of the axle, back of the collar. The patentee inserts as part of his specifications a disclaimer as follows:

"I am aware that wagon-axle skeins have been made of a single piece of sheet metal; and hence, I make no broad claim to such construction of device, but restrict myself to certain improvements specified in the claims."

Assuming, then, as conceded, that thimble skeins made of sheet metal were old and well known when this inventor entered the field, and that such skeins had been made of cast metal of any desired shape, the question is, can there be any invention in cutting a blank sheet of plate metal in such shape as that, when rolled, or bent into cylindrical form, it will



fit, not only the spindle section of the axle, but also extend over the shoulder, with a wing along the under side of the axle back of the collar? To cut a piece of cloth or sheet metal into such form, as that, when its edges are brought together, bringing it into a semi-cylindrical form, it will fit an irregular surface, seems to me, requires only mechanical skill. Tailors and dressmakers do it when fitting sleeves for their customers garments, not by the exercise of invention, but by their acquired mechanical skill. The problem being given any skilled mechanic to cover a piece of wood or metal with an envelope of sheet or plate metal by bending it into the shape of the article to be covered, probably the first step would be to measure the article to be covered at various places, so as to determine the length and width of the blank to be cut at its corresponding places, and, after an approximation to the desired shape of the blank had been obtained by such measurements, probably a paper pattern would be cut out and wrapped about the article to be covered, and in this way a pattern of the desired blank would be obtained, not by invention, but by mechanical experiment. The problem to be solved is mechanical only, and does not, it seems to me, call into action that element of the mind which we call "inventive genius," which meets and overcomes a difficulty by an entirely new expedient, but simply and only demands the exercise of mere skill and dexterity in fitting a piece of iron to a piece of wood. If this patentee had given instructions as to certain measurements to be made which would enable a workman to cut a blank which would always certainly fit an axle, then there might be some ground for saying that he had discovered a law of proportion which involved invention, but he has done no such thing in this patent. The most he has done is to tell us that, if we wish the skain to cover an enlarged surface back of the collar, the blank for that part must be cut correspondingly wider. It obviously required no inventive genius to tell the public this. Any person, it seems to me, who was set to cover a section of a cone, which is about the shape of the spindle section of a wagon axle, with a sheet of plate metal, would know that his blank must be wider where it was intended to cover the larger end than the portion which was intended to cover the small end, and that the taper of his blank must correspond to the taper of the axle, and, if back of the axle there was an abrupt enlargement of the axle forming the shoulder, which he was also to cover, then there must be a correspondingly abrupt increase of the width of the blank at that point. This is all this patentee has done by his specifications and drawings; and in doing this, it seems to me, he has not gone out of the domain of common mechanical knowledge.

Therefore, while I am averse to sustaining demurrers, in this class of cases, which shall, in effect, say that the patent-office has issued a patent which is obviously, and from common knowledge, void for want of invention, yet, when a case is as plain as this seems to me to be, I think it the duty of the court to do so, and thus save the parties the extraordinary expenses and delay which almost uniformly attend patent litigation. The demurrer is sustained, and the bill dismissed for want of equity.

DODGE MANUF'G Co. v. PUSTER *et al.*

(Circuit Court, N. D. Illinois. December 30, 1899.)

## PATENTS FOR INVENTIONS—INFRINGEMENT.

Complainant's president being the owner of letters patent, under which it manufactured split pulleys, assigned an interest therein, with the right in the assignee to manufacture, and any improvements were to be joint property. An employe of complainant instructed the assignee in the manufacture, and, it appeared, used substantially the forms claimed in a patent for which he applied, but assigned to the president, who assigned immediately after its issue to complainant. *Held*, that complainant could not dispute the right of the assignee to manufacture under the last patent.

In Equity. Bill for infringement of letters patent.

*West & Bond*, for complainant.

*J. H. Raymond*, for defendants.

BLODGETT, J. The bill in this case charges the infringement by defendants of the first claim of patent No. 275,947, granted April 17, 1883, to Gustavus B. Sanborn, for a "split pulley," and of claims Nos. 2, 3, 4, and 5 of patent No. 351,064, granted October 19, 1886, to Wallace H. Dodge, assignee of Charles McNeal, for a "wooden pulley," and asks an injunction and accounting. The devices covered by both these patents, and their utility, is aptly described in the second paragraph of the Sanborn patent, as relating to "split pulleys made of wood, or mainly so, such as are used on shafting for driving machinery, and which are split, or made in separate sections or halves, to provide for putting them on or taking them off their shaft laterally relatively to the shaft, whereby they may be hung or removed without disturbing the shaft, and without interfering with other pulleys or devices on the shaft, or the hangers carrying the shaft." The principal feature covered by these two patents is the division of the pulley by a zigzag line, so that the irregular surfaces, when brought together, will interlock, and thus aid in preventing displacement of the parts on the line of separation,—split pulleys being an old device, and the patents now in question being only for improvements on them. The defenses interposed are: (1) That the defendant is agent in the city of Chicago for the sale of pulleys manufactured by the Milburn Gin & Machine Company of Memphis, Tenn., and that by certain dealings and transactions between the complainant company and Wallace H. Dodge, the president of the complainant company, and J. D. & T. H. Milburn, and the Milburn Gin & Machine Company, said Milburn Gin & Machine Company were licensed and authorized to manufacture the pulleys in question, which were sold by the defendant, as the agent of said gin and machine Company. (2) That the claims of which infringement is charged in the respective patents involved herein are void for want of patentable novelty in the devices therein described. (3) That defendants do not infringe.

In regard to the alleged license or permission to the Milburn Gin & Machine Company to manufacture the pulleys in question, the proof

shows that, for some time prior to the 20th of February, 1885, the complainant company had been engaged in the business of manufacturing split pulleys as licensees of Wallace H. Dodge, its president, under patent No. 260,462, granted July 4, 1882, to Wallace H. Dodge and George Phillion, and patent No. 276,330, granted April 24, 1883, to said Wallace H. Dodge,—the said Dodge being also the principal stockholder of the complainant company, and the manager of its business affairs; that some time shortly prior to February 20, 1885, the factory and plant of the complainant company were substantially destroyed by fire, whereby said company met with a severe loss, and became financially embarrassed, and the said Wallace H. Dodge, by reason of said loss, also became seriously embarrassed and in need of funds or other means to sustain his own credit and that of the complainant; that on the 20th of February, 1885, said Dodge entered into a contract with J. D. & T. H. Milburn, of Memphis, Tenn., whereby he conveyed to the said Milburns one-half of the two last above mentioned patents Nos. 260,462 and 276,330, with provisions for the joint management of the interests growing out of the ownership of said patents by a joint-stock company, to be organized by the parties to said contract, and with the further provision in the contract that “any improvements in pulleys that may be discovered from time to time by either parties, or any improvements that may be purchased from others, shall belong jointly to the parties” to said contract; that, as part of the consideration for the transfer of said patents, the Milburns, by their credit and means, aided the complainant company and Dodge, its president, to the amount of nearly \$20,000, and it was understood and agreed that the Milburn Gin & Machine Company, which was mainly owned by the Milburns, should at once enter upon the manufacture of split pulleys of the same kind manufactured by the complainant company; that, in accordance with said agreement and understanding, the Milburn Gin & Machine Company sent one of its men to the complainant company’s factory at Mishawaka, Ind., to have him there instructed in the art and business of manufacturing split pulleys, and the complainant furnished to said agent and employe of the Milburn Gin & Machine Company all necessary instruction in the manufacture of such pulleys, and with all patterns and drawings necessary to enable the Milburn Gin & Machine Company to enter upon said branch of manufacturing, and that the patterns and drawings, so furnished to the said agent and employe of the Milburn Gin & Machine Company, were substantial representations of split pulleys, constructed in accordance with the McNeal patent and the claims thereof now before the court; that Charles McNeal, the alleged inventor of the device covered by the McNeal patent, was at that time the foreman of the complainant’s factory, and instructed the said agent, and furnished him with the drawings and plans for such manufacture; that the Milburn Gin & Machine Company at once entered upon the manufacture of split pulleys, substantially the same in form and construction as those manufactured by the complainant company, and like those in question in this suit, and has continued such manufacture up to the commencement of this suit, with the knowl-

edge of the complainant company; that said Charles McNeal, the alleged inventor of the device covered by the McNeal patent, at or about the time he applied for said patent, assigned all his interest therein to the said Wallace H. Dodge, president of the complainant company, and the said McNeal patent was in accordance with said assignment issued to the said Dodge, as the assignee of McNeal, and that a few days after the issue of said patent said Dodge assigned said patent to the complainant company; that differences arose between the Milburn Gin & Machine Company and the complainant company soon after the issue of the McNeal patent, in regard to accountings between them under the said contract of February 25, 1885, but, although the Milburn Gin & Machine Company has continued to manufacture pulleys substantially like those covered by the claims here in question in the McNeal patent, the complainant has never attempted to enjoin or restrain the Milburn Gin & Machine Company from such manufacture.

Here, then, we have the fact established that in February, 1885, complainant was making split pulleys substantially like those now in controversy, under a shop right to use the patents Nos. 260,462 and 276,330, which were owned by the said Wallace H. Dodge, who then was, and still is, the principal owner in complainant company, and manager of its affairs; that Dodge, for the purpose of obtaining means whereby to continue the business of the complainant company, assigned half these two patents to the Milburns, and the Milburns, in turn, licensed the Milburn Gin & Machine Company to enter upon the manufacture of split pulleys in said two patents, and the complainant company proceeded to furnish the Milburn Gin & Machine Company with instructions in the art of manufacturing split pulleys, and with drawings and plans for the construction of such pulleys, substantially identical with the form of construction for such pulleys provided for in the McNeal patent, and that the complainant acquiesced in and aided and encouraged the Milburn Gin & Machine Company in entering upon said manufacture.

I think, from the facts disclosed, the inference is fairly justifiable that McNeal, as the foreman of the complainant company, had substantially perfected whatever improvement the McNeal patent shows in the construction of split wood pulleys, at the time the Milburn Gin & Machine Company sent their employe to complainant's factory for instructions, and that in instructing and starting the Milburn Gin & Machine Company in such manufacture the complainant, knowing that the said gin and machine company only intended to manufacture under the Dodge and Phillion and Wallace H. Dodge patents, still gave the Gin and Machine company to understand that the approved form of manufacture under said patents was that for which plans, drawings, and instructions were given to the said Gin and Machine company's agent. I think it very clear that McNeal made whatever invention there is covered by his patent as an employe of the complainant, and intended the complainant to have the benefit of it. This is shown by the fact that he transferred his application for a patent to Wallace H. Dodge, the president.

of the complainant, and that, within a few days after the issue of the patent, said Dodge transferred the patent to the complainant, reciting that the complainant was the real owner thereof.

All the dealings and relations between Dodge and the Milburns, and the Milburns and the Milburn Gin & Machine Company, and between the complainant and the Milburn Gin & Machine Company, shown in the proof in this case, satisfy me that Dodge represented and spoke for the complainant company, and that the complainant company understood that the Milburn Gin & Machine Company was expected, under its license from the Milburns, to make just such pulleys as the complainant was then making, or might thereafter make, under any acquired patent. It therefore seems clear to me that the complainant, under the facts disclosed in this case, is estopped from complaining of the manufacture of split pulleys, such as are in controversy in this case, and such as are covered by the specifications and claims of the McNeal patent. It may also, I think, be fairly insisted that, inasmuch as the complainant company allowed the McNeal patent to issue to Wallace H. Dodge as owner, that whatever rights of manufacture are given under said patent inure to the Milburn Gin & Machine Company under the contract between Dodge and the Milburns, and the license from the Milburns to the Milburn Gin & Machine Company.

The Sanborn patent was not purchased by the complainant until some time in December, 1886, and I do not think it necessary to discuss or consider whether that patent came within the provision for the purchase of subsequent improvements in the contract between Dodge and the Milburns or not, as I am abundantly satisfied that the machines sold by the defendants do not infringe the first claim of that patent. The view I have taken in regard to the legal effect of the dealings between the complainant and the manufacturers, for whom defendants were acting as agents in the sale of the pulleys in question, relieves me from the necessity of passing upon the question of novelty raised by the defendants in this case. The bill is therefore dismissed for want of equity.

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SMITH *et al.* v. PARTRIDGE.

(Circuit Court, E. D. Pennsylvania. February 25, 1890.)

1. PATENTS FOR INVENTIONS—INFRINGEMENTS—AUTOMATIC FANS.

Letters patent to William M. Smith, No. 838,300, March 31, 1886, for automatic fans, with an adjustable collar having a spring plug for locking the same to the shaft which it incloses, the leaves connecting the collar and vanes, and the peculiar vane bearings, in combination with the shaft and vanes, as described in specification and shown by model, and limited to exact combination, including peculiar locking arrangements and vane bearings and plain and direct equivalents, is not infringed by a regulator which does not embrace the peculiar locking device or vane bearings described, or their direct equivalents

**3. SAME—WINDMILLS—ANALOGOUS USE.**

Where the uses are precisely similar, and the one device suggests the other, the fact that the anticipatory device was applied to regulate the vanes of windmills, while the present was applied to fans for ventilation, which belonged to a different department of art, does not prevent the two devices from being analogous.

In Equity to Enjoin Infringement of Patent, by William M. Smith and James Caldwell against Edward Partridge.

*George Northwood*, for complainants.

*Chas. F. Van Horn*, for respondent.

BUTLER, J. The suit is for infringement of patent No. 338,300 of March 31, 1886, "for automatic fans," the claims of which are as follows:

"(1) In a fan comprising a power-driven shaft or spindle with blades, the combination, with said shaft and adjustable blades thereon, of an adjustable collar, which locks fast on said shaft at different points, and links or connections between said blades and collar, whereby, by moving said collar, the angle of inclination of said blades may be varied, and the latter locked in their adjusted position, substantially as described. (2) The combination, with a spindle having sockets or recesses, *a, a*, of cross-head or hub, *B*, having female screw sockets, blades, *C, C*, having threaded shanks, *C', C'*, knob or sleeve, *D*, having spring plug, *F*, and links, *G, G*, substantially as shown and described."

The respondent's device (alleged to infringe) is also covered by a patent which contains a great number of claims, the substance of which is as follows:

"In a rotary fan, the combination of a driving shaft, a wing or blade holder having lateral tubular wrist-pins, blades or wings having shafts adapted to the bore of the wrist-pins, and tubular sleeves with gear teeth, fitting upon the outside of said pins, stop mechanism for limiting the axial rotation of the blade shafts, a loose sleeve surrounding the driving shaft, and racks connected to the sleeve, and in gear with the teeth upon the blade-shaft sleeves."

It is thus seen that the patented devices consist of combinations mainly, if not entirely, of well-known mechanical elements, designed to accomplish the same purpose,—that is, the regulation of fan vanes. Devices for this purpose, on the fans of windmills, are very old; and these devices are similar to the complainants'.

The position assumed, that such fans, and those of more recent origin, intended for ventilation, belong to different departments of art, and that therefore the earlier and later use of the regulators are not analogous, cannot be sustained. The uses are precisely similar; the one suggests the other. The complainants were not first, even, to apply the use to ventilating fans.

The validity of their patent, however, is not in issue. The respondent denies infringement only. He does not attack the patent,—doubtless because he might thereby endanger his own. Invoking the state of the art for this purpose might be fatal to his claim of novelty, as well as the complainants'. He therefore contents himself with an effort to confine the complainants' patent within so narrow a compass as to avoid conflict with his device.

Supposing the patent valid, what does it cover? Substantially it is for the collar with locking device to adjust it on the shaft or spindle, and the links or levers connecting the collar and vanes, whereby the latter may be shifted and held in position,—in combination with the shaft and vanes as shown by the model. Thus broadly stated, the combination is old. As before suggested, the same elements similarly combined, are found in the various prior patents relating to windmill fans. The patent must therefore be regarded as for an adjustable collar, having a spring plug for locking the same to the shaft which it incloses, the levers connecting the collar and vanes, and the peculiar vane bearings, in combination with the shaft and vanes, as described in the specification and shown by the model. In other words, the patent must be so limited as to confine it to the exact combination shown, including as necessary parts the peculiar locking arrangement and vane bearings, and their plain and direct equivalents. The claim to substitute any and every other mechanical contrivance for these latter parts is clearly inadmissible. Such substitution would deprive the combination of all possible claim to novelty. Thus limited, the patent is not infringed. I need not enlarge on this subject. It is sufficient to say that the respondent's device does not embrace the locking arrangement or vane bearings, or their direct equivalents. Whether the other elements of the two devices are the same need not be considered. It is certainly easier to distinguish the respondent's from the complainants' than it is to distinguish the latter from those which preceded it. A decree must therefore be entered dismissing the bill, with costs.

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TSHEPPE v. BERNHEIM *et al.*

(Circuit Court, S. D. New York. April 14, 1890.)

**PATENTS FOR INVENTIONS—INFRINGEMENT.**

In a suit to restrain the infringement of letters patent No. 897,259, issued February 5, 1889, to Adolph Tsheppe, for naphthaline paper, where the only question at issue was as to infringement, and the uncontradicted testimony of an expert showed that defendant's paper was manufactured in the manner described in said patent, *held*, that an injunction and an accounting would be decreed.

In Equity.

*Frank V. Briesen*, for plaintiff.

*H. A. West*, for defendants.

SHIPMAN, J. This is a bill in equity to restrain the infringement of letters patent No. 397,259, dated February 5, 1889, to Adolph Tsheppe, for a new naphthaline paper. The invention related to the manufacture of a paper or fabric with a coating of naphthaline on both sides, which was to serve as an insecticide in preserving furs and woolen goods from being injured by moths or other insects. The patentee says in his

specification that his invention consisted "in immersing paper, preferably not sized, first into a bath of molten naphthaline of a temperature as near the congelation point as practical for the operation of dipping, by which a heavy deposit of naphthaline is obtained. This deposit is crystalline and porous, peeling off easily, and its surface is rough and warty, but, if the paper covered with its first coat is then dipped rapidly into a bath of molten naphthaline of a higher temperature,—say five degrees,—then the interstices between the crystals first deposited are filled up, and the coating becomes hard and compact, and the whole product is of a porcelain-like appearance, with smooth surface. By subsequent dipping, this coating of naphthaline may be increased in thickness to any degree." It appears from the specification that it had been proposed to make naphthaline paper by embedding a layer of naphthaline between two layers of paper. It is obvious that a profuse evaporation is furnished from the large surface of the patented paper, and that the naphthaline accomplishes its work without staining or entering into the meshes of the goods. The claim is as follows:

"As a new article of manufacture, the sheet *a*, having a coating, *b*, of naphthaline, in two or more superposed layers, the first presenting a rough appearance, the second filling up the interstices of the first layer, and presenting a hard, compact, porcelain-like appearance, with a smooth surface, substantially as described."

The defendant upon the argument made no criticism upon the patentability of the invention; there was no testimony upon the subject; the state of the art was apparently as recited in the specification; and, as the article is out of the domain of common knowledge, I have no reason to doubt the propriety of the action of the patent-office. The only question in the case is that of infringement, and that can hardly be called a question, for the defendants have no knowledge on the subject,—had no testimony,—while the complainant's testimony was intelligent and definite, from a witness who is a competent expert, and who says that the article which the defendants have sold is manufactured in the manner described in the patent, and the exhibits apparently corroborate his opinion. Let there be a decree for an injunction and an accounting.

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AMERICAN CABLE RY. CO. *v.* MAYOR, ETC., OF THE CITY OF NEW YORK  
*et al.*

(*Circuit Court, S. D. New York. April 14, 1890.*)

PATENTS FOR INVENTIONS—INFRINGEMENT—PLEADING.

Under Rev. St. U. S. § 4886, which provides for patents for inventions which have not been known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, and not in public use or on sale for more than two years before the application, a bill for injunction which alleges that the patentee was the original inventor of the patented improvement, which had not been patented to himself or to others with his knowledge or consent in any country, and had not, to his or the orator's knowledge, been in pub-



lic use or on sale in the United States for more than two years before his application for patent, and had not ever been known or used or described in any printed publication in this or any foreign country before his application, sufficiently shows the patentability of the invention.

In Equity. On demurrer to bill.

*Chas. Howard Williams*, for complainant.

*William N. Dykman*, for defendants.

SHIPMAN, J. This is a general demurrer to the complainant's bill in equity to restrain the infringement of letters patent.

The bill alleges that the patentee was the original, first, and sole inventor of a certain new and useful improvement in the construction of cable railways, fully described in the specification of the said letters patent, which had not been patented to himself or to others, with his knowledge or consent, in any country, and had not, to his or the orator's knowledge, been in public use or on sale in the United States for more than two years prior to his said application for letters patent, and had not ever been known or used or described in any printed publication in this or any foreign country prior to his invention and discovery thereof, and application for letters patent of the United States therefor. The grounds of demurrer which were stated on the argument are—*First*, that there is no averment that the invention had not been patented in this or any foreign country before the date of the invention, but that it is simply alleged that it had not been patented with his knowledge or consent, which is an immaterial matter, and is not the fact which is required by section 4886; and, *secondly*, that the allegation in regard to public use or sale prior to the application is simply that the improvement had not been in such use to the patentee's or the complainant's knowledge, which is also an immaterial matter. Section 4886 is as follows:

"Any person who has invented or discovered any new and useful \* \* \* improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may \* \* \* obtain a patent therefor."

The averments do not use the language of the statute, and are not in the customary form, and some of them are open to the objections which have been urged by the defendants; but, when all the averments are taken together, I think that they state, in an informal way, the facts which are prerequisites to a valid patent. The bill alleges that the patentee was the original and first inventor of the subsequently described new and useful improvement, which had never, prior to his invention thereof, been known or used or described in any printed publication in this or any foreign country. This averment is equivalent to one formally saying that the invention had not been known or used by others in this country, and had not been patented or described in print in this or a foreign country; for, if it had never been known by anybody in this or any other country before the date of the invention, it could not have been patented.

The bill also alleges that the improvement had not been, to the patentee's or the orator's knowledge, in public use or on sale in the United States for more than two years prior to the application for letters patent, and had never been known or used in this country prior to the application. This is an express averment that it had never been in public use for any time before the application; and, if it had never been known by anybody before the application, it could not have been on sale, for the manufacture and presentation of an invention in the market creates a knowledge which is inconsistent with the averment that nobody knew of its existence. The pleader would have made a more simple and more neat paragraph if he had followed the language of the statute, but I think that his averments are adequate, and they apparently comply with the averments which were regarded as sufficient in *McCoy v. Nelson*, 121 U. S. 484, 7 Sup. Ct. Rep. 1000.

The demurrer is not sustained.

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### CLOTWORTHY v. SCHEPP.

(Circuit Court, S. D. New York. April 31, 1890.)

#### 1. TRADE-MARKS—INJUNCTION.

The manufacturer of an uncooked pudding, put up in packages, under the trade-mark name of "Puddine," cannot enjoin the maker of a similar preparation from using the word "Pudding" in describing it.

#### 2. SAME.

The use of the word "Rose," in connection with the word "Vanilla," as a trade-mark, is no ground for enjoining a rival maker of similar products, containing those well-known flavors, from using those words in describing his goods.

#### 3. SAME.

A manufacturer who falsely represents the composition of his goods by the labels on his packages is in no position to enjoin a rival manufacturer from using similar labels and packages, on the ground that the latter thereby deceives the public.

Motion for Preliminary Injunction.

Bill by William P. Clotworthy against Leopold Schepp to restrain certain alleged infringements of complainant's trade-marks.

*Wm. Henry Browne*, for complainant.

*Theron G. Strong*, for defendant.

LACOMBE, J. The complainant owns two registered trade-marks,—the word "Puddine" (an arbitrary word symbol) applied to an article of prepared food, and the word "Rose," also applied to the same in connection with the word "Vanilla." This last word is inaccurately stated in the declaration of trade-mark to be "an arbitrary and fanciful word symbol." It in fact describes a well-known flavoring extract, and, when used in every-day speech with food products, implies that such products are flavored with rose. Complainants seek to enjoin defendant from putting up and selling defendant's food preparation in certain packages, which

he contends infringe his trade-mark, and deceive the public; being mistaken, as he claims, for complainant's packages. What defendant makes and sells is, in fact, an uncooked "pudding," within the dictionary definition of that word, viz: "Flour or meal mixed with a variety of ingredients, and usually sweetened." Of course, the complainant cannot, by coining a word which resembles "pudding," and registering it as a trade-mark, prevent other makers of pudding from calling their goods by their well-known English name. Nor, in view of the evidence produced by the defendant, namely, that both "rose" and "vanilla" are and have been for many years well-known flavoring extracts, bought and sold under those names, and used by confectioners, can complainant prevent other persons who flavor their food products with rose or vanilla, or a mixture of both, from truthfully describing them as so flavored.

Complainant further bases his claim to an injunction upon an alleged simulation of his packages, contending that the preparation of defendant is put up in packages which, by the arrangement of the descriptive terms "pudding" and "rose vanilla," in connection with the shape, size, color, and general appearance of the packages, simulate those of the complainant, and deceive the public into purchasing the defendant's under the belief that they are getting the complainant's. The affidavits of two persons who claim to have been deceived by the appearance of the packages are presented. Of course, ocular inspection of the respective packets is the most persuasive evidence on such a question. There is some similarity between the packages on one face, but the other parts are so dissimilar, so plainly declare that the goods are defendant's make and are claimed to be protected by his own trade-mark, that it is not easy to see how any but the most incautious purchaser could be deceived. Moreover, the complainant himself is engaged in deceiving the very public whom he claims to protect from the deception of others. He calls his preparation "fruit" puddine. In nine different places on his package this word "fruit" is repeated, as descriptive of the article, and a dish of fruit (pears, grapes, etc.) is most prominently depicted on one face of each packet. His packages plainly suggest that fruit of some kind enters in some shape into his compound. A chemical analysis produced by defendant, the substantial accuracy of which is not disputed, discloses the fact that his "puddine" is composed exclusively of corn starch, a small amount of saccharine matter, and a flavoring extract, with a little carmine added to give it color; it contains no fruit in any form. Under these circumstances, complainant's rights are not sufficiently clear to warrant the granting of a preliminary injunction. *Fetridge v. Wells*, 4 Abb. Pr. 144, approved in *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. Rep. 436.

## COLLINS CHEMICAL &amp; MANUF'G CO. v. CAPITOL CITY MANUF'G CO.

*(Circuit Court, D. Connecticut. May 1, 1890.)*

## TRADE-MARKS—INFRINGEMENT—PRACTICE.

Where, in suit for the infringement of a trade-mark, exhibits of the devices used by both complainant and defendant accompany the bill, the court will sustain a demurrer to the bill where the exhibits show that there is no infringement.

In Equity. On demurrer to bill.

*H. A. West*, for plaintiff.

*A. H. Walker*, for defendant.

SHIPMAN, J. The complainants' bill for an alleged infringement of their trade-mark makes profert of the trade-mark, and of the alleged infringement, and exhibits of the boxes and the devices, and symbols thereon, which are used by each party accompany the bill. The defendant has demurred, upon the ground that the plaintiffs' bill shows that they have no case. Upon the hearing of the demurrer the complainants did not appear. An inspection of the boxes shows palpably that there is no infringement. The demurrer is sustained.

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THE ALBANY.*(District Court, D. Massachusetts. April 17, 1890.)*

## SALVAGE—COMPENSATION.

As the steamer *P.* was entering Massachusetts bay, at sunrise, the coal-barge *A.* was sighted three miles to the windward, apparently in distress. The *P.* changed its course, and took the *A.* in tow. The *A.* had been left at 1 o'clock in the morning by the *B.*, it being the rear of a tow being taken to Boston, and the hawser having broken in the rough sea. When found the wind was high, her rudder was disabled, her sails useless, heavy seas were washing over her, and her hatches in danger of being carried away. She was towed by the *P.* to a place of safety, and left; the *B.* having returned and met them. The cargo of the *P.* was worth \$147,000, and she was delayed 11 hours. The *A.* and cargo were worth \$20,700, and was towed with great difficulty, from the roughness of the sea and the loss of her rudder. *Held*, that the *P.* should be allowed \$4,000, the amount being increased by the attempted defenses that the *A.* was not in great peril, was not taken to a place of safety, and that the *P.* agreed to bring her in at towage rates, which were shown to be false by the testimony of the master, who, though swearing to the answer, said he did not know it contained such statements.

In Admiralty.

*Shattuck & Munroe*, for libellant.

*E. P. Carver*, for claimant.

NELSON, J. As the steam-ship *Parthian*, of the Boston & Philadelphia Line, was entering Massachusetts bay, at sunrise on the morning of November 3, 1889, bound for Boston, the wind being southerly, the chief officer sighted from the bridge, about three miles to windward,

the coal-barge Albany, alone, and apparently in distress. The course of the Parthian was thereupon changed, and she bore up until she came within hailing distance of the barge, and, after some interchange of inquiries between the officers of the two vessels, the barge was taken in tow by the Parthian, and brought into Boston harbor, arriving inside Boston light about 6 o'clock P. M. When off the Hardings, the steam-tug Britannia was met, which assisted in the towage from that point. It appeared that the Albany left New York on October 28th, having on board 1,200 tons of coal, together with other coal-barges, in tow of the steam-tug Britannia, bound for Boston. At about 1 o'clock on the morning of November 3d, when off Race point, the sea being rough, and the wind blowing a heavy gale, the hawser parted. The Albany being the rear barge of the tow, and it being extremely difficult to make a new connection, the tug proceeded on her way to Boston with the other barges, leaving the Albany adrift, intending afterwards to return and bring her in. In the mean time she was found by the Parthian, as above stated.

The answer sets up that at the time the Parthian came up, the barge was proceeding towards Boston under sail, and was not in any great peril; that the Parthian did not finally leave her in a place of safety, but left her in a much worse position than when she first took her in tow; and that the master of the Parthian agreed to tow her in at towage rates. These statements were false, and were disproved by all the evidence in the case, including the testimony of the master of the barge, by whom the answer was sworn to. The master testified at the hearing that he was not aware, when he made oath to the answer, that it contained those statements, but the proctor for the owners informed the court that the answer was prepared from the master's own account of what occurred. The barge was in the greatest peril. The wind was blowing a gale, and the sea was very rough. She was lying in the trough of the sea, her rudder disabled, the small sails which she carried useless. Heavy seas were washing over her deck, and her hatches were in danger of being carried away. Her men were exhausted and discouraged. She was drifting and being blown out to sea. The barge was left by the Parthian inside Boston light, in smooth water, on good anchorage ground, in a place of perfect safety, and in charge of the tug. The hawser was finally cast off at the request of the master of the barge. The Parthian rendered the assistance at the request of the master of the barge, and without any agreement whatever as to the compensation she was to receive. It is manifest from all the evidence in the case, and especially from the testimony of the master of the barge, that the answer was not made in good faith, but was well known to the owners to be false and misleading. This certainly indicates a purpose of concealing from the court the magnitude of the peril in which the barge was placed. The towing by the Parthian was a matter of extreme difficulty, owing to the sheering of the barge from side to side, from want of a rudder to keep her in the wake of the steamer. A nine-inch hawser was parted in the towing. The Parthian was a large and valuable ship, and her cargo was valued at \$147,000. Her voyage was delayed 11 hours. The value of the Al-

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banyand her cargo were \$20,700. Considering the peril the Albany was in, and also being of opinion that the compensation should be considerably enhanced on account of the extraordinary character of the defense, I fix the salvage at \$4,000. A decree is to be entered for the libelants for that amount with costs. Ordered accordingly.

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THE SACHEM.<sup>1</sup>

JANSEN v. THE SACHEM.

(District Court, E. D. New York. March 28, 1890.)

**SEAMAN—PERSONAL INJURIES—NEGLIGENCE OF FELLOW-SERVANT.**

A vessel and her owners are not responsible for injuries to a seaman caused by the negligence of another seaman.

In Admiralty. Action for damages for personal injuries.

*A. B. Stewart*, for libellant.

*Wing, Shoudy & Putnam*, for claimant.

BENEDICT, J. This is an action for personal injury, brought by one of the crew of the American ship *Sachem*. On January 11, 1888, while the ship was lying at anchor in Bristol roads, the crew, under the directions of the mate, undertook to rig in the jib-boom. After the head-gear was slackened, and the head of the boom raised clear, the boom came in gradually, until it reached the inner jib-guy band, where it jammed in the bowsprit cap. The men not succeeding in clearing it, the mate went out himself, and tried to pry the boom clear with a crow-bar, but the boom would not come. The mate ordered the heel rope to be taken off the capstan, and made fast to the shank painter bitt on the port side, and tackle to be made fast to the capstan. One of the crew, named Scotty, held the heel rope at the bitt, and the others began heaving on the capstan. The boom not starting, the mate, as the libellant says, ordered Scotty to cast the heel rope off, and then gave the end of the boom another pry with his bar, when the boom started, surged in, and caught the libellant's leg between it and one of the towing bitts, breaking the leg. The mate declares that no order was given by him to cast off the heel rope, and that the accident was caused by the act of Scotty in casting off the heel rope without orders.

Upon the testimony, I think the weight of the evidence is to the effect that Scotty let go the heel rope without orders from the mate. This being so, the case is one of damage caused by negligence of a fellow-servant, for which the libellant cannot recover. If it could be found, upon the testimony, that the injury of the libellant resulted from the negligence of the mate in directing the heel rope to be cast off, a question

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

would then be raised very similar to the question decided by the supreme court in the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, where the court held the negligence of a conductor of a railroad train to be the negligence of the railroad company. That decision might be found to be authority for holding that the chief mate of a ship, in charge of the deck, authorized to command the movements of the ship; to direct when she shall start, when she shall stop, and what sails she shall carry,—has the management of the ship so that the ship and owners thereof are responsible for injuries resulting from his negligence. But the evidence in this case is not sufficient, in my opinion, to justify a finding that the injury to the libelant resulted from negligence on the part of the mate. The libel is dismissed upon the ground that the cause of the accident was negligence of Scotty, a fellow-servant with the libelant.

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THE BRITANNIA.<sup>1</sup>

THE BEACONSFIELD.

CLEUGH v. THE BRITANNIA.

COMPAGNIE FRANCAISE DE NAVIGATION A VAPEUR *et al.* v. THE BEACONSFIELD.

COTTON *et al.* v. THE BRITANNIA *et al.*

(Circuit Court, S. D. New York. March 7, 1890.)

**COLLISION—CROSSING STEAMERS—STOPPING INSTEAD OF HOLDING COURSE.**

The Britannia and the Beaconsfield exchanged signals to pass port to port. When about half a mile apart, the former touched bottom, and, to avoid grounding, went straight ahead at full speed for about half a minute, and passed some 600 feet of deep water without turning into it. Her swing to starboard was then retarded by the ebb-tide and west wind, though her helm was put hard a-port, and for a brief space she made a slight swing to the westward. The Beaconsfield, being retarded by tide and wind, was going much slower than the Britannia. When four or five lengths apart, the movements of the Britannia at that time not indicating that she was porting, the Beaconsfield blew a single whistle, and, hearing no answer, reversed, the danger of collision continuing. Shortly after she reversed, the Britannia commenced to swing to starboard, and apparently they would not have collided had the Beaconsfield continued. Her pilot testified that there was a reef of rocks, which made it dangerous for her to continue in her course. *Held*, that the Beaconsfield was without fault, and the Britannia was liable for the loss of her and her cargo.

In Admiralty. On appeal from district court. 34 Fed. Rep. 546.

**FINDINGS OF FACT.**

*First.* On the 19th of November, 1886, about 10 o'clock A. M., a collision occurred in the harbor of New York, at the mouth of the East river, between the steam-ships Britannia and Beaconsfield, by which the Beaconsfield was shortly afterwards sunk.

<sup>1</sup>Reversing 34 Fed. Rep. 546.

*Second.* The Beaconsfield was a British iron steam-ship, 270 feet long, 34 feet wide, and 24½ feet deep. Her gross tonnage was 1,736 tons, and her draught at the time of collision was 21 feet 6 inches aft, and 21 feet 7½ inches forward. She was bound for Aberdeen, with a full cargo of grain.

*Third.* The Britannia was a French iron steam-ship, 337 feet long, 40 feet broad, and 27 feet deep. Her gross tonnage was 2,422 tons, and her draught at the time of collision was 17 feet aft, and 15 to 15½ feet forward. She was coming from sea, bound to her dock at Prentice's stores, on the Brooklyn side of the East river.

*Fourth.* On the morning in question the day was fine and clear, the wind was from the west, and blowing about 22 miles an hour. The tide in the East river was the last of the ebb, and the water was lower than usual. The ebb was still running very slightly in the East river, but was running strong in the North river; the effect of which condition of the wind and tides was (and under like circumstances always is) to form a flood eddy on the north side of the channel, between the Battery and Governor's island, and an ebb-tide on the south side of the channel. These tides operate to turn the head of a vessel attempting to enter the East river near Castle William (on Governor's island) to the westward, as she crosses the ebb, until she enters the flood eddy. Thereupon her head is turned to the eastward. Such tidal action was within the knowledge of the pilot of the Beaconsfield, and should have been within the knowledge of the pilot of the Britannia.

*Fifth.* The Beaconsfield left Dow's stores next south of Atlantic-Avenue ferry, in Brooklyn, where she lay head in, at about 9:15 A. M., and was backed out, and, with the assistance of a tug, headed around to the northward, and when past the shoals was turned into the East river. When about midway between Diamond reef and the New York piers she saw the Britannia as the latter came clear of Castle William, and blew a single whistle to her. The Beaconsfield was then heading about W. N. W. or W. by N. The full speed of the Beaconsfield is between 9 and 10 knots, with 56 revolutions. At this time her engines were moving under an "easy ahead," with 30 revolutions, which would make her speed through the water about 5 knots. The retardation due to the action of the wind and to that of the flood eddy (described in the fourth finding) gradually reduced her speed over the ground, as she came within the influence of the eddy, to considerably less than 4 knots.

*Sixth.* The Britannia came up from the lower bay, in the channel between Governor's island and Bedloe's island, keeping well over to the eastward, on a course about N. N. E. When a short distance below Castle William, her wheel was ported, to enable her to pass under the stern of a tug and scow, which came out of the East river and crossed her bow. This gave her a change to starboard of about two points. As soon as she cleared the scow and tug she came partly back to her course, probably to about N. E. by N. or N. E. by N. ¼ N., and shortly thereafter touched bottom near to Governor's island, and at about that point off Castle William where the 18-foot curve approaches nearest to the 24-



foot curve, being near the outer end of the projection formed by the 18-foot curve.

*Seventh.* The full speed of the Britannia is 10 to 11 knots, with 48 to 50 revolutions of her screw per minute; half speed, 7 to 8 knots, with 40 revolutions; and slow,  $4\frac{1}{2}$  to 5 knots, with 30 revolutions. As she came up past Bedloe's island she went about half speed. As she hauled to starboard to pass the tug and scow, her speed was reduced to slow, and so continued until she touched bottom. At about the time of touching she sighted the Beaconsfield on her starboard bow.

*Eighth.* In order to avoid grounding, the order was at once given on the Britannia to go ahead full speed, and was promptly obeyed. The helm at that time was about amid-ships. While getting clear of the bottom, and with her engines full speed, she blew a single whistle to the Beaconsfield. The whistle of the Beaconsfield referred to in the fifth finding was neither heard nor seen on the Britannia, but the latter's whistle, given while getting clear of the bottom, was heard on the Beaconsfield, and taken to be an answer to her own signal. At the time the Britannia thus signaled, the distance between the steamers was not quite half a mile.

*Ninth.* After clearing the bottom, the Britannia ported and hard a-ported her helm, but her bow, while in the ebb-tide near Governor's island, did not swing to starboard, but, on the contrary, did for a brief space take a slight but perceptible swing to the westward. Her helm was not changed from hard a-port until the collision. Her engines ran at full speed while clearing the bottom for about half a minute, and were then reduced to slow ahead. She only scraped the bottom. It did not hold her.

*Tenth.* When the Beaconsfield blew her first whistle her wheel was put to port a little, and kept steady a-port; and under her slow engine she drew ahead, her head inclining a little towards the New York docks. A careful watch was kept on the movements of the Britannia, and it was observed not only that she did not swing to starboard, but also that she was showing a little more of her starboard side to the Beaconsfield. Thereupon those upon the Beaconsfield, while still about four lengths from the Britannia, blew another single whistle, and, hearing no answer, put their wheel hard a-port, and stopped, and reversed full speed. Her engines were kept reversed until her headway was stopped. Then her engines were stopped, and at the time of the collision she was nearly, if not quite, dead in the water.

*Eleventh.* At the time the Beaconsfield reversed she had approached so near the New York shore that in view of her draught of water, and the condition of the bottom in that locality, there was some risk of her running aground, should she continue her headway much longer under her port helm. At that time the Britannia, not yet swinging to the eastward, was heading so as to cross the bows of the Beaconsfield, had advanced over a considerable part of the distance which separated them when she blew her first whistle, and was manifestly coming into the northerly part of the channel.

*Twelfth.* The second whistle from the Beaconsfield was not heard on the Britannia. The latter also blew a second single whistle, and thereafter a third, neither of which was heard or seen on the Beaconsfield.

*Thirteenth.* Shortly after the Beaconsfield began reversing, the Britannia commenced to swing to starboard, a motion which was perceived on the Beaconsfield.

*Fourteenth.* The captain of the Britannia had noticed that she did not swing as promptly as he expected after clearing the bottom, and after she did begin to swing he saw that she needed to come more to starboard, and that the ships, for some reason, did not get clear of each other, and, differing from the pilot as to the chance of clearing the Beaconsfield if he kept on, he gave the order to reverse his engines. Thereafter he let go his port anchor when about 100 feet from the Beaconsfield.

*Fifteenth.* The reversal of the Beaconsfield's engines occupied but a short time, during which she ran about a length. The order for the reversal of the Britannia was given before her master saw that the Beaconsfield had stopped. When the Beaconsfield stopped backing, the Britannia was about two of her lengths away, pointing about for the port bow of the Beaconsfield, and swinging to starboard.

*Sixteenth.* After her headway was stopped, the Beaconsfield took no further action, and lay still in the water until struck. The time from such stopping of her headway until the collision, during which she lay still, was about a minute and a half.

*Seventeenth.* The effect of reversing the engines of the Britannia was to reduce her speed so much that at the moment of collision her headway was almost stopped.

*Eighteenth.* At the time of collision the heading of the Beaconsfield was about W. N. W., and of the Britannia about N. E. by E.

*Nineteenth.* The place of the blow on the Beaconsfield was about ten feet aft of amid-ships. The Britannia cut through the port sides of the vessel, and cut into her coal bunkers, through her iron decks and stringer plates five feet on deck, and through her side plating up and down about 15 feet.

*Twentieth.* The place of collision was about on a line between pier 1, East river, and the place where the Britannia touched bottom, and in the northerly part of the channel. (About W. N. W. of the figs. 27 on the chart.)

*Twenty-First.* If the Beaconsfield had not stopped and backed, it is probable that the Britannia would have passed under her stern, a short distance astern of her.

*Twenty-Second.* There is no usage or habit or custom of the port which requires vessels coming into the East river from the lower bay to keep to the south of mid-channel.

*Twenty-Third.* The navigation of the Beaconsfield was in charge of an experienced and competent Sandy Hook pilot, who was on her bridge, where was also her master, who was a competent and careful navigator. At the wheel of the Beaconsfield were two seamen and her second mate; and on the lookout on her topgallant forecastle was her first officer; and

her engine was worked by her second engineer, the first engineer being on the top platform, in general charge,—all were competent and attentive.

*Twenty-Fourth.* At the time these steamers sighted each other and signaled, they were crossing so as to involve risk of collision, within the meaning of the nineteenth rule, and the Britannia had the Beaconsfield on her starboard side.

*Twenty-Fifth.* At the time when the Beaconsfield stopped and reversed, the vessels were approaching each other so as to involve risk of collision, A prudent navigator, viewing the situation at that moment from the deck of the Beaconsfield, would have reached the conclusion that, if neither the course of the Britannia were altered nor her headway checked, collision was imminent and inevitable, unless avoided by some change in the movements of the Beaconsfield.

*Twenty-Sixth.* The Britannia's movements, visible to the Beaconsfield, were not in accordance with the single whistle she had blown, and were such as created a natural, reasonable, and strong apprehension of collision in those in charge of the Beaconsfield, and they were thereby justified in taking the statutory precaution to avoid risk of collision, which is prescribed by the twenty-first rule for a steam-vessel approaching another vessel so as to involve risk of collision.

*Twenty-Seventh.* The Britannia did not keep out of the way of the Beaconsfield.

*Twenty-Eighth.* By the collision the owner of the Beaconsfield sustained damages amounting to \$31,005.46, with interest on \$25,583.98 thereof from December 31, 1886, and on \$5,421.50 from January 12, 1887. The Britannia suffered damage to the amount of \$5,928.46. The owners of the cargo of the Beaconsfield sustained damages amounting to \$42,748.63, with \$6,920.82 interest thereon to July 2, 1889.

#### CONCLUSIONS OF LAW.

*First.* That those in charge of the Britannia were under a duty to keep their vessel out of the way of the Beaconsfield.

*Second.* That they failed and neglected so to do.

*Third.* That this collision did not occur through inevitable accident.

*Fourth.* That those in charge of the Beaconsfield were free from fault in the premises.

*Fifth.* That the decree of the district court, so far as it divides the damages and costs, should be reversed, and decrees entered in favor of the Beaconsfield, and of the representative of her cargo, against the Britannia, with interest, and costs of both courts; and that the libel of the Compagnie Francaise, etc., against the steam-ship Beaconsfield, in the district and circuit courts, be dismissed, with costs of said libel to the claimants of the steam-ship Beaconsfield, and that the petition of the Compagnie Francaise, etc., to bring the steam-ship Beaconsfield into the suit of John Lucas Cotton and another against the steam-ship Britannia be also dismissed, with costs of the district and circuit courts to the claimants of the steam-ship Beaconsfield.

*Geo. A. Black*, for the Beaconsfield.

*R. D. Benedict*, for the Britannia.

*Sidney Chubb*, for cargo of the Beaconsfield.

LACOMBE, Circuit Judge. The conclusion arrived at in this court as to the liability of the Beaconsfield differs from that of the district court. Inasmuch, however, as this divergence of opinion results from a different understanding of the facts, extended discussion of the authorities cited would be unprofitable.

The findings *supra* contain the statement that the condition of the bottom in the locality where the Beaconsfield reversed was such that there was risk of her running aground should she continue under a port helm. Her navigator, (Sisco,) a Sandy Hook pilot of 40 years' experience, testified to the existence of a reef of rocks some distance off the Battery wall. Of this the chart contains no indication, but the witness insisted with great confidence that it was there, and, although five pilots were called by the Britannia after his testimony was given, not one of them contradicted him on this point. Under these circumstances, his statement is accepted as correct.

The testimony, when examined in the light of the chart, seems to indicate with great distinctness the precise place where the Britannia touched the bottom. If the Beaconsfield's position at that time be taken about as given by the Britannia's witnesses, the distance between them was less than half a mile. For half a minute thereafter the Britannia was running at full speed. Her rate of progress over the ground, when running at reduced speed, must have been considerably in excess of the Beaconsfield's, the latter steamer being retarded both by the wind and the flood eddy. From the moment of touching till the Beaconsfield reversed, the speed of the Britannia over the ground was probably twice that of the other vessel. Taking these facts into consideration, it seems reasonably certain that, when the Beaconsfield reversed, the vessels could have been not quite four of her lengths apart, instead of a quarter mile, as the district judge found. Of course, to the point of intersection of their respective courses the distance was much less. Whatever may have been the facts as to the Britannia's helm, nothing in her movements up to that time indicated that she was porting. Whether or not she was in fact doing all she could, observers of her motions from the deck of the Beaconsfield had good ground for believing that she was not, and that, if she still intended to take such action, she was delaying until dangerously near the safety limit. There was, indeed, an agreement on her part to go astern, which for the time being presumptively terminated the risk of collision involved in the fact that the vessels were on crossing courses; but the natural conclusion from her movements was that, either intentionally or through some mischance, she was breaking that agreement, and the moment it was broken the risk of collision was renewed. A reasonable time is no doubt required for the execution of maneuvers agreed upon, and the interval between the Britannia's first signal and the Beaconsfield's reversal was short; but,

short though it was, the former vessel had during it passed over a considerable space, had gotten far beyond any shoal water at Governor's island, had nearly crossed the southerly half of the channel, and had passed, without turning into it, quite 600 feet of the deep water fairway into the East river, whither her signal had indicated that she was bound. If she meant to go there, she could now, under the most favorable circumstances, make the necessary turn only in the northerly water, and perilously near the place where the Beaconsfield would be. But not only did the Britannia's movements fail to indicate that she had begun her maneuvers for turning to the eastward, but her swing to the westward indicated a diametrically opposite maneuver. Whether or not she did in fact swing to the westward is in dispute, but there can be little doubt that her sudden dash forward at full speed, with her helm amid-ships, begun when she touched bottom, was continued till all risk of grounding was over, and sufficiently far for her to feel the effect of the tidal action referred to in the fourth finding. If so, she probably did take a swing to the westward, slight, indeed, but perceptible to those on the Beaconsfield.

Judging from appearances, then, it was reasonably certain that, whatever she had promised, she was not executing proper and sufficient maneuvers to keep out of the way. Meanwhile, the situation of the Beaconsfield was such that further progress on her course involved risk of grounding, without assurance of avoiding the collision. All these circumstances would necessarily create in the mind of a prudent navigator a reasonable and strong apprehension that collision would ensue, unless some further action were taken by himself. The vessels had approached over more than half the space which separated them when the Britannia's first signal was heard, and were still approaching, so as to involve risk of collision. If that risk were to be avoided, it was apparently necessary that both vessels should take some action. What that action should be was indicated by the twenty-first rule,—if necessary, each should stop and reverse,—and the necessity for such action had arisen. The special circumstances of the case, as they appeared to the Beaconsfield's navigator, enlightened as to what the Britannia really was doing only by such indications as her movements afforded, called for this maneuver, which the twenty-first rule required, and which her master testifies he considers the essence of safe navigation. A careful collation of the testimony of those on both steamers and elsewhere, assisted by elaborate plotting on the chart, indicates that the probabilities are that the Britannia would have passed astern of the Beaconsfield if the latter had kept her headway, even though she straightened out sufficiently to clear the shoal water her pilot spoke of, but by a very small margin only. The conduct of the Beaconsfield, however, is to be judged in the light of the circumstances as they would have appeared at that time to an experienced and careful navigator standing on the bridge. At that place and time collision seemed imminent, and a reversal necessary to avoid it.

## ON MOTION TO HAVE CASE REOPENED.

(Filed May 5, 1890.)

LACOMBE, Circuit Judge. This is an application by the owners of the *Britannia* to have the causes reopened, and to allow them to "furnish further evidence as to the correctness of the coast-survey chart in evidence, and to have a finding that the said chart is correct, and that there was no such reef of rocks as was testified to by the witness Sisco on the trial," and generally for a further hearing. The application was induced by the eleventh finding of fact, and by a paragraph contained in the opinion. The said finding is as follows:

"*Eleventh.* At the time the *Beaconsfield* reversed she had approached so near the New York shore that, in view of her draught of water and the condition of the bottom in that locality, there was some risk of her running aground should she continue her headway much longer under her port helm."

The excerpt from the opinion quoted in the moving papers is as follows:

"The findings (*supra*) contain the statement that the condition of the bottom in the locality where the *Beaconsfield* reversed was such that there was risk of her running aground should she continue under a port helm. Her navigator testified to the existence of a reef of rocks some distance off the Battery wall. Of this the chart contains no indication, but the witness insisted with great confidence that it was there, and, although five pilots were called by the *Britannia* after his testimony was given, not one of them contradicted him on this point. Under these circumstances his statement is accepted as correct."

So far as this last excerpt is concerned, it may, if counsel wishes, be stricken from the opinion. The practice of writing opinions in collision cases (involving more than \$5,000) when they are decided in the circuit court seems sometimes of doubtful utility. In all actions for negligence, where the question is one of reasonable care and prudence, each case necessarily depends upon the co-ordination of its own peculiar facts, and only the most general principles can be of universal application. The statute requires this court to state separately the findings of fact, and its conclusions of law thereon. The accuracy of the decision is to be determined by the examination of these findings and conclusions. If the former are supported by proof, and warrant the conclusions drawn from them, the decision is affirmed; otherwise it is reversed. It seems to be the plain intent of this practice to limit the argument upon appeal to the facts which are specifically "found." If those facts are found with sufficient fullness, they should point to definite conclusions; and merely to restate the premises and conclusions in the opinion can rarely be of any assistance, either to counsel or to the appellate court.

The counsel for the *Britannia*, however, moves to reopen the cause to allow of further proof touching the eleventh finding quoted above. Of course in such motions it is essential that the moving party should indicate with reasonable fullness what proof is to be offered. This has been done, the moving papers containing a report of soundings made recently

by an officer of the coast survey, accompanied by a diagram. From these it appears that the four-fathom curve is not correctly shown upon the chart which was in evidence on the trials both in the district court and here. It further appears therefrom that—even if there are no rocks in the locality referred to—there is off the Battery wall a projection of mud or silt which pushes the four-fathom curve further out into the river, and leaves less margin for a vessel, situated as was the Beaconsfield, to maneuver in than the chart shows. Accepting the evidence furnished by the moving papers,—and even without considering the affidavits which were read in opposition,—I am still satisfied that “at the time the Beaconsfield reversed she had approached so near the New York shore that, in view of her draught of water and the condition of the bottom in that locality, there was some risk of her running aground should she continue her headway much longer under her port helm.” There is no cause shown, therefore, for reopening the case. The finding, however, now expresses a conclusion (of fact) reached after a consideration, not only of the record in the district court and the additional proofs taken here, but also of the depositions submitted by both parties on this motion. Should there be an exception taken to the eleventh finding, therefore, these depositions will be considered as before the court when the bill of exceptions is certified.

The following additional finding of fact may be made: *Twenty-ninth.* That the line of 24-foot depth of water off the Battery is as laid down on the chart used on the trial, except that about S. S. W. from the Battery flag-staff there is a projection of mud or silt which pushes the 24-foot line out into the river, as laid down on the tracing attached to the affidavit of Lieut. W. P. Elliott, the extreme outer end of which is less than 30 yards northerly from a line drawn W. N. W. through the place of collision, as found in the twentieth finding.

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### THE ST. JOHNS.

### THE GEN. ROSECRANS.

### HEATH *et al.* v. THE ST. JOHNS *et al.*

(Circuit Court, S. D. New York. April 4, 1890.)

#### COLLISION—EVIDENCE.

The steam-tug Gen. Rosecrans and the steam-tug Delaware were crossing East river in the same direction, in parallel courses, about 800 feet apart. The steam-boat St. Johns, coming up the river on their starboard, agreed by signals to cross the bow of the Delaware, and pass under the stern of the Rosecrans. As soon as the St. Johns crossed the bow of the Delaware, she changed her course so as to pass under the stern of the Rosecrans; but the Rosecrans, thinking the maneuver impossible, reversed her engine. The St. Johns immediately reversed her engine, and hailed the Rosecrans to go ahead. The Rosecrans then started ahead, but was struck and injured by the St. Johns. But for stoppage of the Rosecrans, the St. Johns would have passed 75 or 100 feet under her stern. *Held*, that the St. Johns was not in fault.

In Admiralty. Appeal from district court.

## FINDINGS OF FACT.

(1) At all the times hereinafter mentioned, the libellant Ira Heath was the owner of the canal-boat Stephen A. Pyatt, her tackle, etc. The libellants Frederick G. Van Vliet and Isaac N. Van Vliet at the same time composed the firm of F. G. & I. N. Van Vliet, and were the owners of a cargo of about 10,000 bushels of barley aboard said canal-boat.

(2) On January 4, 1887, about 10 A. M., the canal-boat Stephen A. Pyatt, having said cargo of barley aboard, was taken in tow by the steam-tug Gen. Rosecrans, at the foot of Morgan street, Jersey City, to be towed to Twenty-Fourth street, East river, New York. The Gen. Rosecrans took the canal-boat along-side, on the starboard side of the tug, and proceeded across the North river. At the time, the tide was running ebb in the North river, the wind was light, and the weather fair. The canal-boat was about 100 feet long.

(3) A little after the Gen. Rosecrans left Jersey City with the canal-boat, the steam-tug Delaware left pier F, which is the next pier south of Morgan street, Jersey City. She had in tow on her starboard side a car-float, carrying 10 loaded railroad cars, bound for pier 8, East river. The car-float was about 200 feet in length.

(4) The Delaware, with the car-float, followed a course substantially parallel to the course of the Gen. Rosecrans and the canal-boat, and not more than 300 feet to the southward of the latter. The Delaware moved faster than the Gen. Rosecrans, which was going at the rate of 4 or 5 knots, and gained upon her.

(5) While the Delaware and the Gen. Rosecrans were crossing the North river as above described, the steam-boat St. Johns was coming up from Sandy Hook to her usual landing place at pier 8, North river. The St. Johns is a side-wheel steamer, 260 feet long over all, and about 70 feet extreme width. She was in all respects well and competently manned and provided, and kept a good lookout. She passed up the river about a quarter of a mile from Castle William, on Governor's island, and was then heading straight up the river, on a course passing within about 100 yards of pier 1, North river, and was moving at a speed of about 13 knots an hour. When about abreast of Castle William, her master observed the two tugs on his port bow; the Rosecrans being then considerably in advance of the Delaware.

(6) When the St. Johns was a little above Castle William, whistles began to be exchanged by the Gen. Rosecrans and the Delaware with the St. Johns. First, the Rosecrans blew two whistles, indicating her intention to cross the bows of the St. Johns. Next, the Delaware blew two whistles, indicating the same intention. Then the St. Johns blew one whistle, intending to indicate to the Delaware that the steam-boat did not assent to the proposed course of the tug and float, but would herself cross the bows of the latter. To this the Delaware answered with an assenting signal of one whistle. The St. Johns then blew two blasts of her steam-whistle, intending to indicate to the Rosecrans that the latter might cross the bows of the steam-boat, and the Rosecrans answered with two. Thus the course agreed upon by the steam-boat and the tugs was that the St. Johns should pass between the tugs, ahead of the Delaware and the car-float, and astern of the Rosecrans and the canal-boat.

(7) The St. Johns continued advancing at her full speed of about 13 knots an hour, until the Delaware answered her one whistle with an assenting signal of one whistle, when the engines of the steam-boat were slowed, and her speed was soon reduced to about 5 or 6 knots. At the time she so slowed, the Rosecrans bore a little on her port bow.

(8) When the Delaware gave her assenting signal of one whistle, her car-float was nearly abreast of the stern of the canal-boat in tow of the Gen. Rose-



crans, and was not more than 300 feet to the southward. At the same time the St. Johns was about 200 yards from the Delaware or her float.

(9) As soon as the Delaware gave her assenting signal of one whistle, she reversed her engines. In consequence, her head swung around somewhat to the northward.

(10) The St. Johns kept on, with no change of helm, pointing about for the bow of the Pyatt, until just as she was passing the Delaware, and not more than 300 feet below the Rosecrans.

(11) As soon as the bow of the St. Johns reached the lower corner of the float which the Delaware had in tow, her wheel was starboarded, changing her heading three or four points to the westward, so as to pass under the stern of the Rosecrans.

(12) As the St. Johns was drawing clear of the Delaware, the pilot of the Rosecrans, thinking that the St. Johns would not be able to get under his stern, and believing collision inevitable, reversed his engines, and blew danger signals.

(13) As soon as the stoppage of the tug was or could be seen from the St. Johns, her helm was put hard a-starboard, her engine was stopped and backed full speed, and the tug was hailed to go ahead.

(14) Thereupon the tug's engines were started ahead again. Their previous reversal, however, had somewhat checked her headway.

(15) The St. Johns was checked, but not stopped, by her reversal, and she struck the canal-boat Pyatt with her stem about 10 feet from the stern, on the starboard side, causing her to leak badly, and the cargo and boat thereby sustained serious damage.

(16) If the engines of the Rosecrans had not been stopped and backed, she and the canal-boat would have cleared the St. Johns by about from 75 to 100 feet.

(17) When the proposition of the Rosecrans to cross the St. Johns' bows was made and accepted, the vessels were sufficiently far apart for the proposition to be successfully carried out, if both vessels had thereafter navigated in accordance with their agreement.

(18) The cause of the collision was the stopping and backing of the Gen. Rosecrans,—a maneuver which was the converse of what her signals had promised, and in consequence of which she was encountered by the St. Johns within water which she would have vacated had she navigated according to her signal.

#### CONCLUSIONS OF LAW.

(1) The Gen. Rosecrans was in fault for stopping and backing her engine.

(2) There was no fault in the St. Johns.

(3) The decree as to the St. Johns must be affirmed, and the libel as to her dismissed.

*Carpenter & Mosher*, for the Pyatt.

*R. D. Benedict*, for the St. Johns.

*Owen & Gray*, for the Gen. Rosecrans.

LACOMBE, Circuit Judge. The findings, taken in connection with the opinion of the district judge, (34 Fed. Rep. 763,) sufficiently indicate the grounds of affirmance. Had the navigation of both vessels been in accordance with their agreement, there would have been no collision. What, then, was the agreement, and who failed to keep to it? The Rosecrans and the Delaware being each in the "fifth situation" relatively to the St. Johns, which was on their starboard hand, were required by the rules to port, and pass astern of the St. Johns; the latter continuing on her course, and passing ahead. For some reason or other, the pilot of the

Rosecrans disliked to take this course,—probably because he was crossing an ebb-tide incumbered with a tow,—and undertook to agree with the St. Johns upon some other course. What thereupon occurred, as evidenced by the signals, was this: “I want to cross your bow,” says the Rosecrans. “I am going to cross the Delaware’s bow,” is the reply; “but, if you wish to cross mine, you may.” “I do wish to do so,” responded the Rosecrans, “and will act on your permission.” By this agreement, it became the duty of the Rosecrans to keep her course without unnecessary delay, and of the St. Johns not to thwart her, nor to intrude into the water through which the maneuver which the Rosecrans was about to undertake would in ordinary circumstances be carried out. Thereafter the St. Johns slows. She crosses the bow of the Delaware according to programme, and by as narrow a margin as she safely can. She then co-operates by starboarding. She does not intrude into the water which would have been required for the tug’s maneuver, if executed as promised. She does, in fact, collide with the Rosecrans, but solely because of the latter’s stopping. If what was ordinarily to be expected had happened, the water into which the St. Johns came would not have been at that time required for the maneuver the Rosecrans was making. Nor was the master of the Rosecrans justified in stopping by any fear as to the St. Johns’ course. Nothing in the situation or in the latter’s agreement was demanding an alteration of her course up to the time when the Rosecrans reversed. In this particular the case differs from that of *The Britannia*, ante, 67, which, both by the rule governing her situation, and by the promise of her signal, was required to alter her heading several points. This case is also to be distinguished from *The Sammie*, 37 Fed. Rep. 907. There the failure of the Burke to alter her navigation so as to co-operate with the Sammie was persisted in, without any apparent cause, for so long a time that the pilot of the Sammie was held excusable in reversing, contrary to his agreement, such maneuver being made *in extremis*. Here the St. Johns did alter her navigation to co-operate with the Rosecrans as soon as she could. It is true that by that time she was quite near the Rosecrans; but the master of the latter knew, when he made his agreement with her, that he must expect no stoppage or swinging to port from her until she had reached the Delaware’s bow. Decision of district court affirmed.

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### THE S. S. OREGON, (JOHN SIMPSON, Libellant.)

(District Court, D. Oregon. April 22, 1890.)

#### ADMIRALTY — PROCEEDINGS IN REM — COLLISION — DEATH OF SEAMAN — INTERVENTION OF ADMINISTRATOR.

An administrator may intervene in a suit *in rem* to recover the damages allowed by a law of the state for the death of his intestate, caused by the wrongful act or omission of the persons in charge of the *res*.

(Syllabus by the Court.)

In Admiralty.

*Mr. C. E. S. Wood*, for libelant.

*Mr. Zera Snow*, for claimant.

DEADY, J. Austin and Reed, seamen on the *Clan Mackenzie*, were killed in a collision that occurred between that vessel and the steam-ship *Oregon*, on the Columbia river, on the night of December 26, 1889.

The master of the *Mackenzie*, John Simpson, has brought suit in this court against the steam-ship to recover damages for the injury sustained by the collision, alleging that it was caused by the negligence of the persons in charge of the latter, in which suit the administrator has intervened.

Under the Oregon statute (Comp. 1887, § 371) giving a right of action to the administrator for the death of a person, caused by the wrongful act or omission of another, in cases where the deceased, had he lived, might have maintained an action for an injury caused by the same act or omission, an administrator might maintain a suit in admiralty to recover damages for the death of his intestate. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140; *The Alaska*, 130 U. S. 201, 9 Sup. Ct. Rep. 461.

A person injured by a marine tort—a tort committed on a navigable river of the United States—has a lien upon the offending vessel for the damages he is entitled to recover for such injury. *The Rock Island Bridge*, 6 Wall. 215; *The Avon*, 1 Brown, Adm. 170.

By the law of this state the administrator having the same right to maintain an action for the death of his intestate as the latter would have for an injury caused by the same act or omission if he had lived, it follows, in my judgment, that he has, as an incident of such right, a lien upon the offending vessel for the amount of the damages he may recover in such action.

The administrator has such lien, also, by virtue of the Oregon statute, (Comp. 1887, § 3690,) which gives a lien on "every boat or vessel used in navigating the waters of this state \* \* \* for damages or injuries to persons or property by such boat or vessel;" for, the tort being a maritime one, the state may give a lien in favor of the injured party when it occurs within its jurisdiction. The administrator in this case may intervene in any suit brought against the offending vessel for an injury to person or property caused by the wrongful act or omission that resulted in the death of his intestate, and may join in his libel claims for the death of both Austin and Reed.

Under the admiralty rule 34, the administrator may file his libel in the clerk's office, and then apply to the court for an order requiring the claimant to answer the same; and such claimant may thereupon take such exceptions or make such defense thereto as, by the course of admiralty proceedings, he is entitled to.

THE WYANOKE.<sup>1</sup>BUCK *et al.* v. THE WYANOKE.

(District Court, S. D. New York. March 15, 1890.)

## COLLISION—MUTUAL FAULT—LIBEL BY CARGO-OWNER—COSTS.

Where suit was brought against a steamer by the owners of a sailing vessel totally lost by collision with the steamer, and the owners of the cargo lost with the sailing vessel joined in her libel against the steamer, and both vessels were held in fault for the collision, it was held that the defendants should be adjudged to pay only one-half of the cargo owner's bill of costs, and that the latter must look to their co-libelants for indemnity against the other half.

In Admiralty. On appeal from taxation of costs.

*Carter & Ledyard*, for libelants.

*Biddle & Ward*, for claimants.

BROWN, J. Since the decision of Mr. Justice BLATCHFORD in the case of *The Warren*, 25 Fed. Rep. 782, it has been the settled practice in this circuit to apportion the costs as well as the damages when two vessels are held in fault in collision causes. In the present case the libelants include the owners of the schooner *Ruth Darling*, which was totally lost by the collision, as well as the owners of the cargo. Both vessels were found in fault, and the damages were ordered to be divided between them. The value of the schooner being less than the value of the cargo, her owners are not entitled to any decree against the *Wyanoke*, because one-half of her damages is less than one-half of the value of the cargo which she would be bound to pay. The result, therefore, is that the owners of the cargo have a decree for their full damages against the *Wyanoke*. They now claim, also, a full bill of costs against her, on the ground that they should not be placed in a worse position than if they had filed an independent libel. Had the cargo owners filed a separate libel against the *Wyanoke*, the *Ruth Darling* or her owners, would naturally have been brought in as co-defendants, under the fifty-ninth rule. All parties would have been before the court, as they are in the present action. Upon the apportionment of the damages in such an action, the owners of the schooner, upon any stipulation for costs, would have been bound to pay their share of the costs according to the terms of their stipulation. I see no reason for any different disposition of the present case. The cargo owners may tax their full bill of costs, but these costs, as well as the claimant's costs, will be apportioned between the two vessels or their owners; that is, one-half of the whole costs must be charged in the decree against the stipulation given by the plaintiff owners of the schooner, the other half paid by the claimants. The total loss of the *Ruth Darling* does not absolve her owners and their stipulators from their share of the costs imposed on the two vessels in their own action, and the liabilities assumed by their own stipulators. As respects the *Wyanoke*, the result is the same as if the owners of the schooner were sole libelants. As between the libelants themselves, the cargo owners must look to their co-libelants for their further indemnity.

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

BENSINGER SELF-ADDING CASH REGISTER CO. v. NATIONAL CASH REGISTER Co. *et al.*

(Circuit Court, E. D. Missouri, E. D. May 2, 1890.)

## 1. COURTS—JURISDICTION—CORPORATIONS.

A corporation does not acquire a residence in a state other than one in which it is incorporated by maintaining an office and having an agent there, within the meaning of Act Cong. March 3, 1887, which provides that, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Following *Booth v. Manufacturing Co.*, 40 Fed. Rep. 1.

## 2. SAME—JOINT DEFENDANTS.

Where, on motion to dismiss for want of jurisdiction, it appears that the jurisdiction is dependent wholly on diverse citizenship, and that one of the defendants lives in the district where suit is brought, and the other defendant and the plaintiff live in different districts, the action will be dismissed as to the non-resident, but not as to the resident, defendant.

On Motions to Dismiss for Want of Jurisdiction.

*R. A. & Paul Bakewell*, for plaintiff.

*Sale & Sale*, for defendants.

THAYER, J. The question raised by these motions has been foreclosed in this district by the decision of Justice BREWER, while circuit judge, in the cases of *Booth v. Manufacturing Co.*, and *Walker v. Railroad Co.*, 40 Fed. Rep. 1, and in *Smith v. Lyon*, 38 Fed. Rep. 54. The suit at bar is an action *ex delicto* by a corporation of Illinois, having its chief office in Chicago, against a corporation of Ohio, having its chief office at Dayton, Ohio, and against a citizen of Missouri. The suit is one in which jurisdiction is dependent on diverse citizenship. The Ohio corporation, although it has an office and agent in this district for the transaction of its business, is not a resident of the district, within the meaning of the judiciary act of March 3, 1887, and cannot be sued in the federal court in this district, unless with its consent, by a corporation or citizen of Illinois. *Booth v. Manufacturing Co.*, *supra*. Nor does the fact that a citizen of Missouri has been joined as a party defendant serve to extend the jurisdiction of the court over the Ohio corporation, as it was held in the case of *Smith v. Lyon*, *supra*, (and the decision in that case has since been affirmed by the supreme court of the United States, 133 U. S. 315, 10 Sup. Ct. Rep. 303,) that, when the first section of the act of March 3, 1887, speaks of suits being brought "only in the district of the residence of either the plaintiff or the defendant," the words "plaintiff" and "defendant" are used in a collective sense, and include all who are plaintiffs or defendants, so that all parties on one or the other side of the controversy must be residents of the district to sustain the jurisdiction.

The contention that the Ohio corporation has waived its right to object to the jurisdiction of the court is not tenable. Conceding that this is a case in which the corporation might by its acts submit itself to the jurisdiction of the court, yet it clearly has not done so. The first step taken by it after being served was to file the present motion to dismiss

for want of jurisdiction. The fact that it maintains an office and an agent in this state for the transaction of its business does not, as contended, amount to a waiver of its right, under the act of March 3, 1887, to be sued in the district of its residence, or in the district where the plaintiff resides. A waiver of such right will only be implied from some act done in this very case, as by appearing generally and pleading to the merits, or doing some other equivalent act. It is true, as has been urged, that, under the judiciary act of March 3, 1875, and under previous acts, it was held that a corporation maintaining an agent and transacting business in a foreign state might be there sued in the federal courts by process served on its agent, especially if the laws of the foreign state sanctioned such service. But those decisions were predicated on the fact that the judiciary acts then in force permitted a defendant to be sued not only in the district of which he was an inhabitant, but also in any district "in which he was found at the time of serving the writ." The theory was that a corporation might be found, within the meaning of the statute, in a foreign state, where it kept an agent and office and transacted business, although not a citizen or resident of such state. *Good Hope Co. v. Fencing Co.*, 22 Fed. Rep. 635; *St. Louis Wire Mill Co. v. Barb-Wire Co.*, 32 Fed. Rep. 802. The act of March 3, 1887, unlike all previous acts on the subject, requires suits to be brought against a defendant in the district of the residence of the plaintiff or defendant, when jurisdiction is dependent on diverse citizenship. The decisions cited are, for that reason, not applicable. They do not establish that the Ohio corporation, by opening an office in this state, has waived its right, in a suit like the present, to be sued only in the district where it or the plaintiff resides. *Connor v. Railway Co.*, 36 Fed. Rep. 273.

Inasmuch as the privilege asserted by the Ohio corporation is a personal privilege that can be asserted by it only, and as the court clearly has jurisdiction of the suit as between the plaintiff and the citizen of Missouri, the motion by the last-named defendant will be overruled, although the motion of the Ohio corporation is sustained. It will then be optional with the plaintiff to discontinue his suit, or proceed against Rosenbaum alone.

### PENNSYLVANIA R. Co. *et al.* v. ALLEGHENY VAL. R. Co. *et al.*

(Circuit Court, W. D. Pennsylvania. April 28, 1890.)

#### 1. CORPORATIONS—INSOLVENCY—RECEIVERS—INTERLOCUTORY ORDER OF SALE.

In a proper case, a court of equity, having the possession by a receiver of the property of an insolvent railway company, may make an interlocutory order for the sale of the property before the rights of the parties under several mortgages have been fully ascertained and determined.

#### 2. SAME—DISCHARGE OF MORTGAGE NOT YET DUE.

But in this class of cases a court of equity will never make such interlocutory order for an immediate sale upon terms discharging the lien of a mortgage not yet due, unless it clearly appears, not only that in the end there must be a sale of the property, but a sale upon those terms.

## 3. SAME.

Income bondholders secured by a junior mortgage, the plaintiffs in a cross-bill, petitioned the court, *pendente lite*, for an interlocutory order for the immediate sale of the property of an insolvent railway company defendant in the hands of a receiver, upon terms discharging the lien of two senior mortgages securing a large issue of bonds having a long time yet to run. The litigation involved the validity of the lien of these two mortgages, and that question was undetermined, and the final issue of the litigation was otherwise uncertain. *Held*, that the petition for a sale upon the proposed terms should be denied.

In Equity. *Sur* petition for an interlocutory order of sale, and demurrer to same. Motion for an order of sale under said petition.

*John G. Johnson, George Shivas, Jr., and D. T. Watson*, for petitioners.  
*Samuel Dickson*, for trustee.

ACHESON, J. This case is now before the court upon a motion for an interlocutory order of sale, before final hearing, of the lines of railroad, franchises, and corporate property generally of the Allegheny Valley Railroad Company, a defendant in the suit. For the proper understanding of the application, it will be necessary to state the issues here involved, and to recite briefly the proceedings in the cause thus far. The original bill set forth that the fixed charges of said company are—*First*, a mortgage on the company's main line, dated March 1, 1866, to secure \$4,000,000 of interest-bearing bonds, due March 1, 1896; *second*, an issue of bonds amounting to \$10,000,000, dated March 31, 1869, and due April 1, 1910, with coupons attached, for the payment semi-annually of interest at the rate of 7 per cent. per annum, secured by a first mortgage, of the same date as the bonds, on the company's line of railroad, from the mouth of the Mahoning to the mouth of Bennett's branch, and further secured by a mortgage dated September 4, 1874, on the company's main line; *third*, a mortgage dated April 1, 1869, to secure to the commonwealth of Pennsylvania \$3,500,000 of bonds, which are further secured by a mortgage dated September 5, 1874, of which bonds about \$2,600,000 remain unpaid; *fourth*, a mortgage dated October 1, 1874, to secure \$10,000,000 of income bonds. These income bonds on their face are entitled to interest only out of the company's net income after payment of interest on bonds secured by the mortgages of prior date, and the mortgage to secure the income bonds is made expressly under and subject to the lien of the five mortgages above mentioned. By an indorsement on each bond of the issue of March 31, 1869, the Pennsylvania Railroad Company (plaintiff in this suit) binds itself to purchase the bond at maturity from the holder at par, and also the several coupons at par as they fall due, "and, when so purchased, each and all of said bonds and coupons are to be held by said company, with all the rights thereby given, and with all the benefit of every security therefor," and by an indorsement on each coupon the company binds itself so to purchase the same. The bill alleges that the Allegheny Valley Railroad Company is insolvent, and had defaulted in payment of the interest on the \$10,000,000 of bonds of the issue of March 31, 1869; and that in consequence thereof, and by reason of its said indorsement, the Pennsylvania Railroad Company had been compelled to pay and purchase cou-

pons of that issue of bonds to the amount of over \$4,000,000; and the bill prays for a sale of the corporate property, franchises, etc., of the Allegheny Valley Railroad Company, "under and subject to the lien" of the aforesaid five mortgages prior in date to the income bond mortgage, "as to the principal of the bonds thereby secured, and not theretofore matured, and the interest thereafter payable after the making of said sale." Under one of the prayers of the bill, receivers were appointed, the survivor of whom is in possession of all the corporate property of the Allegheny Valley Railroad Company, and operating its lines of railroad. The trustees under the mortgages of March 31, 1869, and September 4, 1874, were made defendants in the suit, and in their answer to the bill they submitted themselves to the court, but prayed "that, in the event of a sale being decreed as prayed for in the said bill, such decree may be formulated and enforced as will leave unaffected the lien of the several mortgages of which they are trustees, except so far as the interest thereon may be payable out of the proceeds of said sale." E. W. Ross, a holder of some of said income bonds, having been permitted to intervene in the suit, filed a cross-bill, the allegations of which are such that, if sustained by the proofs, the Pennsylvania Railroad Company would have no valid claim under the coupons of the bond issue of 1869 it had lifted and holds, but, on the contrary, would be bound to account for and pay to the Allegheny Valley Railroad Company large sums of money, and appropriate relief is prayed for as against the Pennsylvania Railroad Company. The cross-bill also avers that the line of railway described in the mortgage of March 31, 1869, was never constructed, but another line (the low-grade railroad) was built, and said mortgage was not given on the line actually constructed; that the mortgage of September 4, 1874, is fraudulent as against creditors, and void also for want of authority to execute it; and the cross-bill prays that it be decreed that the mortgage of March 31, 1869, is not a valid lien upon the "low-grade railroad" as constructed, and that the mortgage of September 4, 1874, is not a valid lien upon the premises therein described, and is void as against the income bondholders and other creditors of the company. There is no prayer in the cross-bill for any sale. Other income bondholders intervened in the suit, and have become co-plaintiffs with Ross in the cross-bill. The cause being at issue, an examiner was appointed, before whom a large amount of testimony has been taken, but the testimony is not closed.

In this state of the case, on February 1, 1890, the plaintiffs in the cross-bill presented a petition to the court, setting forth that, "so far as can be seen, many years must elapse before all questions in controversy can be settled;" that during each year of the receivership the earnings of the company have not been sufficient to meet the interest on the fixed charges, and that the arrears of indebtedness are thus increasing largely; that the railroad cannot be operated as advantageously by a receiver as in the hands of the owners; that in its equipments, etc., it is deteriorating in value; that the present is the most advantageous time to sell the property, and that an immediate sale is to the interest of all



the creditors; and that the longer the sale is delayed the more detrimental it will be to the petitioners and other holders of income bonds, "as well as to the complainants in the original bill." And the petition prays for an order for the immediate sale of the corporate property, franchises, etc., of the Allegheny Valley Railroad Company, discharged of all liens except the first mortgage, dated March 1, 1866, for \$4,000,000. The petition also contains a prayer that, upon the confirmation of the sale, it be decreed that the principal of the \$10,000,000 of bonds of the issue of March 31, 1869, shall become due and payable; but that prayer need not be here quoted at length or considered, as the present motion is simply for an order of sale of the property discharged of liens, as above stated. To this petition William J. Howard, the surviving trustee under the mortgages of March 31, 1869, and September 4, 1874, to secure the bond issue of the former date, has filed a demurrer, and resists the granting of the pending motion. All the other parties to the litigation have virtually submitted themselves to the decree of the court. The commonwealth of Pennsylvania, however, is not a party to the suit. Notice of the present application, indeed, was given to the treasurer and attorney general of the state, but there has been no appearance in behalf of the commonwealth.

Such being the matters in controversy, and this the state of the litigation, ought the present motion to be allowed? Undoubtedly, in a proper case, a court of equity, having the possession by a receiver of the property of an insolvent railway company, may make an interlocutory order for the sale of the property before the rights of the parties under several mortgages have been fully ascertained and determined; and we have an instance of the exercise of the power in the case of *Bank v. Shedd*, 121 U. S. 74, 7 Sup. Ct. Rep. 807. That decision the petitioners cite as a precedent to be followed here. In that case, however, not only was it certain that in the end the sale must take place in the manner ordered, but the property was depreciating in value by the accumulation of receiver's indebtedness, while the contested points were simply as to the extent of the priority of the lien of the first mortgage, and the amount due on that issue of bonds,—disputes which could be as easily settled after the sale as before, and which, in truth, involved mere questions of distribution. But very different is the present case. Here no receiver's indebtedness has been created. Indeed, the net income from the railroad has been sufficient, at least, to meet the interest on the first mortgage for \$4,000,000, and hence it is not proposed to disturb that lien. But the court is asked, by income bondholders secured by a junior mortgage, to discharge, by an immediate sale, the lien of prior mortgages securing an issue of bonds amounting to \$10,000,000, which have yet 20 years to run, while the question of the validity of the lien of those mortgages—a question raised by nobody but the petitioners—is still pending and undetermined. The discharge of the lien of said mortgages is of the essence of the present application, the petitioners not seeking a sale upon any other condition.

Now, I think it may be confidently affirmed that in this class of cases

a court of equity will never make an interlocutory order for an immediate sale upon terms discharging the lien of a mortgage not yet due, unless it clearly appears not only that in the end there must be a sale of the property, but a sale upon those terms; for otherwise irremediable injury might be done to the parties whose security was thus stricken down *pendente lite*. But here the original bill is framed with a view of preserving the lien of the mortgages of March 31, 1869, and September 4, 1874, as respects the principal of the bonds thereby secured, and the interest to accrue after the sale; and the prayer of the bill is that to that extent the property shall be sold under and subject to the lien of those mortgages. Whether, by virtue of its ownership of the matured coupons acquired under its contract of purchase, the Pennsylvania Railroad Company, as against the bondholders, could enforce a sale of the property discharged of the lien of the mortgages before the maturity of the bonds, is a question which need not now be discussed or considered. Such a sale is not within the scope of the original bill. Therefore, if at final hearing the cross-bill should be dismissed, assuredly a sale upon the terms of the proposed interlocutory order could not be decreed under the pleadings. On the other hand, should the plaintiffs in the cross-bill obtain the full measure of relief therein sought, it would seem that no ground would be left upon which to base a decree of sale; or if they should succeed in securing only the relief prayed for against the Pennsylvania Railroad Company, then, in the event of a sale, the supposed insuperable objection urged by the petitioners to a decree discharging the lien of the mortgages as to part of the indebtedness, but retaining it as to part, might cease to have any application to the case, the coupons lifted by that company being out of the way. Taking into consideration, then, the nature of the controversy, and the uncertainty as to the final issue of the litigation, it seems to me very clear that the court would not be justified, at this stage of the case, by an interlocutory order to impose upon the holders of the bonds of 1869 the proposed terms of sale; and, this view being decisive, it is not necessary to discuss or pass on the other objections urged by the trustee of the bondholders against the allowance of the motion. And now, April 28, 1890, the motion for an interlocutory order of sale, under the petition of February 1, 1890, is denied, and said petition is dismissed.

DU PONT *et al.* v. TILDEN *et al.*<sup>1</sup>

(Circuit Court, N. D. Illinois. March 7, 1890.)

**CORPORATIONS—LIABILITY OF STOCKHOLDERS.**

Where a corporation which is authorized by its charter to buy land, and pay for it in full-paid stock, issues such stock in payment for land to an amount greatly in excess of the value of the land, and the stock is sold to a purchaser for value, such purchaser is not liable to the creditors of the corporation on the ground that his stock is not fully paid for, where there was no fraud in the original transaction, and the corporation has taken no steps to rescind it.

In Equity.

*Mason Bros.*, for complainants.

*Judd, Ritchie & Esher*, for defendants.

BLODGETT, J. This is a bill brought by several judgment creditors of the Illinois Coal & Iron Company of La Salle, in this state, seeking to obtain a decree for the payment of their several judgments from certain of the stockholders of the company, on the ground that their stock has never been fully paid for. Originally there were quite a large number of stockholders made parties defendant, but the bill has been dismissed as to some by the complainants; others have been dropped out by the death of the defendants, and the bill was dismissed at the time of the final hearing, on pleadings and proofs as to four of the other defendants, on the ground that the proof did not show them to be stockholders, so that the case, as it now stands for final decree, only affects the estate of William B. Ogden, deceased, whose executors have appeared and answered, and James F. Joy. The ground on which complainants claim that the stock is not fully paid is that one E. D. Taylor, who was the president of the coal company, in the month of May, 1866, conveyed to the company, by deed, certain tracts of land in La Salle county, in this state, in payment for which there was issued to him 7,000 shares of the capital stock of the company, at \$100 per share; that the deed of these lands from Taylor to the company only expressed a consideration of \$150,000, and complainant has introduced parol proof tending to show that it was worth, in cash, even less than that sum at the time the conveyance was made, wherefore complainants contend that the stock so issued was only paid for to the extent of the value of the land so conveyed to the company.

The proof shows that the company was organized under a special charter granted by the legislature of Illinois on the 18th of February, 1857; that by its charter the capital of said company was fixed at \$500,000, with power to increase it, but not to exceed \$1,000,000, and that the company was, by its charter, authorized to purchase real estate, and pay for the same in stock; that stock certificates were to be issued to the stockholders on full payment for their stock; that the company organized under the said charter, and before the 18th of May, 1866, had issued

<sup>1</sup> Reported by Louis Boiset, Jr., of the Chicago bar.

stock to the amount of \$300,000; that on the 18th day of May, 1866, at a meeting of the stockholders of the company, a resolution was adopted increasing the capital stock to the sum of \$1,000,000, and provided that the \$700,000 of increased stock should be issued to E. D. Taylor "for and in consideration of certain lands conveyed by him to said company by deed bearing date April 21, A. D. 1866." It also appears that Taylor did make a deed to the company, dated the 21st day of April, 1866, of certain lands in La Salle county, in which a consideration of \$150,000 is expressed. There is also in the record the oral testimony of two witnesses, claiming to have some recollection or information as to the value of the said lands in April, 1866, who testified, in substance, that said lands were not at that time worth to exceed the sum of \$88,000. It also appears that 5,000 shares of these 7,000 shares of \$100 each, which were to be issued for this land, were issued to Taylor, and that Taylor, within a few months thereafter, sold to William B. Ogden 1,363 of said shares, and that in 1874 he sold to the defendant James F. Joy 250 shares of stock, for which both Ogden and Joy, respectively, paid a full and valuable consideration,—probably more than the stock was worth at the time they received it, or ever has been since,—Taylor representing the stock to be full paid at the time of the purchase, and the said purchasers understanding and believing that it was fully paid. There is no proof showing the value of the stock of the company at the time this deed was made, and there is no proof of any bad faith or deception on the part of Taylor as to the value of the said land. Upon these facts, complainants claim that, even if the land conveyed by the deed of April 21, 1866, from Taylor to the company, was worth \$150,000, the consideration recited in it, there was still left \$550,000, which is about 78 per cent., unpaid on the par value of this stock, and that the defendants now before the court, as such stockholders, are liable to contribute this unpaid amount to the complainants as creditors of the company.

I think there can be no doubt from the proof in this case that the coal company agreed to give Taylor 7,000 shares of its stock for the land which he conveyed to it. The question, therefore, arises, does the fact that complainants' testimony shows, or tends to show, that this land was not worth in cash over \$150,000 at the time it was conveyed to the coal company, establish any liability as against these stockholders? There being no proof in the record, aside from the resolution of the 18th of May, 1866, and the deed, of the negotiations and dealings between Taylor and the company, or of the circumstances surrounding the transaction and leading up to it, I shall assume it, as the only natural conclusion from the proof, that Taylor offered to sell these lands to the company for 7,000 shares of its stock, and the company accepted the proposition. Taylor made the deed of the land to the company, and the company issued to him the stock, or, at least, issued the shares now held by the defendants.

The question then arises, could the company have sued Taylor, and recovered the difference between the cash value of this land and the par value of its stock, without first rescinding this contract, even if the land

was not worth the par value of its stock? And this question, I think, must, upon reason and authority, be answered in the negative. See Cook, Stocks, § 47, where it is said:

"Many attempts have been made in cases where stock was issued for property taken at an overvaluation to hold the party receiving such stock liable for its full par value, less the actual value of the property received from him. These attempts have not been successful. As already seen, the transaction is upheld as legal and valid and binding on all parties, unless there is an overvaluation, and that overvaluation is shown to have been fraudulent. When this is proved, then, the contract is to be treated like other fraudulent contracts. It is to be adopted *in toto* or rescinded *in toto* and set aside. Both parties are to be restored as nearly as possible to their original positions. The property, or its value, is to be returned to the person receiving the stock, and he must return the stock or its real value."

See, also, *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. Rep. 20; *Scovill v. Thayer*, 105 U. S. 143; *Van Cott v. Van Brunt*, 82 N. Y. 535; and many other cases which might be cited to the same point.

It may, I think, be assumed as probable that the 7,000 shares of the stock of this coal company issued to Taylor were not worth, in cash, more than the land conveyed by Taylor to the company at the time this transaction took place. But the proof shows that, since these lands were so conveyed, the company has been engaged in mining coal from them, and hence it will be presumed that these lands were deemed valuable for the coal deposits supposed or known to be beneath them, and it is well known how prone men, and especially sanguine and hopeful men, are to overvalue mining and coal lands, what high estimates they place upon their future possibilities of value and development; and the fair inference from the testimony in this case is that this coal company, with its favorable charter, was satisfied to accept these lands, and did so accept them, in full payment for this stock, in the expectation and belief that the full value of the stock was represented by these lands. And the fact that this expectation may have proved fallacious, although there is no proof to that effect in the record, furnishes no ground for the present claim of complainants. They certainly have no higher equity than the company would have had as against Taylor, and the company would have had no such equity, except for a fraudulent overvaluation, and that only by a rescission of the contract by a prompt reconveyance of the land, so as to place Taylor in as good a position as he was when the transaction began.

The charter of the company allowed it to take real estate for stock, and hence, necessarily, left the value of such real estate to be agreed upon between the person from whom it acquired the real estate and the company; and also provided that stock certificates should only be issued on full payment. It therefore seems to me palpable that, even if a purchaser of its stock was bound to inquire whether the stock had been fully paid for or not,—a proposition which I do not think supported by authority,—such inquiry, at most, would, if made, only have disclosed the fact that the stock had been paid for in lands, and that perhaps some persons did not consider them worth as much as the stock at par,

but that would not prove that the company had not accepted them in full payment, as the resolution of the stockholders' meeting shows it did, nor that the stock so issued was not full paid. Nor would such facts have suggested that if he purchased the stock he would become liable to contribute to the difference between the value of the land and the par value of the stock. The stock had already been paid for once, and, in view of the situation of the parties to the contract, that payment was sufficient to protect the purchaser of the stock for value against the company or its creditors. It may be said that, on the ground of gross overvaluation alone, the company might, if it had acted in apt time, have had this transaction set aside, and the stock surrendered and canceled on a reconveyance of the land for the stock while it still remained in the hands of Taylor, but it is now impossible to restore the parties to their original condition. The stock, at least a part of it, has gone into the hands of *bona fide* purchasers for value, and the coal, as the proof shows, has been largely mined out of the land. The cases of *Bridge Co. v. McCluney*, 8 Mo. App. 500, and *Brant v. Ehlen*, 59 Md. 1, seem to me to be instructive upon the points raised, and conclusive against complainants' right to recover. The bill is dismissed for want of equity.

BRITISH FOREIGN MARINE INS. CO. v. BOARD OF ASSESSORS *et al.*  
LIVERPOOL & LONDON & GLOBE INS. CO. v. SAME.

(Circuit Court, E. D. Louisiana. April 10, 1890.)

FOREIGN CORPORATION—TAXATION.

Under Acts La. 1886, No. 76, which provides that if the capital of a foreign insurance company shall not have been taxed in any other state the company shall be taxed on its gross receipts, but provides no method for ascertaining the amount of the gross receipts, and fixes no rate of taxation, the gross receipts cannot be taxed.

On Motion for Injunction *pendente lite*.

*W. W. Howe*, for British Foreign Marine Insurance Company.

*Huntington & Dufour*, for Liverpool & London & Globe Insurance Company.

*Wynne Rogers*, for the State.

*Sam. L. Gilmore*, for city of New Orleans.

Before PARDEE and BILLINGS, JJ.

PER CURIAM. These suits are proceedings in equity, and submitted upon bill and affidavits for injunctions *pendente lite*. The complainants are foreign insurance companies, and have been taxed upon their gross receipts, estimated for the current year in advance by the assessors, and seek to enjoin the state officers and the officers of the city of New Orleans from collecting this tax. The statutes of the state on the subject are an act in relation to insurance companies, etc., No. 76 in the Acts of 1886, and the general annual revenue act No. 98 of the same year. Both these

acts were approved on the same day. The general revenue act was re-enacted in 1888. The act in relation to insurance companies provides that the capital of the foreign insurance companies shall be determined and certified to by the secretary of state yearly, and shall be the aggregate value of the deposits made in this state and in the other states of the Union, as the security for the policy-holders, and bonds or mortgages upon real estate in the United States, with the proviso as follows: Provided "that said capital has not been taxed and paid by the main agency or company in any other state, then taxation shall be levied upon the gross receipts, less deductions governing companies organized under the laws of this state." There is no other provision for taxing gross receipts. There is no method presented or indicated for ascertaining them. On the contrary, in the general revenue law, the valuations upon which taxes are to be assessed are required to be ascertained at the beginning of each year. In the general revenue law there is a most comprehensive enumeration of the things which shall be subject to taxation, but gross receipts are not mentioned, nor are they included in anything which is named. It is further to be observed that in the proviso, which contains the only authority for taxing gross receipts, no rate of taxation is fixed, or authorized to be fixed. In the absence of any method, which the nature of the thing would require for ascertaining or approximating to the amount of gross receipts for an entire coming year, as well as in the absence of the establishment of any rate at which the amount, when reached, should be taxed, we are of the opinion that the gross receipts of the complainants cannot be deemed to have been subjected to any tax by the legislature, and therefore allow the injunctions *pendente lite* as prayed for.

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### HENRY v. SUTTLE *et al.*

(Circuit Court, D. New Jersey. March 25, 1890.)

#### 1. EQUITY—PLEADING AND PROOF—VARIANCE.

Where a bill prays that a deed be set aside on the ground that its execution was procured by fraudulent representation of one of the defendants that it was simply a power of attorney, and the evidence shows that complainant had never executed the deed, and that her signature thereto was a forgery, the variance is fatal.

#### 2. SAME—LACHES.

Complainant took no steps to set aside the alleged fraudulent deed for five years after its execution, when she instituted an action which at the end of two years and a half was dismissed because not brought to a hearing. She then remained inactive for 10 years longer, during which time the land greatly increased in value, and passed to third persons, who made valuable improvements thereon. *Held*, that complainant's laches barred any equitable relief.

In Equity.

*H. M. Hitchings*, for complainant.

*John W. Griggs* and *Michael Dunn*, for defendants.

GREEN, J. This bill was filed to set aside a certain deed of conveyance alleged to have been procured by one John Rennet from the complainant by "fraud and deceit, and by false and fraudulent representations." The lands which were the subject of this conveyance are situate in Paterson, in this state, and are now claimed to be legally owned by, and are in the possession of, the defendants Suttle, Mirandom, Liotard, and Hinchcliffe, by virtue of sundry mesne conveyances to them. These defendants claim to have purchased the premises in good faith, relying upon the validity of their grantor's title, and for value. The allegations of the complainant, as set out in her bill of complaint, are that previous to 1870 she had been a servant in the family of John Rennet, for many years. While living in his family in that capacity, she became seised and possessed of a certain parcel or tract of land in Paterson, unproductive in its character. Unable to pay the taxes which had been and were annually assessed against the land in question, at her request Rennet paid them for her, and so in time she became indebted to him in various sums, increasing constantly, for which she gave him mortgages as security. The last mortgage so given by her was for the sum of \$729. It was admittedly a valid lien upon her lands. In 1870, the complainant asserts, she became desirous of selling and disposing of these lands, and, the better to accomplish her purpose, as she alleges in her bill of complaint, upon the advice and at the suggestion of Rennet, "ignorantly made, executed, and delivered to the said Rennet a paper which she has since discovered to be a deed of conveyance of said tract or parcel of land and premises, it being falsely and fraudulently represented to her by the said Rennet at the time of the said execution, and she thoroughly believing and relying upon the same, that the paper which she so executed and delivered was surely and solely an agreement or power of attorney to enable said Rennet to sell and dispose of said lands for her benefit, and to pay over to her the proceeds of the same, after deducting the sum of \$729 then claimed by said Rennet to be due to him, and secured by a mortgage upon said land; that the complainant did not intend or understand that she was executing a deed to the said Rennet, or was in any way parting with the legal title to said lands; that the said Rennet, having procured said deed by said false and fraudulent representations and deceit, caused said deed, on the same day, to be filed for record in the office of the clerk of the county of Passaic." It further appears from the record in this cause that, on the same day that this deed was executed and recorded, Rennet caused the mortgage upon the lands in question, given to him by the complainant to secure \$729, to be canceled of record; and, although it is not important, in the view I have taken of the case, it may be here stated, Rennet always claimed that the lands in question were in fact conveyed to him in satisfaction of this mortgage debt, and of other indebtedness of the complainant to him, amounting to about \$1,900. The bill further charges that after the execution of the said deed of conveyance, and some time in the year 1874, Rennet, together with his wife, made, executed, and delivered to the defendant William T. Suttle a mortgage upon said premises to secure the sum of



\$1,000, which mortgage was immediately recorded in the office of the clerk of the county of Passaic. In August, 1875, it appears that the complainant exhibited in the court of chancery of New Jersey her bill of complaint, against Rennet and wife and William T. Suttle, to have the deed to Rennet set aside on the ground that it was obtained from her by Rennet's false and fraudulent representations. In that bill of complaint the statements and allegations of the complainant touching the making, execution, and delivery of the deed to Rennet are practically identical with the statements and allegations of her bill of complaint in this court. As both bills prayed for injunctions against the defendants therein, they were duly verified by the complainant's oath. It further appears that the defendants to the bill of complaint filed in the court of chancery of New Jersey fully answered the same; Rennet, in his answer, denying the fraudulent and false allegations under oath, and Suttle claiming to be a *bona fide* mortgagee. The cause was never brought on for hearing; but, after repeated orders upon complainant to speed her cause, made by the chancellor upon motion of the defendants, the bill of complaint was dismissed, upon the written consent of the solicitor of the complainant, in 1877,—more than two years after the commencement of the complainant's suit, and more than seven years after the making of the deed to Rennet. It does not appear that any *lis pendens* was filed in the office of clerk of Passaic county by way of notice of the complainant's claim, as could have been done under the statute law of New Jersey. In 1878 the Suttle mortgage was foreclosed in the circuit court of Passaic county. The record of that foreclosure suit, as it appears in evidence in this cause, is regular and orderly in all respects. The final decree directed the sale of the lands and premises in question. At such sale, Matthew Suttle, an uncle of William T. Suttle, purchased the property; and to him a deed was made by the sheriff of Passaic county, who executed the writ of *feri facias*. The defendants other than William T. Suttle derived their titles to the lands in question from Matthew Suttle. There is no evidence that William T. Suttle had, at the time of the execution of the mortgage to him by Rennet, any notice or knowledge of the claim of the complainant to the mortgaged premises. The bill contains, also, a charge against all the defendants of conspiracy to deprive the complainant of her property, but such charge may be dismissed with the statement that there is no evidence to sustain it. The prayer of the bill is that the complainant may be decreed to be the rightful owner in fee of the premises in question; that the deed to Rennet may be decreed to have been obtained from the complainant by false and fraudulent representations, and declared to be void and of no effect, and to have conveyed to Rennet no right, title, and interest in or to the said premises; that the dismissal of the complainant's suit in the court of chancery was obtained by fraud; that the circuit court of Passaic county never acquired jurisdiction over the property of the said complainant, or over her, because of her non-residence in New Jersey; and that the defendants may be declared and decreed to have secured and taken their deeds of said property with full notice of the rights of the complainant

therein, and subject thereto, and that they have no right, title, or interest in and to the same, and that they should account for all moneys, emoluments, rents, issues, and profits received therefrom. There was also a prayer for injunction and for a receiver. The defendants have answered fully and under oath. They deny all charges of fraud or conspiracy, and claim to be *bona fide* purchasers of the lands in question for a valuable consideration, without notice.

Upon examination of the testimony taken under these issues, it at once becomes apparent that the complainant has, for some cause, shifted her grounds of complaint. She does not pretend to substantiate or justify the allegations made so specifically in her bill of complaint, but introduces, for the first time in her proofs, novel and more criminal charges against her employer, Rennet, but which charges are directly in antagonism with the allegations previously made by her. Now, there is no principle more firmly entrenched in equity practice than that a complainant must recover, if at all, upon the case made by and stated in the bill of complaint, and upon that alone. It is never permitted to a complainant to make one case by the specific allegations of the bill, and a wholly different one by the proofs, and yet be entitled to a decree. It is not only necessary that the substance of the complainant's case should be proved, but, to entitle him to a decree in his favor, it must be substantially the same case as that which he has stated in his bill; for the court will not allow a defendant to be taken by surprise, by permitting the complainant to prove a case different from that set up in the pleadings. It is absolutely essential that the *allegata* and the *probata* must correspond. Thus, where the bill sought to establish a trust by virtue of an express agreement, and the evidence was of a purely resulting trust, in an entirely different person and at a different time, the variance was held to be fatal. *Midmer v. Midmer*, 26 N. J. Eq. 299; *Same Case*, (on appeal,) 27 N. J. Eq. 548. And in another case, strongly illustrating the principle stated, where a bill filed to set aside a sale on the ground of fraud charged that there was collusion between an administrator and his son, to whom the property was sold, by which the son obtained an unfair advantage over other bidders, and purchased the property at a less price than it was worth, and the evidence showed satisfactorily that the son purchased the premises not by collusion with his father for his own benefit, but that they were in fact purchased for his father, although the sale was void because in violation of the well-settled doctrine of equity forbidding a trustee from becoming indirectly the purchaser at his own sale, yet it was held that the complainant was not entitled to relief upon that ground, because it was not the case made by the bill. *Howell v. Sebring*, 14 N. J. Eq. 84. The fatal effect of an essential variance between the allegations of the bill of complaint and the proofs under it is clearly stated in *Story*, Eq. Pl. 36, and notes; *Gres. Eq. Ev.* 23, 161; *Parsons v. Heston*, 11 N. J. Eq. 155; 1 *Daniell*, Ch. Pr. \*860; *Shields v. Barrow*, 17 How. 144; *Lloyd v. Brewster*, 4 Paige, 537; *Railroad Co. v. McFarlan*, 30 N. J. Eq. 180; *Andrews v. Farnham*, 10 N. J. Eq. 94; *Marshman v. Conklin*, 21 N. J. Eq. 546; *Vansciver v. Bryan*, 13 N. J. Eq. 436. In

the last case cited, (*Vansciver v. Bryan*,) Chancellor GREEN states the principle in these apt words:

"Evidence relative to matters not stated in the pleading, nor fairly within its general allegation, is impertinent, and cannot be made the foundation of a decree."

Applying this rule to the case now under consideration, and it becomes instantly apparent that the complainant must be denied any relief. The charge of fraud made in her bill is that, at the suggestion and by the advice of Rennet, her employer, and in whom she had entire confidence, she executed a certain writing which, as she was assured by Rennet, was simply and solely a power of attorney, in effect authorizing him to sell certain lands for her, and to account to her for the proceeds, while in truth the writing which she so executed ignorantly and trustfully was, as she discovered some time afterwards, a deed in fee-simple to Rennet for the lands in question. But not one *scintilla* of proof has been offered to sustain this charge. On the contrary, a very different case is sought to be made by all the evidence offered by the complainant, and that is that the complainant never signed, executed, or delivered to Rennet any deed or agreement or power of attorney or writing whatever; that Rennet never advised or counseled her to do so; that the deed which it was charged by her, at first, had been executed by her because of the fraudulent representations as to its character by Rennet had, as a matter of fact, never been signed by her; that she knew nothing of its contents; had never heard it read; had never acknowledged it before any officer authorized to take acknowledgments; had, in very truth, never seen the paper until March 29, 1889, 19 years after it bore date, when, for the first time, her attention was called to it while giving testimony as a witness on her own behalf in this cause. In other words, in her testimony she denies emphatically, and absolutely repudiates, all the allegations she had made in her bill of complaint touching the writing or deed in question, and the circumstances under which it was executed; and, Rennet being dead, she now boldly brings against him charges which, if true, should have been called to the attention of the grand inquest of Passaic county years ago. There remains no pretense in her evidence that her excess of faith and overconfidence in her employer, who had been so kindly paying her debts, led her into the execution of a writing of which she did not know the contents or effect; but she declares that the deed by which Rennet claimed title is a forgery, pure and simple. A greater variance between the *allegata* and the *probata* could hardly be conceived, and such variance must be held fatal to the success of the complainant in this case.

Arriving at this conclusion, it is hardly necessary to consider the other issues presented by the pleadings. Yet I think it proper to state that nowhere in the evidence offered by the complainant do I find any satisfactory proof of fraud tainting any of the transactions of which she complains. Neither in the Rennet deed, nor in the Suttle mortgage, nor in the foreclosure proceedings in the circuit court of Passaic county, nor in the dismissal of complainant's bill in the court of chancery of New Jer-

sey, nor in the conveyance of parcels of these lands to the respective defendants, is there visible any taint caused by fraudulent acts of any of the defendants; while, on the other hand, I cannot but conclude, from the testimony, that the defendants come into this court with clean hands.

Nor do I think that the complainant has shown such diligence in asserting her claim as to clear her from the charge of laches. For five years, admittedly, she slept upon her alleged rights. Then she asserted them, indeed; but so feeble was that assertion that in two and a half years it died of inanition. Then followed 10 years of absolute inaction. During that time these defendants, or some of them, expended large sums of money in the improvement of these premises. Because of this expenditure, and, as well, because of the growth of the city of Paterson, this unproductive property once belonging to the complainant has doubled, quadrupled perhaps, in value. Now the complainant thinks the time is opportune, and seeks the aid of this court. Her delay has been remarkable. Her success would carry disaster to innocent parties. Such conduct does not commend itself to a court of equity. The bill of complaint is dismissed, with costs.

**SOCIÉTÉ ANONYME DE LA DISTILLERIE DE LA LIQUEUR BENEDICTINE DE L'ABBAYE DE FECAMP v. WESTERN DISTILLING Co.**

(Circuit Court, E. D. Missouri, E. D. April 29, 1890.)

**INJUNCTION—VIOLATION—CONTEMPT.**

A defendant who, when enjoined from selling a certain cordial in certain bottles with a particular label, sells its entire stock of the cordial, bottles, and labels to a third person, under an arrangement that he would fill such orders for the cordial as the defendant might receive, is guilty of a violation of the injunction, though the defendant did not share in the profit of filling such orders, and though it had received the advice of counsel that it might sell its stock in bulk without violating the injunction.

**On Motion to Punish the Defendant and Its President for Contempt.**  
*F. N. Judson and Chas. Bulkley Hubbell, for complainant.*  
*Rassieur & Schnurmacher, for defendant.*

THAYER, J. The order heretofore entered in this case commanded the defendant, its officers, servants, and agents, to desist during the pendency of the action "from putting up, selling, or exposing for sale, \* \* \* any liquid or cordial commonly called 'Benedictine,' which was put up in bottles, or with labels or wrappers, made in imitation of, or resemblance to, the bottles, labels, or wrappers in use by complainant for putting up a liquid or cordial known as 'Benedictine.'" It is admitted by the defendant that, after the service of this order, it sold to a third party its stock of liquor called 'Benedictine,' also its stock of bottles,

labels, and wrappers made in imitation of those used by complainant for putting up Benedictine, and that it turned over to such third party all orders for Benedictine in bottles subsequently received from its customers, and notified its customers that such third party would fill such orders. Though not expressly admitted by the affidavits, the court is satisfied, as a matter of fact, that the sale by defendant of its stock of cordial, bottles, labels, etc., to such third party was made for the express purpose of enabling him to supply defendant's customers with Benedictine put up in bottles, and with labels and wrappers, made in imitation of those in use by complainant, and under an arrangement with such third party that he would so supply them. Under the circumstances, the defendant must be adjudged guilty of a violation of the injunction. By entering into an arrangement with a third party to do the very act that it was enjoined from doing, and by supplying him with the means of doing the prohibited act, and by turning over to him such orders as were from time to time received from its customers for Benedictine put up in bottles, the defendant made itself a party to the act in question, and is as much responsible for it, as if done by itself. A party who, while resting under an injunction restraining him from doing a given act, counsels, advises, and procures another to do the act, violates the letter as well as the spirit of the restraining order. Even the criminal law regards one who counsels and advises another to commit a crime as an accessory before the fact, and as punishable in that capacity.

The affidavits filed by the defendant show that it did not make any sales of Benedictine in bottles, in its own name, after the injunction was served, and that it did not share in the profits of the sales made by the person to whom it transferred its stock of bottles, labels, etc. This, however, is immaterial. In a proceeding against the defendant for violating the injunction, its responsibility cannot be tested by determining whether it realized any profit from the sales in question. The test is, simply, whether it was intentionally instrumental in causing such sales to be made, and I have no doubt that it was.

Advice of counsel is also pleaded as an excuse for what was done by the defendant. The proof shows that advice was given to the effect that defendant might sell its stock of Benedictine in bulk, and even its stock of bottles and labels, without violating the injunction. But, conceding such advice to have been given, and to have been sound as far as it went, still it does not excuse the defendant for selling the articles in question under an arrangement with the purchaser that he would do with them precisely what the defendant was prohibited from doing, and that he would fill such orders as the defendant might receive, but was prohibited from filling. It is not claimed that advice was given to the effect that such an arrangement could lawfully be entered into, although it sufficiently appears that that was substantially the arrangement under which the sale was made. The defendant and its president are hereby adjudged guilty of contempt, and a joint fine of \$50 is hereby imposed, together with the costs of this proceeding.

CHEESMAN *et al.* v. HART *et al.*

(Circuit Court, D. Colorado. April 28, 1890.)

## 1. MINES AND MINING—STATUTORY CONSTRUCTION—SIDE LINES.

Where the strike of the vein passes perpendicularly through the end lines of the location, the fact that between the end lines the outcrop is forced by the surface influences of slides and *débris* to meander so as to make slight variations from the general trend of the strike, does not prevent the side lines from being parallel with the vein; it being only necessary in such case that they should be substantially parallel.

## 2. SAME—END LINES.

The fact that a location is cut by another valid claim crossing it obliquely does not make the line of such intersection the end line of the location when the location extends beyond the intersecting claim.

## 3. SAME.

Where part of the end of a location is adjudged to be in conflict with a prior claim, and thereupon the owners of the prior claim quitclaim the land in conflict to the owners of said location, whose possession thereof is not interrupted, the location will continue to include the land in conflict.

## 4. SAME—LOCATION—PRESUMPTION.

Where mining locations which have passed out of the hands of the original owner have stood unchallenged for years, and have been developed to a considerable extent, it is proper in a suit involving their validity to instruct the jury that "the certificates of location are presumptive evidence of discovery, and every reasonable presumption should be indulged in by the jury in favor of the integrity of the locations."

## 5. SAME—ADJOINING OWNERS—DIP.

Under Rev. St. U. S. § 2322, which gives the locators of lode claims the right to follow the dip of the vein beyond their side lines, such right is not cut off by the issue of a patent for the land into which such vein in its dip extends.

## 6. TRIAL—PRODUCTION OF PAPERS.

Where during the progress of a trial defendant's counsel, on being asked by plaintiff to produce a certain paper, promises to look for it, and bring it into court if found, and the plaintiff's counsel does not again call the matter to the attention of the court, the right to insist on the production of the paper, or introduce secondary evidence of its contents, is waived.

## 7. SAME—RIGHT TO OPEN AND CLOSE.

In an action of trespass for taking ore from plaintiff's mining claim, where the defendant admits the taking and seeks to justify it, and the only evidence necessary to make out a *prima facie* case for plaintiff is the production of his patent, and proof of the quantity and value of the ore taken, it is proper to allow the defendant to open and close the argument to the jury; the burden of proof on the main issue in the case being on him.

## 8. NEW TRIAL—JURISDICTION OF DISTRICT JUDGE.

A district judge who has, under order of the circuit judge, tried a case in another district, has jurisdiction to pass upon a motion for a new trial in the case, even after he has returned to his own district, where the parties waive his returning to the other district for the purpose of deciding the motion.

At Law. On motion for new trial.

C. J. Hughes, for plaintiffs.

B. F. Montgomery, A. S. Frost, and C. C. Parsons, for defendants.

PHILIPS, J. I have examined the grounds for new trial herein as fully as my limited time would permit, and can give but a cursory review of the many questions involved. During the progress of the trial, extending over a period of two weeks, with access to the statutes and decisions of the courts in similar mining controversies, aided by the daily discus-

sions of able counsel on both sides, the court learned all it could, and its conclusions on the law are expressed, as fully as seemed justifiable, in the charge to the jury reported in 40 Fed. Rep. 787. Such questions were new to the court, but it labored to understand so much of the facts and the law as would enable it to present the case fairly to the jury. Some of these questions were embarrassing, and are by no means free from doubt. The evidence impressed my mind, by a great preponderance, as tending to establish the existence of an outcrop of a lode of mineral within the surface lines of the Champion claim, and that this vein was, in contemplation of the statute, a continuous one to the point of the alleged trespass.

The question of fact and law which has most perplexed the mind of the court is as to the parallelism of the defendants' claims. The parallelism of the end lines of the surveys and the parallelism of the side lines to the actual strike of the outcrop were left by the evidence in such condition as to render the determination of this fact peculiarly a matter for the jury; and I tried to so frame the charge as to leave them uninfluenced by any impressions of the court respecting the question of fact.

As to the point so much pressed by plaintiffs' counsel, that the outcrop of the vein ran so zigzag or serpentine as to make it the duty of the court to tell the jury that, as matter of law, it was not parallel to the side lines of defendants' claim, my impression at the trial was, and on further consideration my opinion is, that it was not in the mind of congress, in framing the section of the statute in question, that, where the strike of the vein passes perpendicularly through the end lines, the mere meanderings of the outcrop between the end lines (caused by the surface influences of slides and *debris* on the mountain sides, as the evidence impressed me was the fact in this case) should absolutely control the question of parallelism; but rather that the spirit and reason of the statute require that the settled and permanent course of the vein on its strike, as nature fixed it, should control; of course such zigzagging being restricted to slight variations from the general direction and trend of the strike. The illustration furnished by the expert witness Boehmer in the scored-out apple quite aptly demonstrated the principle of law and fact. It was with this thought in mind that I employed in the charge the term, "substantially parallel," assigned for error in the motion for new trial. It ought not to be that the court should apply to these locations the most exact mathematical precision. The law, being designed for the encouragement and benefit of miners, should be liberally construed, and should look to substance rather than shadow; and here, as elsewhere, should be administered on lines of obvious common sense. So long as the right of trial by jury stands, the court should be allowed to assume that the jury may understand the purport of words and terms which by their common use have acquired a recognized meaning. The term "substantially" means "really, truly, essentially, competently." In the connection in which it was used in the charge the jury could but understand that the variation from parallelism must be substantial, material, and

real; that a very slight variation from a mathematical line was not of substance. I am free to make this confession, that neither at the trial nor after reference to my minutes did or do I obtain from the evidence a very satisfactory impression either as to the precise shape in which the original survey of the Champion claim, or the relocation of 1882, left it. There was an amended location in 1886. Whether or not the lines were substantially parallel under all the evidence, (much of it conflicting,) together with the aid of the maps and diagrams before them, I thought was peculiarly a question for the jury. Following the decisions of the supreme court of Colorado, the charge told the jury that "such amendments or relocations, when made, had relation back to the time of the original location; and these plaintiffs are in no position in this controversy to question such amendments or relocations." The plaintiffs had the full benefit of what counsel so urgently contends for respecting the end lines intersecting the actual outcrop in the following declaration of law, drawn by himself:

"The court further charges the jury, at the instance of the plaintiffs, that end lines, as designated in the location certificate, are not necessarily in law the end lines, unless they actually cross the actual outcrop of the vein."

This is certainly as much as, if not more than, they could claim, in view of the language of the federal statute, (section 2322:)

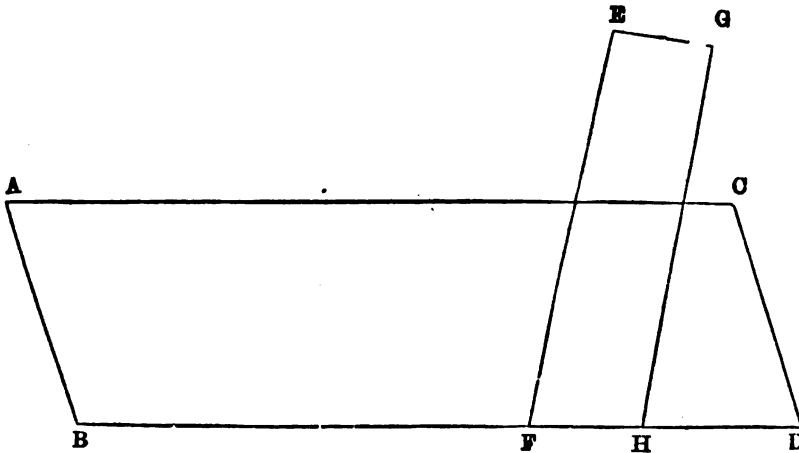
"Their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes, drawn downward \* \* \* through the end lines of their *locations*."

In addition to which the jury were further charged that—

"The statute of the United States also requires that the end lines of the claim should be parallel with each other, and, in asserting a right to follow the vein on its dip without the side lines of their location into plaintiffs' location, defendants must show the outcrop or apex of such vein to be in their own location throughout the ground in controversy, being the extent of the locations of plaintiffs and defendants, parallel to each other."

It was insisted at the trial, and is reurged forcibly in the motion for a new trial, that the court was in error in holding, as stated in the charge, that "in considering this issue [of parallelism] you will disregard the fact that the south end of the Champion claim extends beyond or is intercepted by the Pacific survey." The contention of counsel, reduced to its essence, is that, whenever a location as surveyed and certified is intercepted by another valid claim going through it perpendicularly or obliquely, in the following form:





(A, B, C, D, representing the claim as located, and E, F, G, H, representing the intersecting claim.)

—then the end lines of the location are to be determined by the lines A B and E F. The said statute allows to the locator of any lode claim a length of 1,500 feet along the vein. It has been the custom to obtain this extent by locating over and across an intersecting claim, and in asserting the right of length the intersecting claim of course is excluded.

The construction contended for by plaintiffs would lead to this: that every time there was patented an intersecting slice through a location, although it left to the locator on either side of the patented strip unchallenged ground, the end lines to which are parallel, he must readjust his end lines so as to obtain his parallelogram without any interruption between the end lines; and if, in the mean time, between the original location and the amendment a lateral contiguous location has passed to patent, the contention of counsel is that the extralateral right to pursue the outcropping vein is gone irrevocably; and that even the doctrine of relation, referring back to the original entry, would not apply to save the right. I do not understand that such has been the recognized custom among miners, nor do I believe it executes the will of the statute. So in respect to the Belle of the East claim. It is true that the evidence shows that after the location of the Widow McCree claim the Belle of the East claimed that the north end of the former conflicted with the prior right of the latter, and so it was adjudged. Thereafter, and prior to the alleged trespass, this controversy was ended by the Belle of the East quitclaiming to the defendants. There was no interruption in the possession of the disputed territory occupied by the Widow McCree claim. Both prior and subsequent to that controversy the evidence tended to show the defendants had held and operated as one claim and system of development the Champion group, including the Widow McCree claim, as originally surveyed. The parallelism of the end lines of the Widow McCree claim was not practically disturbed. It seems to me that it

would hew to pieces on the sharp edge of merest technicality defendants' apex rights, which they were prosecuting, by looking only at a fragment of the case instead of its essence in the entirety. But little question can be made that when defendants, as claimants of the Champion group, ask for a patent, it will be granted to cover the extent of the original Widow McCree location.

Severe criticism is made of that portion of the charge respecting the assault made by plaintiffs upon the discovery location on the Champion claim. All that was requested by plaintiffs defining the statutory requirements of location, the necessity of the discovery of mineral in place, was given in the charge. The qualification, if such it may be termed, put to this is found on page 791 of the reported charge. The statute of Colorado (sections 2399, 2401) provides for such location of certificates to the discoverer of a lode, and what shall be done by the locator before filing such location certificate, so that such certificate amounts to and imports something. The evidence on both sides tended to show the long-standing indications of a staked claim, and of shafts sunk or holes dug. The witnesses differed only as to the precise point of such workings. The claims had stood unchallenged for years, and work of more or less importance had been prosecuted at various points on these claims years before this controversy. If, after all this, the court should not tell the jury that every reasonable presumption should be indulged in favor of the discovery of a lode by the miner, it is difficult to conceive of a state of facts where such intentment should arise. Any other rule, it seems to me, would render such claims practically unmarketable or valueless in the hands of an assignee. The miner goes, digs, and delves, and is so satisfied that he makes the survey, stakes off his claim, and then makes his location certificate, which is entered of record. After this he sells to an honest man, and passes out of view or dies. All the subsequent workings go to show the existence of a lode or vein on the claim of more or less importance. Can it be that after the lapse of many years the assignee must lose his claim because of his inability to produce the lost or the dead, and prove affirmatively an actual visible discovery by the original locator of ore in place where he dug? Possibly the charge in this particular would have been more theoretically correct had the court told the jury that it was not necessary that defendants should establish such discovery by witnesses to the physical fact at the time. But the same might be inferred from the certificate of location, the manifestations of workings done, the long tenure of the claim, the development of a vein on the claim by subsequent working, and from all the surrounding circumstances. In view of the actual proofs at the trial in this case, had the jury found for the plaintiffs on the ground of the lack of proof of an original discovery, the court would have felt it to be its solemn duty to accord a new trial. Nor do I think even after "cooling time" that the language employed respecting "witnesses sent to these old opening, with their accumulated debris, to obtain evidence by inspection that no vein was in fact found by the original locators," as also what was later on said respecting witnesses in general, was any too strong. Courts, so

long as they are presided over by flesh and blood and mind, however weak or strong, must be expected to feel and think. Language, which is the vehicle of thought, with its seat in the heart, must reflect some tinge of the conviction of an earnest man; and while a proper judicial temper should be rigidly maintained, the judge on the bench should ever feel he is a minister of justice, and should not allow the truth to fail for lack of courageous action and frank utterance on his part. My observation at this trial satisfies me that an important mining litigation is a model training school for expert testimony; and if there ever is a case where the judge himself, like the witnesses in this case, should have the largest latitude of taking part in the discussion, it should be accorded in such cases, at least so far as it "is profitable for doctrine, for reproof, for correction."

It is again urged, as at the trial, that the court should hold that, after the grant of a patent to the adjacent claimant, the right of the mere certificate holder to pursue his vein beyond his side lines is at an end; in other words, that this statutory right of the apex owner applies only as between certificate locators. Such, I am advised, has not been the holding of Judge HALLETT, whose opinion in mining law is justly entitled to great respect. Nothing short of a sense of the supreme command of the law could induce me to set up in this case a different ruling. Counsel has presented his view of this question with marked clearness and force. Without undertaking to review the authorities or his argument, it must suffice here for me to say that the statute contains no warrant for this position, unless it is to be found between the lines. The language of the federal statute (section 2322) in explicit terms declares:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, \* \* \* shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

The legislature of Colorado certainly entertains the view that the extralateral right exists without restriction in the mere holder of a certificate location. Section 2405, Gen. St., declares that—

"The location or location certificate of any lode claim shall be construed to include all surface ground within the surface lines thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lie inside of the side lines, extended downward vertically, with such parts of all lodes or ledges as continue by dip beyond the side lines of the claim."

This, likewise, has ever been the view of the department of the interior, as evidenced by the expressed reservation from the grant in the patent. While of course this is not binding on the courts, as it is a matter of statutory construction, yet it is entitled to respect until otherwise affirmatively adjudicated. It might present a different question, if,

after the patentee sunk a shaft from the surface to the underlying vein, and had taken actual possession of it, a subsequent certificate locator of the apex should undertake to oust the patentee. But that is not this case.

As to what is said in the brief of counsel touching the Champion group being regarded as one property, it seems to me to be sufficient to say the language of the charge does not justify the elaborate criticism. The court did not tell the jury that the holding of the several claims as one property, and prosecuting the work on any one as a system of development of the whole, would obviate the necessity of an original location, or cure substantial defects in parallelism. Judge BREWER refused to strike out of the answer averments in this particular, and I gave this matter such office in the charge as it seemed to deserve.

The action of the court on the effort of plaintiffs to get in evidence some map or survey, and affidavits used at some preliminary hearing, connected with the equity branch of this case, is assigned for error. According to my recollection of the first matter, plaintiffs offered a survey, or something of the kind, made out by some witness of the defendants, but not by defendants themselves. My further recollection is that the court observed that, without the testimony of the party who made this paper as to its correctness, he did not see how defendants could be bound thereby. It is possible that, if it had been shown that defendants had approved and used it, it would have been competent evidence, as being of the character of an admission or circumstantial fact, to go to the jury. But certainly, in view of all the surveys, maps, and diagrams before the jury from both sides, with all the witnesses before the court for examination and cross-examination, and no subsequent attempt by counsel to contradict any one by offering such survey or paper therefor, the court cannot see or believe that any such evidence could possibly have changed the verdict; and, in respect to the affidavits or paper claimed by plaintiffs to be in possession of defendants' counsel, the history of what occurred at the trial will satisfy the judgment of counsel himself that the court is not in fault for the non-production of that paper. Counsel had taken the proper legal steps to bring the paper, whatever it was, into court, by giving notice to opposing counsel to produce it. When defendants' counsel was asked in court to produce this paper, the statement by the latter was that he had looked for it, and had not found it, but that he would examine further, and if he had it he would bring it into court without more. There the matter rested. The paper was not brought to court. It was expected by the court that before the case closed plaintiffs would again bring the matter up for some decisive action. If it had been shown to the court that defendants' counsel withheld the paper, on motion they would have been ordered to produce it, or been proceeded against for contempt, and plaintiffs would have been permitted to show the contents by parol. The matter afterwards passed out of the mind of the court, as it seemed out of that of plaintiffs' counsel. Certainly no error was committed by the court in this matter, as it was not asked to

take any affirmative action therein. The plaintiffs had the benefit before the jury of the moral effect of what transpired in court relative to this incident.

Error is assigned on the action of the court in allowing defendants' counsel to open and close the argument to the jury. To properly understand this action of the court, a brief reference to the state of the pleadings is necessary. Owing to the particular character of the averments of the petition as to jurisdictional facts and the grounds of defendants' claim, a question of law arose at the outset as to whether or not the plaintiffs should not go so far in their proofs as to maintain these allegations. But the court soon became satisfied that the question of jurisdiction had been practically eliminated by the action of Judge BREWER in striking this issue from the answer, and later on a careful reading of the answer satisfied the court that it, in effect, admitted plaintiffs' title to the surface location of the Battle Mountain and Little Chicago claim, and directly admitted the invasion of the side lines of the plaintiffs' claim. Under the issues as they really stood, the only burden the law imposed upon plaintiffs was the mere formal introduction of the patent in evidence, and proof of the quantity and value of the ore taken. As it was not to the interest of defendants to disprove the presence of valuable ore at this point, the evidence on this issue was brief, and merely as to the value. If, forsooth, the plaintiff saw fit to extend this mere formal inquiry over a wider field, it was not demanded by the pleadings or by the court. It is manifest from the trial, the charge of the court, and this motion for new trial, that the real burden rested, and heavily, on the defendants. They held the laboring oar throughout on all vital issues in question. From them the burden of the real issue never shifted. Under such a peculiar condition of the trial, I felt that common fairness demanded that defendants' counsel should open and close the argument. This view of the real equity of the rule in question I have long entertained. I fought for it while at the bar, and shall endeavor to impartially maintain it, as one founded in justice and equality, while I remain on the bench.

My jurisdiction to pass upon this motion is called in question on the ground that I am not now acting under the order of Judge BREWER, which sent me to Colorado to hold circuit court in aid of the district judge. It was the pending litigation between these parties mainly which induced Judge BREWER to send me to Colorado, partly owing to the fact that Judge HALLETT wished to be relieved from sitting in the cause on account of his relation to some of the parties. The trial of the cause would have been incomplete without a final disposition of the motion for a new trial. The right to try the principal cause carries with it the incident. Had I remained at that court until the coming in of the motion for new trial, four days after the verdict, as I might well have done, no question could possibly arise as to my jurisdiction to pass upon the motion. Equally true must it be that I might have returned to Colorado after the motion was filed, and taken it up and decided it. Counsel for both parties having agreed to waive the necessity or burden of such

trip to me, my right to pass upon this motion must be viewed as if I had gone to Colorado, or remained there in the first instance, to hear the motion. Unpleasant as it is to act under even the imputation of assuming authority, I feel constrained to proceed in this matter under an imperative sense of official duty. As the consideration of this motion involves not only a review of the questions of law in the case, but the complicated issues of fact, as well as the official and personal conduct of the trial judge, it at once becomes apparent that there is almost a necessity that he should pass upon this motion, as also the bill of exceptions, if any, to be presented in the case. Respecting what has been brought into the discussion on this motion touching indications of partiality at the trial, I may be indulged simply to say that both litigants and counsel on either side were entire strangers to me when the trial begun, and my acquaintanceship with them was limited to the court-room. If collisions between court and counsel occurred, it was doubtless attributable to mutual misconception. Two temperaments much alike, each impelled by a spirit of self-assertion, now and then produce antagonisms more apparent than real. I am satisfied that counsel did his duty, and did it well, on this trial; and no language could express my sense of regret if I felt there was any occasion for the thought that the scales of justice were unevenly held by the court. The court tried the case as best it could; and, if it erred to plaintiffs' prejudice, it will bring no regret to the court personally to see the wrong righted by an appeal to a higher court, or upon a subsequent trial, should the plaintiffs see fit to resort to either. The remedy being left to plaintiffs either to appeal or bring another action within a year, under the provisions of the Colorado statute, I feel the less hesitancy in following my judgment in denying the motion for a new trial.

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CENTRAL TRUST CO. OF NEW YORK *v.* SHEFFIELD & B. COAL, IRON & RY. CO. *et al.*

(Circuit Court, N. D. Alabama, N. D. February 12, 1890.)

1. MECHANICS' LIENS—IMPROVEMENTS—COAL MINES.

A coal mine is an improvement on land, within the meaning of Code Ala. 1886, § 3018, giving a lien to every mechanic or other person doing work or furnishing material, fixtures, or machinery "for any building or improvement on land."

2. SAME—MATERIALS.

Coal-cars used in a mine are "material," if not "fixtures or machinery," within the meaning of Code Ala. 1886, § 3018, giving a lien for "any material, fixtures, engine, boiler, or machinery" furnished for any building or improvement on land.

On Exceptions to the Master's Report.

Suit by the Central Trust Company of New York against the Sheffield & Birmingham Coal, Iron & Railway Company, and others. Intervention of the Watt Mining Car-Wheel Company.

*Roquemore, White & McKenzie*, for intervenor.

*H. B. Tompkins and Lawrence Cooper*, for defendants.

PARDEE, J. The intervenor came into this court to have recognized and enforced a lien claimed on a certain coal mine, and on the machinery, equipment, and fixtures therein, especially on 240 coal-cars, all of which is in the custody of this court. Under a specific contract, the intervenor furnished to the owners of the mine cars specifically adapted for use in the mine; and for the furnishing and equipment thereof—

"It is agreed that said cars are now in use in said mine as a part of the equipment thereof, and are used to haul coal from where it is mined to the opening or mouth of the mine, upon an iron track; and they are propelled or drawn by machinery at the mouth of the mine, or pushed by hand, or drawn by mules, and are not adapted to any other use or transportation, or used in any other manner."

The case shows that the laws of the state of Alabama with regard to recording a lien were complied with. In short, the joint answer of the complainant, defendant, and the receiver, to the intervention, admits the entire case as claimed for the intervenor except as to the lien. The intervention was referred to a special master to report upon the amount due, and as to the character and extent of intervenor's lien. The master has reported against the intervenor on the question of lien on the ground that a coal mine is not a building or improvement, within the meaning of section 3018, Code Ala. 1886. As a further reason for his report, the master doubts if the cars are such "material," "fixtures," or "machinery" as come within the purview of the said statute. Intervenor's lien is claimed under section 3018, Code Ala. 1886, as follows:

"Every mechanic or other person who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler, or machinery for, any building or improvement on land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or sub-contractor, upon complying with the provision of this chapter shall have a lien therefor on such building or improvement, and on the land on which the same is situated," etc.

The first question presented is whether or not the coal mine, as set forth and described in the intervention and exhibits, is such an improvement upon land as comes within the meaning of the statute just quoted; it being contended on one side that the word "improvement" in the statute must be limited in its meaning to buildings and things *ejusdem generis*; in other words, that an improvement upon land which is not in the nature of a building is not an improvement within the meaning of the statute. On the other hand, it is claimed that, in the proper construction of the statute, the word "improvement" is not at all limited by the word "building" preceding it, but that it is to be taken as extending the class of constructions which may be the subject of a lien, rather than limiting such class. It is said that this point has never been settled by the jurisprudence of the state of Alabama, and is to that extent a new question. The question was before the supreme court of the state in the case of *Iron-Works v. Dorman*, 78 Ala. 218, but was not passed upon; the lien being defeated for failure in description of land subject to lien. An examination of the legislation and jurisprudence of the state with

reference to this matter of liens will, however, decidedly aid in reaching a correct decision. Section 3101 of the Code of 1867 provides as follows:

"Mechanics and builders have a prior lien upon the tract, parcel, or lot of land on which buildings are erected by them, and on the buildings so erected, for the price agreed on, or compensation to be paid, and materials used in the construction thereof, unless surety be given to such builders for the performance of the contract, or an agreement be made, in writing, waiving the lien."

In 1873, (Acts Ala. 1872-73, p. 117,) the said section 3101 of the Code of 1867 was amended so as to read as follows:

"Mechanics and builders have a prior lien upon the tract, parcel, or lot of land on which buildings, inclosures, or fixtures are erected by them, and on the buildings, inclosures, or fixtures for the price agreed upon, or compensation to be paid, and materials used in the construction thereof, unless there be an agreement in writing waiving the lien," etc.

This act extended the cause of the lien from "buildings" to "buildings, inclosures, or fixtures," and the subject of the lien from "land" and "buildings" to "land," "buildings, inclosures, or fixtures." In 1876, three years later the law was again amended so as to read as follows:

"Every mechanic or other person who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler, or machinery for, any building, erection, or improvement upon land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this chapter shall have, for his work or labor done, or materials, fixtures, engine, boiler, or machinery furnished, a lien, to the extent and in the manner by this chapter provided, upon such building, erection, or improvements and upon the land belonging to such owner or proprietor, on which the same are situated, to the extent of one acre," etc. Section 3440, Code Ala. 1876.

This act extended the subject of the lien from "land," "buildings, inclosures, or fixtures" to "land," "building, erection, or improvement." The next change that seems to have been made in the law is made by section 3018 of the Code of 1886, *supra*, in which the statute last quoted is amended by striking out the word "erection," so that the statute reads, "for any building or improvement on land," and by further striking out the words, "for his work or labor done, or materials, fixtures, engine, boiler, or machinery furnished," in that part of the section describing extent of the lien, so as to read, "shall have a lien," etc. The changes made at this time were in codifying, and do not appear to materially enlarge or restrict the scope and effect of the act of 1876. In the case *Ex parte Schmidt*, 62 Ala. 252, the supreme court of the state of Alabama, in considering the proper construction of the mechanic's lien under the Code of 1876, said:

"Our present statutory system, defining and declaring liens of mechanics, employes, and material-men for buildings, erections, or improvements upon lands, or for repairing the same, are of recent enactment, and their construction, in the main, remains to be settled. Such liens were unknown to the common law, and hence are purely of statutory creation. They are to be construed as other statutes introductive of a new policy are construed; and, while it is not permissible, under the guise of interpretation, to extend the provisions of the



enactments to cases not provided for, it is equally unjust and unauthorized to emasculate the statutes by a narrow or strict construction of their beneficial provisions. Their general policy was and is to secure to the artisan and laborer the just reward of his labor, and the lien conferred is somewhat analogous in its aims to the equitable lien of a vendor for unpaid purchase money of land sold. It is inequitable, says the law, that one shall enjoy another's lands and not pay the promised price. So the policy of the statute we are considering declares that it is inequitable that one shall enjoy another's goods, or the products of his labor and skill, without making just compensation therefor. The same reason which upholds the policy of the one vindicates the justice of the other. Our legislative policy for the last thirty years, and the overthrow of private fortunes consequent upon our late civil war, have had the effect to place much of the property of the country in fiduciary hands; and the beneficiaries of many estates, while they could and did enjoy the products of their property, were left without power to fasten a charge upon it by any contract of theirs. This, in many instances, worked great hardship and inflicted grievous wrong; and our very liberal exemption statutes, in the absence of a special waiver, have placed the entire property of much the larger part of our population beyond the reach of legal process. The manifest and deplored result of all this has been that the honest toil of the laborer, and the merchandise of the material-man, have often been appropriated by a faithlessness in some cases highly culpable. These considerations, no doubt, influenced the legislature in declaring the very liberal and comprehensive system of liens now found upon our statute-book. It is our duty, in construing these statutes, to give to the language its natural import and scope, and thus carry into effect the intention of the legislature as far as it can be gathered from the language employed."

If the changes made in the statute from 1867 to 1886 are considered, and the statute itself is considered and construed in the light of the decision of the supreme court, just quoted, it seems clear that the lien granted is not to be restricted to material, etc., furnished for any building or improvement of the same kind and nature as a building upon land, but rather that the words "building or improvement," in the law, are used independently, and as having a different meaning; and, if not independent of each other, then that the word "improvement" is of the greater significance, and has the larger meaning; otherwise the act of 1876 is useless, for the act of 1873, under the description of inclosures and fixtures, included improvements that were of the same kind and nature as buildings. The decision in *Ex parte Schmidt*, *supra*, is in harmony with *Copeland v. Kehoe*, by the same court, reported in 67 Ala. 594, which latter case is cited by the master as favoring a strict construction of the statute. Neither case proposes to go outside the language of the statute to find its meaning, but the former case does make use of the light furnished by the current history of the state to show the meaning of the words used in the statute, which is no more going outside the statute than would be a resort to a dictionary. Statutes like the one in hand are in derogation of the common law, and courts have been inclined to construe them strictly; but the better opinion now is that these statutes are highly remedial, and should be construed so as to carry out the objects in view. See *Ex parte Schmidt*, *supra*; *De Witt v. Smith*, 63 Mo. 263; *Taggard v. Buckmore*, 42 Me. 77; *Buchanan v. Smith*,

43 Miss. 90; *Weathersby v. Sinclair*, Id. 189; *Putnam v. Ross*, 46 Mo. 337; *Bullock v. Horn*, 44 Ohio St. 420, 7 N. E. Rep. 737. At the time the act of 1876 was passed the state of Alabama was known to have immense mineral resources awaiting development, and wanting capital therefor. Mechanics' liens were restricted to buildings and things *ejusdem generis*. The new law, in terms, extended the lien to all improvements on land. If this word "improvement" is given its ordinary meaning, the new law is extended to cover the construction of coal and iron mines; and thereby great help is given to the owners of mineral lands to develop their property, and such development increases the general prosperity of the state. There was no reason why capital and labor put into the coal and iron industries should not be encouraged and protected as well as in other works and improvements. A going coal mine is not merely a hole in the ground. It is made up of shafts, drifts, slopes, engines, machinery, platforms, cars, tracks, scales, etc.; and, taken as a thing, if not a building, it is unquestionably an improvement, and an improvement on land. Taking into consideration the importance and condition of the mines and mining interests of the state in 1876, it is a fair presumption that the legislative intention in the act of 1876 was mainly to extend the lien of mechanics and material-men for work and material so as to aid in the development of the state's mineral resources. However this may be, it clearly appears to me that the coal mine described in the intervention and exhibits is an improvement, within the meaning of the terms used in section 3018 of the Alabama Code, and that for material, fixtures, engine, boiler, or machinery furnished therefor, a lien results to material-men on compliance with the requirements of the statute.

The question remains as to whether the coal-cars, as furnished under the contract by intervenor, are "material," "fixtures," or "machinery," within the meaning of said section 3018. There is good authority at the present day for holding rolling stock of a railroad to be, in a general sense, "fixtures." See brief of *Matt Carpenter*, 2 Wall. 647, note. And many cases to that effect may be cited where the question arose generally under mortgages. In Alabama the question is not decided. Whether the coal-cars in this case can be considered machinery, as they have no motive power, and "are propelled by machinery, or pushed by hand, or drawn by mules," query? "Machine. A contrivance which serves to apply or regulate moving power; or, it is a tool, more or less complicated, which is used to render useful natural instruments." Bouv. Law Dict. "The term machine includes every mechanical device, or combination of mechanical powers and devices, to perform some function and produce a certain effect or result." *Piper v. Brown*, 4 Fish. Pat. Cas. 175. Material, however, is a word of such general import that I see no difficulty in making it cover the cars in question. "Material includes everything of which anything is made." See Bouv. Law Dict.

It is a conceded fact in this case that the contract with intervenor stipulated that the coal-cars were to be furnished for the equipment of the particular mine, and were used for that purpose. As the mine ready for operation is an improvement on land, and the coal-cars are a neces-

sary part of the mine, considered as an entirety, the coal-cars were material for the improvement, and within the statute. The intervenor should have judgment recognizing its lien as prayed for. The master's report should be reformed and amended so as to conform to the views herein expressed, and, as so amended, should be approved and confirmed; and an order to that effect will be entered.

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UNITED STATES v. BOULIGNY.

(Circuit Court, E. D. Louisiana. April 26, 1890.)

**HUSBAND AND WIFE—COMMUNITY PROPERTY.**

A wife having inherited money, and the community being indebted to her, her husband, in payment of such debt, conveyed certain land to her. This land was afterwards exchanged for another piece of land, title to which was made to the husband, though afterwards husband and wife, and the person with whom the exchange had been made, united in a notarial act, declaring that the transfer was intended to have been to the wife, and that the land transferred was exchanged for her paraphernal estate. *Held*, that the land belonged to the community, and was subject to a writ against the husband.

*F. L. Richardson*, for intervenor and Mrs. Judice, third opponent.  
*Wm. Grant*, U. S. Atty.

**BILLINGS, J.** The facts are as follows: The third opponent claims the property, which is immovable, on the ground that it is her paraphernal estate. The evidence shows that she had inherited money; that the community was indebted to her; and that, in payment of her debt, the husband conveyed to her a piece of real property. This property she, in connection with her husband, exchanged for another piece, which is the property seized herein. In the conveyance through which the exchange was effected the title to the land seized was made to the husband alone. Subsequently the third opponent and her husband, and the party with whom the exchange had been made, united in a notarial act, declaring that the transfer of the piece of property seized herein was intended to have been to the wife, and that it was exchanged for her paraphernal property. Upon these facts, the real estate in question belongs to the community, and is subject to the writ against the husband. *Comeau v. Fontenot*, 19 La. 406; *Percy v. Percy*, 9 La. Ann. 185. The general principle of our law is that, if a purchase be made by the husband in his own name, the property, though bought with the wife's funds, belongs to the community, and the price or value constitutes a legal debt in her favor against the community. See 1 Hen. Dig. tit. "Marriage," XIII. (b.) 2, par. 10, (p. 883.) The two cases referred to above show that this principle applies and controls in case of an exchange. There must be judgment against the third opponent, and in favor of plaintiff, without prejudice to her right to claim a lien and privilege upon the proceeds arising from the sale of the property.

GOLDEN v. THE MORNING NEWS OF NEW HAVEN.<sup>1</sup>

(Circuit Court, E. D. New York. March 31, 1890.)

## WRITS—SERVICE OF PROCESS—FOREIGN CORPORATIONS—JURISDICTION OF STATE COURT.

In an action by a resident of New York against a foreign corporation, which does not do business, or have office, agent, or property within the state of New York, service of process upon an officer of such corporation, while temporarily within this state, does not confer jurisdiction upon the state court from which process issued.

At Law. On motion to vacate service of process.

Plaintiff is a resident of the eastern district of New York. Defendant is a Connecticut corporation. The action is for libel, the alleged libelous article having been published in defendant's newspaper. The defendant does not do business here, nor has it either office, agent, or property within this state. Summons and complaint, entitled "In the Supreme Court in the County of Kings," were served upon Henry W. Farnam, the president of defendant, while temporarily within the state of New York. Defendant appeared and filed petition of removal, and now moves to set aside service of the summons. The appearances, both in the state court and here, were special, and expressed to be for the sole purpose of raising the objection now advanced.

*M. L. Towns*, for plaintiff.

*H. B. B. Stapler*, for defendant.

LACOMBE, J. It has been held in this circuit that service such as this does not confer jurisdiction upon the state court to render a personal judgment against the defendant, and that such judgment, had the case not been removed, would be treated in this court as void. *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep. 635. That decision determines the question raised here. Motion to vacate service of the process is granted.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

*In re BARRY.*<sup>1</sup>

(Circuit Court, S. D. New York. May 25, 1844.)

## 1. HABEAS CORPUS—CUSTODY OF INFANT.

By the common law, both of England and the United States, in virtue of the authority of the sovereign as *parens patriæ*, the writ of *habeas corpus* will issue to determine the right to the custody of an infant as between parents, who are living apart.

## 2. CONSTITUTIONAL LAW—INCIDENTS OF SOVEREIGNTY—PERSONAL RIGHTS.

The government of the United States has no inherent common-law prerogatives. It possesses only such as are conferred upon it by the constitution, and therefore has no power to interfere in the personal or social relations of citizens by virtue of authority deducible from the general nature of sovereignty.

## 3. JURISDICTION OF FEDERAL COURTS.

The circuit courts have not, as incident to their constitution as such, any common-law jurisdiction. They possess no other jurisdiction than that concurrently conferred by the constitution and congress of the United States.

## 4. SAME—CONSTRUCTION OF STATUTE.

The judiciary act of 1789, (1 U. S. St. at Large, c. 20, § 14,) provides "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of commitment: provided, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." *Held*, the power of the circuit courts to issue writs of *habeas corpus* is thereby limited to cases of commitment under process or authority of the United States; and they derive therefrom no authority to issue the writ for the purpose of determining, as between parents living apart, the right to the custody of an infant child.

## 5. SAME—STATE LAW TO GOVERN—CUSTODY OF INFANT.

If, under section 11 of said act, the circuit courts have jurisdiction of personal rights and duties because of diverse citizenship, or the alienage of a party, then, on application of a citizen of a foreign country residing without the United States for a writ of *habeas corpus* to have awarded to him the custody of his child, as against its mother and grandmother, who are citizens of the state of New York, the court will be governed in its decision by the law of New York as determined by its statutes and decisions.

## 6. SAME—ALIENAGE OF PARTY—HABEAS CORPUS—CUSTODY OF INFANT.

Under 2 Rev. St. N. Y. p. 466, § 23, on *habeas corpus*, and the decisions of the court of errors on the same subject, the fact that a mother, having in nurture her female child under seven years of age, keeps it from the father, who lives apart from her, and in a foreign country, does not entitle the father to a writ of *habeas corpus* to have its custody awarded to him.

Petition for Writ of *Habeas Corpus*.

BETTS, J. On the first day of term the petitioner presented in open court and filed his petition praying that "the people's writ of *habeas corpus ad subjiciendum* may issue in his behalf, directed to Mary Mercein, relict of the late Thomas R. Mercein, deceased, of the city of New York, and to Eliza Anna Barry, wife of the petitioner, commanding them forth-

<sup>1</sup>Published by request of one of the justices of the supreme court of the United States in connection with *Ex parte Burrus*, 10 Sup. Ct. Rep. 850, wherein it is cited and approved. The case was taken to the supreme court by writ of error, and in an opinion delivered by Chief Justice TANEY the judgment of the circuit court was affirmed. See *Barry v. Mercein*, 5 How. 103, 119, 120.

with, immediately on the receipt of said writ, to have the body of Mary Mercein Barry, daughter of the petitioner, by them imprisoned or detained, with the time and cause of such imprisonment or detention, before this court, to do and receive what shall then and there be considered of the said Mary Mercein Barry." The petitioner alleges that he is a native-born subject of the queen of Great Britain, resident in Nova Scotia, and that he has never been naturalized, or claimed naturalization, under the laws of the United States; that in April, 1835, in the city of New York, he intermarried with Eliza Anna, daughter of the late Thomas R. Mercein, a citizen of said city; that in the month of May thereafter he returned to Nova Scotia, accompanied by his wife, and there resided about a year, when he removed his family to the city of New York, where he resided until April, 1838, when he returned to Nova Scotia with a portion of his family, and has continued to reside there from that time; that a son and daughter were born of said marriage during his residence in the city of New York, and on his removal to Nova Scotia he left his wife and two children temporarily with her father in the city of New York; that in the month of May thereafter he returned to New York, when difficulties arose between him and his wife respecting her removal to Nova Scotia, and she declared her determination to part with him, rather than think of going to Nova Scotia; that he remained in New York until the 28th of June, 1838, and, with a view to arrange amicably the differences between himself and wife, he finally agreed to allow her to continue in New York, at her father's house, until the 1st day of May, 1839, and to retain in her care their said daughter, Mary Mercein, during that period, and also their son until such time as the petitioner might think proper to require him; that in September following he returned to New York, and made every possible effort to conciliate his wife, and induce her to consent to go at some future time to her own proper home, in Nova Scotia, but she utterly refusing, and declaring that she had no expectation of so doing, the petitioner returned himself, taking his son along with him; that these attempts to conciliate her were frequently repeated without avail, and the petitioner awaited the expiration of the time he had agreed she should remain with her father, and on the 2d day of May, 1839, formally demanded of the said Thomas R. Mercein the surrender of his said wife and child, which demand was not complied with; that his wife, from that time to the present period, has refused to return to his home, and has absented herself therefrom, contrary to his desires, and has detained, and does still keep from him, unlawfully, his daughter, who is now in the seventh year of her age; that Thomas R. Mercein has lately deceased, and that thereby the wife of the petitioner is left without any present property, and little or no prospect of any in reversion, and that she has no property whatever of any kind in her own right, and has no means known to the petitioner for the present or future support of herself and their daughter, and that she resides with, and is harbored in her present vicious and illegal condition by her mother, Mary, relict of the late Thomas R. Mercein. The petitioner alleges his own ability to provide comfortably for the support and

education of his daughter, and especially claims that she is a British subject, allegiant to the crown of Great Britain, at least during her minority. The petitioner sets forth many other matters of aggravation in the separation from him, persisted in by his wife, and the countenance and support of her by her family in her conduct and refusal to return to her home. These particulars it is unnecessary to rehearse, and the right to the remedy or relief claimed by the petitioner is not, in this stage of the case, to be determined by a consideration of the relative conduct of these parents towards each other or the child, or of the advantages to the infant to be placed with the one rather than the other. These matters would be most material if the case had proceeded so far as to require from the court a decision upon the question as to the fit or proper disposal of the infant. The point now to be considered is whether the petitioner has presented a case coming within the jurisdiction of this court, or, if this court has cognizance of the matter, whether the facts stated by the petitioner entitle him to the interference of the court in the manner prayed for.

The same petition, in substance, was presented to the supreme court of the United States, at the last term, and was supported by an elaborate argument on the part of the petitioner. The court observes, (*Ex parte Barry*, 2 How. 65):

"It is the case of a private individual, who is an alien, seeking redress for a supposed wrong done him by another private individual, who is a citizen of New York. It is plain, therefore, that this court has no original jurisdiction to entertain the present petition. \* \* \* Without, therefore, entering into the merits of the present application, we are compelled, by our duty, to dismiss the petition, leaving the petitioner to seek redress in such other tribunal of the United States as may be entitled to grant it. If the petitioner has any title to redress in those tribunals, the vacancy in the office of the judge of this court assigned to that circuit and district creates no legal obstruction to the pursuit thereof."

This instruction of the supreme court seems to be regarded by the petitioner as a declaration of that high tribunal that the United States circuit court for this district has the power to grant the relief demanded by the petition. The expression of such opinion by that court, even in an incidental manner, and not on a point under adjudication, would have the highest influence with this court, and would undoubtedly be adopted here as the rule of decision. But the cautious and reserved phraseology employed by the supreme court in respect to the competency of any other United States tribunal to take cognizance of the subject, is, in my opinion, to be regarded rather as an admonition to the inferior courts that grave difficulties rested over the matter, than an assurance to them that their original jurisdiction contained the authority to award the common-law writ of *habeas corpus ad subjiciendum* prayed for. That court says of itself: "We cannot issue any writ of *habeas corpus*, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the constitution or laws of the United States,"—language plainly not employed to import that a circuit court has in this behalf a capacity transcending that of the supreme court, and can create a jurisdiction to

itself by awarding writs of *habeas corpus*. This opinion of the supreme court, I think, supplies no authority or suggestion in aid of the jurisdiction now invoked, and, taken most favorably for the petitioner, merely leaves the question as to its power to award the writ to be settled by the circuit court in consonance with the constitution and laws of the United States. The application to the supreme court was supported by an exposition of this case, intended to show that this petitioner's claim had been unjustly adjudged against in the courts of this state, and that the interposition of that tribunal was necessary to correct these erroneous judgments, and secure the legal rights of the petitioner. That argument, with the decision of the supreme court on this motion, was also submitted to me with the petition when filed. On the perusal of these papers, I at first hesitated as to the course most proper to be pursued preliminarily,—whether to grant a rule against Mrs. Barry and Mrs. Mercin to show cause why the writ should not issue, or even to award the writ, with a view to have the entire case spread before the court, or such points presented as would lead to a definite decision of the case. But, as the adoption of either alternative must involve great delay and expense, both in the disposition of the case in the first instance, and in removing it by either party to the supreme court for revision, and as the right of the petitioner to relief in this court, under any aspect of the case, was doubtful, I conceived it the least expensive and more convenient course to inquire and decide whether the petitioner presented a case of which this court should take cognizance.

When the cause of imprisonment or detention shown by the petition satisfies the court that the prisoner would be remanded if brought up, the writ will not be awarded. *Watkins' Case*, 3 Pet. 201, *per* MARSHALL, C. J.; *Milburn's Case*, 9 Pet. 706; 2 Story, Const. p. 207, § 1341; *Ex parte Bollman*, 4 Cranch, 75. The practice in the English courts is the same. Bac. Abr. "Habeas Corpus," B 4, cases cited; 4 Com. Dig. (Day's Ed.) 550, and note 3; Hallam's Const. Law, 20; *Penrice's Case*, 2 Mod. 306; *Slater v. Slater*, 1 Lev. 1; *King v. Marsh*, 3 Bulst. 27; *White v. Wiltshire*, 2 Rolle, 138. If, upon the facts stated by the petitioner, it shall be determined that the court cannot grant the relief prayed for, either for want of jurisdiction, or because the law is against his demand, it would be inexpedient and oppressive to cause the parties implicated to be arraigned before this court, and held under its control, pending the discussion and consideration of the subject, and, accordingly, upon the doubts arising from a perusal of the papers, I deemed it proper to invite the petitioner in the first instance to support his petition by arguing these two points: (1) Whether the United States circuit court has jurisdiction over the subject-matter of his petition. (2) If such jurisdiction exists, do the facts stated upon the petition give the petitioner, under the law of the land, a title to the remedy prayed for? The petitioner has read an argument, prepared with great research and ability, in support of the affirmative of both inquiries, bringing into review numerous English and American decisions upon the same question, and has submitted the manuscript to the examination of the court. With the aid of this most ample discus-



sion of this subject, I proceed to pronounce the result of my reflections upon this interesting and important case.

The incongruity of awarding proofs, at the instance of husband or wife, to take away an infant child from the parent having it in nurture and keeping, upon the allegation that such keeping is a wrongful imprisonment, is most palpable and striking. It is a bold figure of speech, or rather fiction, to which the law ought not to resort, unless indispensably necessary to be employed in preservation of parental rights, or the personal fondness of the child. The courts, however, assume such supposititious imprisonment to exist as the foundation for jurisdiction, to a limited extent, over the detention of infants, even by their parents, on the ground that the writ is rather to be considered a proceeding in the name and behalf of the sovereign than by one named person against the other. *Com. v. Briggs*, 16 Pick. 203. There is no reason to doubt that originally the common-law writ was granted solely in cases of arrest and forcible imprisonment under color or claim of warrant of law. As late as 2 James II., the court expressly denied its allowance in a case of detention or restraint by a private person, (*Rex v. Drake*, Comb. 35; 16 Vin. Abr. 213;) and the *habeas corpus* act of Charles II., which is claimed as the *Magna Charta* of British liberty, has relation only to imprisonment on criminal charges. 3 Bac. Abr. 438, note. It is not important to inquire at what period the writ was first employed to place infant children under the disposal of courts of law and equity. This was clearly so in England anterior to our Revolution, (*Rex v. Smith*, 2 Strange, 982; *Rex v. Delaval*, 3 Burrows, 1434; *Blissets' Case*, Lofft, 748,) and the practice has been fully confirmed in the continued assertion of the authority by those courts unto the present day, (*King v. De Manneville*, 5 East, 221; *De Manneville v. De Manneville*, 10 Ves. 52; *Ball v. Ball*, 2 Sim. 35; *Ex parte Skinner*, 9 Moore, 278; *King v. Greenhill*, 4 Adol. & E. 624;) and this indifferently, whether the interposition of the court is demanded by the father or mother, (*King v. Greenhill*, 4 Adol. & E. 624; *Ex parte Skinner*, 9 Moore, 278.) The late act of 2 & 3 Vict. c. 54, (1839,) sanctions the principle, and would seem to reinstate the old *dictum*, that the judgment and discretion of the court is not to be controlled by any supposed legal right of the father in exclusion of that of the mother, if the infant be within the age of seven years. An act of the state of New York passed in 1830 had established the same doctrine within this state by positive law; and, independent of this statute, the course of the American courts in this respect had been substantially in consonance with the decisions in England antecedent to the Revolution. *In re McDowle*, 8 Johns. 253; *In re Waldron*, 13 Johns. 418; *In re Wollstonecraft*, 4 Johns. Ch. 80; *People v. Mercein*, 8 Paige, 47; *Com. v. Addicks*, 5 Bin. 520; *Com. v. Briggs*, 16 Pick. 203; *State v. Smith*, 6 Greenl. 462. The later cases in New York are founded upon a principle common to all the decisions cited. *People v. —*, 19 Wend. 16; *Mercein v. People*, 25 Wend. 80; *People v. Mercein*, 3 Hill, 400. But, in so far as they may seem to favor the latest adjudications in England, in respect to the fixed and controlling right of the father, as the true exposition of the common-law rule, they

are modified and overruled by the decisions of the court of errors. *Mercein v. People*, 25 Wend. 106, and *Sittings* 1844, MSS. The petitioner in this case asks of the court the award of the common-law writ of *habeas corpus ad subjiciendum*, with all of its common-law attributes and efficacy. That is a high mandate, by means of which courts or judges, in protection of the liberty of individuals, exercise functions appertaining to the sovereign power, and which, in intendment of law, rest only in the sovereign, and are co-extensive with his dominion. *Kendall v. U. S.*, 12 Pet. 627, 629. The writ is purely one of prerogative. Whether emanating from a king or a state; whether returnable before the king in person, as it undoubtedly was in its origin, or awarded and acted upon by magistrates as surrogates of the sovereign authority,—it has always been made to bring the party imprisoned directly before the supreme power, that, if there be not due cause of law for his detention, the sovereign may set him free of his restraint. 3 Bl. Comm. 131; Bac. Abr. "Habeas Corpus," 421; 2 Story, Const. 207; *Ex parte Watkins*, 3 Pet. 202; 2 Kent, Comm. 26, 29. In respect to married women or other adults held in detention by private individuals, the sovereign, through this writ, acts as *conservator pacis* and *custos morum*, and, in regard to infant children, as *parens patriæ*, taking, in these high capacities, summary order that the party be forthwith set at liberty, if improperly and wrongfully detained. *Blissets' Case*, Loft, 748; *In re Waldron*, 13 Johns. 418; *People v. Chagaray*, 18 Wend. 637; *People v. Mercein*, 8 Paige, 48; *U. S. v. Green*, 3 Mason, 482. The state thus acting upon the assumption that its parentage supersedes all authority conferred by birth on the natural parents, takes upon itself the power and right to dispose of the custody of children as it shall judge best for their welfare. *People v. Chagaray*, 18 Wend. 642, 643; *Blissets' Case*, Loft, 748. The cases before cited show that the English and American courts act in this behalf solely upon the assertion of the right of the sovereign whose power they administer to continue or change the custody of the child at his discretion, as *parens patriæ*, allowing the infant, if of competent age, to elect for himself; if not, making the election for him. Even in the extraordinary conclusions drawn from the facts brought to light in *Com. v. Addicks*, 5 Bin. 520, and *King v. Greenhill*, 4 Adol. & E. 624, both courts, in denying that these facts called for any change of the custody of the children, readjudged the principle that it was their province, at common law, authoritatively to decide that question according to their legal discretion.

Does this common-law prerogative in relation to infants vest in the government of the United States, and has the circuit court competent authority to exercise it? The argument bearing upon the first branch of this inquiry assumes two propositions as its basis: (1) That the government of the United States is supreme over all subjects within its cognizance; and (2) that the common law of England is embodied with, and has become a measure and source of authority to, the national government, and is to be enforced in the circuit court whenever persons competent to sue in those courts prosecute their rights therein. It is believed that neither of these propositions can be maintained, and cer-

tainly not in respect to the subject-matter of this proceeding. Many of the powers of the general government are unquestionably supreme and exclusive, while others, especially those in relation to remedies afforded by its courts to private suitors, are only concurrent with similar powers possessed by the state governments. If the power in respect to parties competent to sue in the national federal courts could be supposed to exist, in its absolute sense, in the United States government, its exercise has been modified and restricted by congress in the eleventh section of the act of September 24, 1789, which gives the circuit courts no more than a concurrent jurisdiction with the state courts of suits of a civil nature at common law. 1 U. S. St. at Large, 78. Nor, again, do all attributes of sovereignty devolve upon the national government. Whether considered as emanating directly from the people in their aggregate capacity, or as proceeding from the states in their independent organization and character, the government of the Union is one of special powers, defined or necessarily implied in the terms of the grant. *McCulloch v. Maryland*, 4 Wheat. 407; 2 Story, Const. § 1907; *Rhode Island v. Massachusetts*, 12 Pet. 657. Though the point has been labored with ability by a late jurist of eminence in this department of legal learning, to deduce from the circumstances attendant upon the establishment of this government that the common law became embodied in it, as an efficient principle of its authority and action, (Dup. Jur. 85-90,) yet the doctrine has never been declared or sanctioned by our courts. So far as the decisions have gone, they tend to repudiate the principle *in toto*. *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat. 415. There is, accordingly, no sure foundation for the assumption that the federal government possesses common-law prerogatives, inherent in the sovereign, which can be exercised without authority of positive law. *Martin v. Hunter's Lessee*, 1 Wheat. 329. If any common-law prerogative in relation to the administration of justice can be proved to exist in the sovereignty of the United States, it must, upon the same principle, be endowed with all such prerogatives, and can, on the like authority, unless inhibited by positive law, award writs of *mandamus*, *quo warranto*, *ne exeat*, or mandates to citizens abroad to return home on pain of confiscation of their estates, (Com. Dig. "Prerogatives" D 34, 35,) or this writ of *habeas corpus*; they being all common-law writs *ejusdem generis*. That such attributes or functions of sovereignty cannot be inherent in the United States government necessarily results from the character of the government, and the objects of its constitution. It is not designed, in its organization or aim, to regulate the individual or municipal relations of the citizen. These are left under the dominion of the state government; and there accordingly exists no relation between the nation and the individuals which affords foundation for these prerogatives. The social or personal duties or liabilities of the citizens come within the control of the general government only when remitted to its charge by a special cession of authority, and then solely to the end that such regulations as are of a federal character may be enforced, as in relation to land and naval forces and persons in the employ of the United States, the punishment of offenses, etc.; but in other re-

spects the national government does not supply the law governing the citizen in his domestic or individual capacity. These particulars appertain to the institutions and policy of the respective states.

This reasoning, however, may not be supposed to meet fully the case presented by the petitioner; for although, in the abstract, there may be no prerogative authority in the head of the United States government, yet the argument would maintain that its courts of justice, as organized, may possess all the powers exercised by superior courts at common law, and the issuing and acting upon writs of *habeas corpus ad subjiciendum* become thereby a branch of jurisdiction necessarily incident to the constitution of such courts. This hypothesis overlooks the peculiar foundation of the United States judiciary, and the allotment of its functions in respect to the powers of the states. The federal government came into force co-ordinately with, or as the concomitant of, state governments at the time existing, and in the full exercise of legislative, executive, and judicial sovereignty. These sovereignties are left entire, under the action of the general government, except in so far only as the powers are transferred to the federal head by the constitution, or are by that prohibited to the states, or, in some few instances, are allotted to be exercised concurrently by the two governments. The United States judiciary is constituted and put in action in the several states, in subordination to this fundamental principle of the Union, and empowered to exercise only such peculiar and special supremacy, and not one in its absolute sense. To render this connection of the United States judiciary with that of the states more intimate and entire, and to take away all implication that it was a paramount power, acting irrespective of state laws, or that it possessed, or could exercise, any inherent jurisdiction countervailing those laws, the act of congress organizing the courts establishes it as an element in their procedure that the laws of the state where the court sits shall be its rule of decision in common-law cases. It necessarily results, as a consequence of this special character of the United States judiciary, that it can possess no powers other than those specifically conferred by the constitution or laws of the Union, and such incidents thereto as are necessary to the proper execution of its jurisdiction. All other judicial powers necessary to the complement of supreme authority remain with, and are exercised by, the states. This doctrine is sufficiently indicated in the decision of the supreme court made in this case at the last term, and it has been invariably recognized from the earliest adjudications of the court. *Chisholm v. Georgia*, 2 Dall. 432, 435; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Watkins*, 3 Pet. 201; *Kendall v. U. S.*, 12 Pet. 524. The jurisdiction of the United States courts depends exclusively on the constitution and laws of the United States, and they can neither in criminal nor civil cases resort to the common law as a source of jurisdiction. *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat. 415; *Chisholm v. Georgia*, 2 Dall. 432; *Ex parte Bollman*, 4 Cranch, 75; *Town of Pawlet v. Clark*, 9 Cranch, 333; *Ex parte Randolph*, 2 Brock. 477; *Craig v. Missouri*, 4 Pet. 444; *Wheaton v. Peters*, 8 Pet. 658; *The Orleans v. Phœbus*, 11 Pet. 175; *Kendall v. U. S.*, 12 Pet. 524.

It is now argued that this principle is limited to the supreme court, but that, in respect to the circuit courts, they have a common-law jurisdiction incident to their constitution, inasmuch as judicial sovereignty resides in them, rendering the range of their original jurisdiction co-extensive with the subjects of litigation arising under the constitution and laws of the United States, and because all remedies not otherwise provided are, in the exercise of that judicial sovereignty, to be in conformity to the common law. Although the speculations of our most eminent jurists may countenance this argument, (Dup. Jur. 85; 1 Kent, Comm. 341,) yet it has not received the sanction of the United States courts. *Chisholm v. Georgia*, 2 Dall. 435; *Kendall v. U. S.*, 12 Pet. 616, *per curiam*, and 626, Chief Justice TANEY; *Ex parte Bollman*, 4 Cranch, 75; Chief Justice MARSHALL, *Ex parte Randolph*, 2 Brock. 477; *Lorman v. Clarke*, 2 McLean, 569. The distinction established by the cases is clear and practical, and embraces all United States courts alike, and is, in effect, that those courts derive no jurisdiction from the common law, but that, in those cases in which jurisdiction is appointed by statute, and attaches, the remedies in these courts are to be according to the principles of the common law. *Bains v. The James and Catherine*, 1 Baldw. 558; *Robinson v. Campbell*, 3 Wheat. 223; *U. S. v. Hudson*, 7 Cranch, 32; *Ex parte Kearney*, 7 Wheat. 38; *Anderson v. Dunn*, 6 Wheat. 204; *Ex parte Randolph*, 2 Brock. 477. It is not, accordingly, conclusive of their right to take cognizance of the subject-matter, to show that the parties connected therewith are competent to sue or be sued in the United States courts, and that there is a perfect right of action or defense thereupon supplied such parties at common law. The evidence must go further, and prove that the particular subject-matter is one over which the courts are by act of congress appointed to act, or that the question has relation to the remedy alone, and not to the jurisdiction of the court. *U. S. v. Bevans*, 3 Wheat. 389; *McCulloch v. Maryland*, 4 Wheat. 407; *Rhode Island v. Massachusetts*, 12 Pet. 721.

The authority to take cognizance of the detention of infants by private persons, not held under claim or color or warrant of law, rests solely, in England, on the common law. It is one of the eminent prerogatives of the crown, which implies in the monarch the guardianship of infants paramount to that of their natural parents. The royal prerogative, at first exercised personally *ad libitum* by the king, (*Kendall v. U. S.*, 12 Pet. 630,) and afterwards, for his relief, by special officers, as the lord high constable, the lord high admiral, and the lord chancellor, in process of time devolved upon the high courts of equity and law, and in them this exalted one, of allowing and enforcing the writ of *habeas corpus ad subjiciendum*, became vested as an elementary branch of their jurisdiction. In the performance, however, of this high function in respect to the detention of infants by parents, etc., the court or judge still acts with submission to the original principle out of which it sprang, that infants ought to be left where found, or to be taken from that custody and transferred to some other, at the discretion of the prerogative guardian, and according to its opinion of their best interest and safety. The reference

already made to the origin and object of our Federal Union demonstrates that no prerogative of this character could be exercised as an incident to its qualified and peculiar sovereignty; and I think it equally clear that the inherent authority of no branch of the judiciary can transcend that of the government in this behalf, and that it has no capacity to issue this writ, or act upon it, except under appointment by positive law. *Ex parte Bollman*, 4 Cranch, 93.

It remains, then, only to consider whether such jurisdiction is conferred upon the circuit courts by statute; for, even if the language of the constitution might import such authority to be within the competency of the judiciary, it is authoritatively established that the circuit courts, at least, cannot exercise jurisdiction as to individual rights, because authorized by the constitution, unless congress has specifically assigned it to them. They possess no jurisdiction other than that which both the constitution and acts of congress concur in conferring upon them. *Turner v. Bank*, 4 Dall. 10; *Bank v. Deveaux*, 5 Cranch, 61; *Livingston v. Van Ingen*, 1 Paine, 45; *Browne v. Strode*, 5 Cranch, 303; *Kendall v. U. S.*, 12 Pet. 524; *Ex parte Bollman*, 4 Cranch, 93; *McClung v. Silliman*, 6 Wheat. 598. The ninth section of the first article of the constitution, par. 2, declaring that "the privilege of the writ of *habeas corpus* shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it," does not purport to convey power or jurisdiction to the judiciary. It is in restraint of executive and legislative powers, and no further affects the judiciary than to impose on them the necessity, if the privilege of *habeas corpus* is suspended by any authority, to decide whether the exigency demanded by the constitution exists to sanction the act. So, although the second section of the third article gives the United States judiciary jurisdiction over all cases in law and equity between our own citizens and the citizens or subjects of foreign states, yet, as already shown, the circuit court cannot, under that provision, act on one of the subjects without an express authorization by statute. *McClung v. Silliman*, 6 Wheat. 598. In our government the judiciary power acts only to give effect to the voice of the legislature. *Osborn v. Bank*, 9 Wheat. 866. The material question in the case must, accordingly, be, whether congress has given to the circuit courts the special jurisdiction appealed to by the petitioner.

Judge Story holds that the courts of the United States are vested with full authority to issue the great writ of *habeas corpus* in cases properly within the jurisdiction of the national government. 2 Story, Const. § 1341. The general doctrine the commentator is discussing, and the authorities supporting it, have relation to the law as it exists in England and in the respective states of the Union. The only case referred to as giving application of the general doctrine to the United States courts is that of *Ex parte Bollman*, 4 Cranch, 75. That was a case of imprisonment on a criminal charge, under and by color of the authority of the United States, the prisoners having been committed by the circuit court of the District of Columbia on a charge of treason against the United States; and the supreme court held that, though it could not take cog-

nizance of the matter under any common-law jurisdiction, yet the act of congress of September 24, 1789, had conferred the jurisdiction, and they proceeded, by virtue of the statute, to exercise it in the case. The court nowhere advert to an implied power in the circuit courts broader than that vested in the supreme court, which would empower a circuit court to grant the writ upon the footing of a general jurisdiction in respect to the parties to be affected by it. The positions adopted as the basis of the decision would seem to look to an entirely opposite conclusion. Chief Justice MARSHALL says: "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. \* \* \* It extends," in case of United States courts, "only to the power of taking cognizance of any question between individuals, or between the government and individuals. To enable the court to decide on such question, the power to determine it must be given by written law." This language of the chief justice is explicit against the theory that the United States courts have necessarily cognizance of all subjects of litigation arising between parties over whom they have jurisdiction. So in respect to another prerogative writ, that of *mandamus*, the supreme court, in disavowing in itself the power to issue it in the common-law sense, holds, in terms not less definite and decisive, that the circuit courts cannot award it but by virtue of express authority from statute, (*Kendall v. U. S.*, 12 Pet. 524;) and this conclusion has no exclusive connection with the particular writ of *mandamus*, but flows from the doctrine definitely announced by the court, that the United States judiciary has no authority to award prerogative writs of any character further than the power is specifically given by statute.

The relator refers to the argument of counsel in the case of *Ex parte Bollman*, as demonstrating that the fourteenth section of the act of congress of September 24, 1789, imparts to the United States courts authority as ample as exists in the supreme courts of judicature at common law in the application and enforcement of the writ of *habeas corpus*. No judicial decision, unless it be that of *U. S. v. Green*, 3 Mason, 482, is found which sanctions that exposition of the statute; and it accordingly becomes necessary to examine with attention the foundation of the construction contended for. The terms of the statute are—

"That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment: provided, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless when they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The scope and purport of this enactment were very carefully considered by the supreme court. *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Watkins*, 3 Pet. 201. The courts being authorized to issue the writ "for the purpose of an inquiry into the cause of commitment," the supreme court regarded the provisions of the act as incorporating in a considerable degree the English law on the subject, and that the statute of 31 Charles II. had defined the cases in England in which relief could be had under the writ by persons detained in custody, and was an enforcement of the common law in that respect. The argument of the court tends clearly to the conclusion that our act was to be construed as applicable to the cases embraced within the English *habeas corpus* act, and as framed in reference to the law established by that statute. If the term "commitment" in our act is used in its common acceptation, it would have reference to the forcible confinement of a person under color of legal process or authority. In its common-law sense, it imports an imprisonment under a warrant or order on a criminal charge, and no other, (4 Bl. Comm. 296; 2 Hawk. P. C. c. 10, §§ 1-3, 13-15;) and, under the statute, all the judges of England decided that the act of Charles did not extend to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal, or supposed criminal, matters. 3 Bac. Abr. 438, note. As our statute uses the term "commitment," and drops the limitation of it in the English act, "for any criminal or supposed criminal matter," it may be reasonable, in favor of liberty, to understand it in its broadest signification. A court of deservedly high character decided that under our statute a writ of *habeas corpus* lies to inquire into the cause of commitment, though made on civil process. *Ex parte Randolph*, 2 Brock. 476. See, also, *Bank v. Jenkins*, 18 Johns. 309. But it is to be borne in mind that the supreme court hesitated as to the soundness of this interpretation of the statute, for in *Ex parte Wilson*, Chief Justice MARSHALL, after consultation with the judges, on a motion for a *habeas corpus*, stated that the court was not satisfied that a *habeas corpus* is the proper remedy in a case of arrest under civil process, (6 Cranch, 52,) and the writ was denied; and to the same effect was the decision of the supreme court of New York. *Cable v. Cooper*, 15 Johns. 152. If the more extended interpretation of the term be adopted, and cases of commitment for civil or criminal matters may be brought under review by *habeas corpus*, yet, in view of the qualified character of the federal government, and the special jurisdiction of its judiciary, the more reasonable inference would be that congress intended the protection of this writ should be interposed by its courts only in cases of imprisonment under color or claim of the authority of the United States. Rawle, an eminent commentator on the constitution, says that the writ of *habeas corpus* is restrained to imprisonments under the authority of the United States. Rawle, Const. 115. Every adjudicated case in the United States courts, with one exception, has been under writs sued out for relief against an actual arrest of a party under process, or his confinement by claim of authority of the United States. *U. S. v. Hamilton*, 3 Dall. 17; *U. S. v. Johns*, 4 Dall. 412; *Ex parte Burford*, 3 Cranch, 447; *Ex*



*parte Bollman*, 4 Cranch, 75; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 3 Pet. 201; *Ex parte Milburn*, 9 Pet. 704; *U. S. v. Bainbridge*, 1 Mason, 71; *Ex parte Cabrera*, 1 Wash. C. C. 232; *Ex parte Randolph*, 2 Brock. 447, in which a doubt is made whether the writ may not apply in case of imprisonment on civil process. Judge WASHINGTON, on *habeas corpus*, adjudged the matter not within the cognizance of the circuit court because the prisoner was not in custody by authority of the United States, and was not committed for trial before any of its courts. *Ex parte Cabrera*, 1 Wash. C. C. 237. The proviso to the fourteenth section, above recited, looks to such limitations of the writ. It is palpable that congress did not intend that an inquiry into the cause of commitment of a person detained should authorize the United States courts to interfere with his custody unless the subject-matter upon which he was confined was to be acted on and decided by the United States tribunals. This policy of the statute is emphatically indicated by the act of March 2, 1833, c. 57, § 7, in which special powers are conferred on the United States courts to liberate by *habeas corpus* even persons confined under authority of state law, for any act done, or omitted to be done, in pursuance of a law of the United States, or in pursuance of any order, process, or decree of any judge or court thereof. Both clauses denote that it was the violation of a law of the United States, or its just authority, in the imprisonment of the citizen, that was intended by congress to be inquired into and remedied by *habeas corpus* before the courts of the United States.

My opinion upon this review of this subject is that there is no foundation for the claim that there is vested in the United States government a common-law prerogative, or that the circuit court can, upon the footing of common-law prerogative, by writ of *habeas corpus*, assume and exercise this function of *parens patriæ* in relation to infant children held in detention by private individuals, not acting under color of authority from the laws of the United States. And it also seems equally clear to me that the authority given by the fourteenth section of the judiciary act to issue writs of *habeas corpus* "for the purpose of an inquiry into the cause of commitment" necessarily restricts the jurisdiction of the courts to commitments under process or authority of the United States. I should, upon the conclusions against the competency of the court to take cognizance of the matter, feel constrained to deny the petition, but for the decision of the circuit court in the first circuit, in an analogous case, where the relief now prayed for was granted. *U. S. v. Green*, 3 Mason, 482. The jurisdiction of the court was not brought in question, and was undoubtedly conceded by the parties; but the acquiescence in a legal proposition so important by a judge of the exact and varied learning of Judge STORY, and one whose judicial habit is so cautious and investigating, is an imposing authority in its support. A citizen of New York sued out a *habeas corpus* against a citizen of Rhode Island, the grandfather of his infant child, to recover possession of the child, which was retained and defended against the demand of the father. The court took cognizance of the subject-matter, and after full hearing decided the ques-

tion of rightful custody, upon its merits, in favor of the father. It is supposed that the circuit court possessed such authority under the provisions of the eleventh and fourteenth sections of the judiciary act. The eleventh section gives circuit courts original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, etc., when one party is a citizen of the state where the suit is brought, and the other an alien, etc. 1 St. at Large, 78. It is well settled that congress has not in this section exhausted the powers vested in them by the second section of the third article of the constitution, and imparted to the circuit courts cognizance of all cases at common law which might be within the control of the legislative power. *Turner v. Bank*, 4 Dall. 11; *Bank v. Deveaux*, 5 Cranch, 61. The supreme court say there is, manifestly, some limitation to the authority of the circuit courts in respect to the cases therein brought within the purview of their jurisdiction, and that those courts have not jurisdiction, under the eleventh section, of all suits or cases of a civil nature at common law. *Kendall v. U. S.*, 12 Pet. 616. Two particulars must concur as the foundation of a suit in a circuit court,—that the litigant parties be competent to sue and be sued, and that the subject-matter be one over which the court has cognizance. *Voorhees v. Bank*, 10 Pet. 474. A procedure by *habeas corpus* can in no legal sense be regarded as a suit or controversy between private parties. It is an inquisition by the government—at the suggestion and instance of an individual, most probably, but still in the name and capacity of the sovereign—to ascertain whether the infant in this case is wrongfully detained, and in a way conducive to its prejudice. Neither in England or the states in this country does the court regard this as a suit in which the right of guardianship is to be discussed or decided. *Rex v. Smith*, 2 Strange, 982; *People v. Mercein*, 8 Paige, 48; *In re Wollstonecraft*, 4 Johns. Ch. 80; *In re McDowle*, 8 Johns. 253. Judge STORY, in the case cited, manifestly took the same view of the subject. *U. S. v. Green*, 3 Mason, 482.

There would, moreover, be a technical objection to this proceeding, if a suit, which the court might not be permitted to overlook. Neither in this country nor in England can an action be prosecuted by an individual in the name of the government without express authority of the court, or the officer appointed by law to represent the public. And no distinction is made between actions popular in their nature, and those in which the private suitor is solely the party in interest. The authority of the circuit court to take cognizance of the case must, probably, then, be deduced from the provisions of the fourteenth section, in conjunction with those of the eleventh; and the first clause or branch of the fourteenth section must be accepted as giving the courts of the United States power to issue the writ of *habeas corpus*, without the restriction of the subsequent clause, to "the purpose of an inquiry into the cause of commitment." And the eleventh section must be regarded as supplying the parties in whose behalf such general power may be exercised. The argument was pressed with great earnestness before the supreme court, in *Bollman and Swartwout's Case*, that the first clause of this section was to

be interpreted as a positive and absolute grant of power, (4 Cranch, 82;) but the court does not seem to have yielded to that construction, for in reference to that point they say that "the true sense of the words is to be determined by the nature of the provision and by the context." *Ex parte Bollman*, 4 Cranch, 94. And they evidently regard the whole section as having relation to one and the same matter. The principles established by the supreme court, and brought in review in that case, would seem to militate so strongly against the doctrine involved in the case of *U. S. v. Green* as to prevent this court adopting the latter as its guide in determining this point; but, without asserting that such diversity exists in the judgments of the supreme and circuit courts, and admitting that the decision in 3 Mason stands unimpaired as an authority, I proceed to consider the remaining general inquiry,—whether, by the law of the land, the petitioner is entitled to the relief asked for.

What, then, is the law which this court administers? For that will be the law of the land in respect to these parties and the subject-matter of this petition. The argument assumes it to be the common law of England, as declared and enforced by her courts, and that the most recent adjudications in those tribunals are the highest and most important evidence of what the law is, and must supply the rule of decision to the United States courts. This view of the subject disregards the special organization of the United States circuit courts, and the limited purposes they were designed to subserve. They are distributed among the states, to exercise that special jurisdiction bestowed upon the federal government, or shared with it by the state sovereignties, and not to carry with them an inherent power to resort to or employ any other law than that given them by express and written grant. *Chisholm v. Georgia*, 2 Dall. 432-435; *Ex parte Barry*, 2 How. 65. Although the people brought with them, on their emigration to this country, the essential principles of the common law, and embodied them in their institutions, yet this was not done by them in a national capacity, (at the time no such character or capacity was contemplated,) but as distinct communities independent of each other. *Chisholm v. Georgia*, 2 Dall. 435; *Bains v. The James and Catherine*, 1 Baldw. 557. Nor has the common law been adopted by the United States as a system applicable to the states generally, and to be administered as such in the national courts. *Kendall v. U. S.*, 12 Pet. 621. This has been done specifically by act of congress in relation to the District of Columbia, (*Id.*;) but in respect to the states the common law is regarded in force only as adopted or modified by the constitution, statutes, or usages of the states, respectively. It came to them, and was appropriated by them, and became an integral portion of the laws of the particular states, before the United States government had existence. 1 Story, Comm. cc. 16, 17; 1 Kent, Comm. 471, and notes; *Town of Pawlet v. Clark*, 9 Cranch, 333; *Southwick v. Postmaster General*, 2 Pet. 446. In bringing this new government into action amid sovereignties already organized and established, it would be a cardinal object to have the limited share of judicial authority possessed by the national judiciary administered, as far as practicable, in consonance with the laws and usages

of the state where the court was placed. Political considerations of the highest moment would exact this. The disquietude and jealousy in relation to this new power would be aggravated tenfold, if, in addition to its authority under appointment of positive law, it could by its inherent jurisdiction supplant local customs and usages, and substitute in their place the common law of England in its primitive plenitude and vigor. There was a deep-rooted attachment in the states to their own laws and customs, while every influence acting on the public mind at that day would tend to induce alarm and distrust of English law, except only in so far as it had already been modified and adopted by express authority of the states. All the early legislation of congress manifests the purpose to affiliate the new system with that of the state, and, especially in the jurisprudence as between individuals, to have the writs of the one government or the other organs of the same law, and controlled by a common rule of decision. This principle was varied only when the constitution of the United States, treaties, or acts of congress provided a specific law for the case. Accordingly, when congress assigned to the circuit courts sitting within the states "original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law," it was careful to direct "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." Act Sept. 24, 1789, §§ 11, 34. The supreme court has recently decided that the decisions of the state courts are not laws of the state, within the purview of this section of the act of congress, in questions of a commercial character, and that such questions are to be determined according to general principles of mercantile law recognized by American and English authorities. *Swift v. Tyson*, 16 Pet. 1. The argument upon which the decision is founded insists that only the statutes of the state, or long-established local customs having the force of laws, are embraced within the language of the clause, and that the court has always understood the section to apply solely to state laws, strictly local,—positive statutes,—and their construction by the state tribunals, and to rights and titles to things having a permanent locality, immovable, and intraterritorial in their nature or character. This exposition by the supreme court, so far as it covers this question, is the law of the land, to the same extent and with equal force with the statute itself; and, although a state statute which should declare the laws of the United States a rule of decision in commercial questions would scarcely be understood to exclude this decision as appertaining to that character, yet under the authority of that adjudication, this court is bound to regard only certain classes of decisions made by the state tribunals as laws of the state, within contemplation of the judiciary act, whatever may be their authority within the state itself. But it would seem, from the opinion of the supreme court, that long-established local customs, having the form of laws, come within the terms of the section, and must be followed by the United States courts as rules of decision, and

that the decisions of the state courts are evidence of what the laws of the state are. The court in the same opinion declare that the decisions of the state courts upon even commercial questions are entitled to, and will receive, the most deliberate attention and respect of the supreme court, though they do not supply positive rules or conclusive authority. *Swift v. Tyson*, 16 Pet. 19. This decision confirms the general doctrine, before stated, that the circuit court is bound to administer the laws of the state. It perhaps renders indefinite and ambiguous, to some degree, the methods by which the United States court is to ascertain and determine what that law is,—whether, if it is not found on the statute-book, it is to be authenticated by the *dicta* and decisions of English jurists, or by the adjudications of the local judicatories.

The proposition on which the petition rests is that a subject of the queen of Great Britain, resident in Nova Scotia, is entitled, as father of a female child under the age of seven years, born within this state, to have that child taken by writ of *habeas corpus* from the keeping of its mother, and transferred by the judgment of this court to his custody; the mother being a native and resident of this state, but residing in the family of her parents, separate from her husband, and without his consent, and refusing to cohabit with him. Do the laws of the state of New York give him that right; and, if they do, can they be enforced in this court? The United States courts cannot take cognizance of matters of right created or conferred by local statutes. It is to be presupposed that a case at common law exists, of which the United States court acquires jurisdiction under an act of congress; and the determination of that right is then to be made in conformity with the state law. It is accordingly unnecessary to consider the question which has been raised in the state courts, whether, under the Revised Statutes, (2 Rev. St. p. 477, § 88,) there exists in this state any common-law right or remedy by *habeas corpus*, because, if the eleventh and fourteenth sections of the judiciary act bring the case within the jurisdiction of this court, it must proceed to adjudicate on it conformably to the general principles of the common law of England, (*Ex parte Watkins*, 3 Pet. 201,) unless that rule is varied by the local laws. Nor need the point be discussed, whether, if an infant is brought before this court on *habeas corpus*, on the application of its father or guardian, the court can act on the matter as if the writ were presented at the instance of the mother, and accordingly regard the provisions in the Revised Statutes as the rule of decision for governing the case. 2 Rev. St. p. 82, §§ 1, 2.

The question now is whether the petitioner can demand as his legal right the writ prayed for, on the facts stated in his petition. The present posture of the case does not raise the point whether the individual cause of action has been adjudicated and settled by the state courts, so as to bar the party from again prosecuting it; but the proposition to be determined is one general in its nature,—whether the facts stated in this petition entitle any party, as matter of right, to relief by a *habeas corpus*. This subject has undergone a most searching discussion before various tribunals of the state. Two of the local judges and the chancellor, on

these facts, allowed a writ, but refused to award the custody of the child to the father. *People v. Mercein*, 8 Paige, 47. The supreme court, on full discussion, adopted a different conclusion, and by two solemn decisions adjudged that the father, under such a state of facts, was by law entitled to the custody of the infant child. *Mercein v. People*, 25 Wend. 82; *People v. Mercein*, 3 Hill, 405. These judgments of the supreme court were reviewed on error in the court of errors, and both reversed by that tribunal. *Mercein v. People*, 25 Wend. 106; MSS. Ops. Sess. 1844. The supreme court based their decisions upon the doctrines of the common law, and not upon the terms of the Revised Statutes, (2 Rev. St. p. 466, § 23,) the language of which certainly comprehends the broadest range ever given the writ by the English courts, and might very plausibly be urged as extending it to matters not before embraced within that remedy. Revisers' notes, 3 Rev. St. 784. The substance of the enactment is that a *habeas corpus* shall issue on the application of any person (by petitions signed by himself, or another in his behalf) "committed, detained, confined, or restrained of his liberty, for any criminal or supposed criminal matter, or under any pretense whatsoever," (2 Rev. St. p. 466, §§ 23, 25,) with some exceptions that need not now be noticed. It must, therefore, be regarded as the settled law of this state, so far forth as the decision of the court of errors, twice rendered on this point, can furnish the law, that the keeping of an infant female child under seven years of age, from its father, by the mother, living separate from him, and who has it in her nurture, is not, in judgment of law, a detention or restraint of the liberty of the child, and that the father is not entitled by writ of *habeas corpus* to have such possession of the mother adjudged illegal, nor to have the custody of the child awarded him.

These decisions have been stigmatized on the argument as outrages upon the common-law doctrine on this subject, and as devoid of all claims to professional consideration and respect. Most earnest efforts were made to place them in disparaging contrast with the opinions of the individual judges of the supreme court, whose judgments upon the point are overruled by the court of errors; and this, not by weighing the arguments of one tribunal against those of the other on the subject, but by sharp invectives against the constitution of that high court, and the competency of its individual members. This court was solicitous to allow the petitioner the opportunity to discuss his case in all its bearings, and, as his language was decorous in terms, did not feel called upon to check the course of remarks conducing, and palpably intended, to impute ignorance or disregard of the law, in this respect, to that high tribunal; but I should do injustice to my own convictions if I omitted to observe that, on a careful perusal of the opinions leading to the decisions of the respective courts on this subject, I discover nothing in the ultimate judgments of the court of errors which places that judicatory in disadvantageous contrast with the one whose opinion it reviews and reverses. Every lawyer, however, is well aware that a decision is not to be estimated merely by the ability or learning displayed in its composition, but, essentially, by the sanction it obtains. Of what value towards

establishing a principle, or fixing a rule of law, is the most erudite opinion of a high judge, when the full bench to whom it is submitted adopts a different conclusion, although *sub silentio*? What court or lawyer, in searching for and applying a rule of law, rests upon the dissenting arguments of judges in the courts of this country or England, whatever be their grade or reputation? The judgment sanctioned by the court can alone answer the exigencies, and meet the inquiry. The more elevated the rank of the court may be, the higher becomes the sanction of its judgments. Every system of jurisprudence imports in its organization that, upon questions mooted from tribunal to tribunal, the judgment of the one of last resort is conclusive proof of what the law is upon the points in dispute; and this entirely irrespective of the qualifications of the members of such *dernier* court. A barrister would not be permitted to argue in Westminster Hall that a decision of the house of lords on a writ of error weighed nothing, in settling the law of the case, in comparison with the reasonings of the individual judges on the case in the courts below. A decision by the house of lords ends all question before every tribunal of the kingdom as to the point adjudicated, and this is certainly not founded upon the fact that any extraordinary judicial learning or experience exists in that body, or is brought to act on the subject-matter. That court is lauded by Sir William Blackstone, and English writers generally, as one of the eminently excellent features of the British constitution, and as the most august tribunal in the world. Its judgments of reversal annihilate the decisions of the courts of Ireland and Scotland, rendered unanimously by all the judges, and also of the lord chancellor, and all the judges, barons, and lords of English courts of law and equity; and no party, subject or foreigner, can be permitted to gainsay the efficiency and wisdom of such final determination. And yet, in that court, on the decision of appeals from Ireland and Scotland, in admiralty and in equity, the lord chancellor almost invariably sits and acts as sole judge. Lord BROUGHAM asserts that he rarely or ever, when lord chancellor, could obtain the assistance of any other member of the court to sit with him on review of his own decisions, and that he, solely, had to decide questions brought from the Irish and Scotch courts, where all the members of those tribunals had concurred in judgment upon points resting on local and peculiar laws. When the house of lords sits on writs of error, only three lords need be in attendance. No more, in fact, do attend; and these three may change daily. And it results, in practice, that the three noble lords who ultimately decide that the 12 judges of England have erred in their opinion of the law were neither of them present at the argument on the writ of error. These facts are asserted by Lord BROUGHAM, in the face of the house of lords, and stand uncontradicted. 2 Chit. Pr. p. 587, note *h*. Whatever obloquy may be aimed at the construction of the court of errors in this state, there are features in its constitution which elevate it most honorably, in comparison with that of the house of lords. At least 21 members must be present at the hearing and decision of every case in the court of errors, and those members alone who hear the argument take part in the decision; and it is

doubted whether any period can be referred to in the history of these two exalted tribunals, since they have had co-existence, in which the professional learning and experience in the New York court of errors was not at least equal in amount to that contained in the English house of lords. The decisions of the court of errors are, within the state of New York, obligatory to the same extent as enactments by positive law. It no more diminishes their efficiency that the judgment of one court may be modified or varied by that of its successor, than the vitality of a statute is impaired because it is liable to repeal at the will of the legislature. Such judgments are absolute rules of decision in all cases to which they apply in the state tribunals, (*Hanford v. Archer*, 4 Hill, 271; *Buller v. Van Wyck*, 1 Hill, 438;) and although, within the doctrines declared by the supreme court in *Swift v. Tyson*, 16 Pet. 19, they are not laws, in a technical sense, and as such obligatory upon this court, still, on the inquiry as to what the law of the state is, such decisions must supply evidence of great weight and cogency. Indeed, what particulars can be regarded as in principle more local or intraterritorial than those which pertain to the domestic institutions of a state,—the social and domestic relations of its citizens,—or what could probably be less within the meaning of congress, than that, in regard to these interesting matters, the courts of the United States should be empowered to introduce rules and principles, because found in the ancient common law, which should extinguish or supersede the policy and cherished usages of a state, authenticated and sanctified as part of her laws by the judgments of her highest tribunals?

In my opinion, the rule indicated by the supreme court in *Swift v. Tyson*, if not limited strictly to questions of commercial law, does not embrace the present case, and that the adjudications of the court of errors, prescribing the laws of its citizens in respect to the custody of infant children, resident in the state, and the relative rights of parents in respect to such children, are rules of decision in this court in all common-law cases touching these questions. But, if not so, and the United States court is to act independently of all control by the decisions of the local courts, and is to determine for itself what the common-law rule is in relation to such matters, the judgment of the local tribunal cannot but be of most imposing weight and significance as a matter of evidence. I do not discover that that judgment stands opposed to any authentic evidence of the common-law rule as it existed in England anterior to our Revolution, or which has ever existed in this state; and, if even a doubt might be raised on that point, the inclination of this court, most assuredly, must be to yield to the domestic, and not to the foreign, interpretation of the rule. If it be conceded that the more recent decisions in England establish the law of that country now to be as claimed by the petitioner, they supply no authority here, further than they correspond with the law as clearly existing antecedent to 1775. I am not aware the doctrine has ever been countenanced in the supreme court of the United States that modern decisions in the English courts, unsanctioned by ancient tradition, are entitled to outweigh those of state courts in fixing the final



laws of the state. The value of the latest decision, the most relied on, that of *King v. Greenhill*, 4 Adol. & E. 624, when brought in competition with those of the American courts, upon an inquiry into the reason of the law, is essentially impaired by the declaration of Lord DENMAN in the house of lords, (the judge who pronounced the decision below,) that he was ashamed of the necessity which exacted a decision of that character from a British court, and of a late lord chancellor, on the same occasion, that the rule of law announced by that decision was a disgrace to the English character. But I do not feel that it is imposed on this court to revise the subject at large, and determine what is the true rule of the common law in this respect. The United States court in no way acts in supervision of the state courts. The decisions of these tribunals are independent of the United States judiciary, and absolute in themselves, in all cases not subject to review in the method pointed out by the judiciary acts. *Ex parte Bollman*, 4 Cranch, 96, 97. This case is not in that predicament. The extent of the authority of this court, on the principle of its organization, is no more than to act concurrently with the state court upon the subject-matter of this petition. If that concurrence does not import and exact an entire coincidence; if each tribunal acting within its sphere may examine and declare for itself, independently of the other, what rule of law shall govern the decisions,—that comity at least due between co-ordinate courts, if not that intimate and special relation of both to a common source and standard of law, would demand that neither should rigorously insist upon a principle which would bring it in collision with the other; the more especially that the United States courts should avoid, upon a balanced question, adopting conclusions which, carried into execution, must violate the domestic policy of the state, settled by the most solemn adjudications of its own judiciary. The alienage of the petitioner would not vary this principle, even if it be conceded that, by the laws of his domicile, he is entitled as absolutely to the custody of his infant children as to that of his estate. No interest, not even one resting in contract, is enforced by a court when it is repugnant to the laws or policy of the place where the action is prosecuted. *Pearsall v. Dwight*, 2 Mass. 89; *Bank v. Porter*, 5 Day, 320; *Bank v. Earle*, 13 Pet. 589. It by no means is an indisputable doctrine of public law, or of the law of this country, that the father of this infant can have here the same legal rights and dominion over it as if born within the country of his allegiance; for, if so, it might impart to him a power abhorrent to the civilization and Christianity of our age, giving him a dominion no less absolute than one over his chattels, animate or inanimate. I do not, however, go into this topic, nor regard it as having any important bearing upon the decision now made. I apprehend it has been sufficiently shown that neither in England, before our Revolution, nor in this state since, has judgment been rendered under a *habeas corpus* in regard to infants, on the acceptance that the right of the father to their custody was anything in the nature of property, or so fixed in law as to afford a controlling rule of decision to the court. In the use of the remedy afforded by means of this writ the courts have regarded

the father as that guardian first to be looked to, in case a change of custody should be deemed proper, and the infant was not of competent age to make its own choice of guardian; but it has been purely in the application of the remedy, and for the protection and interest of the infant, and not in subordination to the legal right of the father, that such award is ever made. Nothing is clearer in international law than that a party prosecuting upon the clearest right, under the laws of his country, must still take his remedy in accordance with the law of the court he invokes, without regard to the law of his allegiance, and that his demand of this particular relief is no way aided by the consideration that it would be awarded him in England or Nova Scotia.

I close this protracted discussion by saying that I deny the writ of *habeas corpus* prayed for because (1) if granted, and a return was made admitting the facts stated in the petition, I should discharge the infant on the ground that this court cannot exercise the common-law function of *parens patriæ*, and has no common-law jurisdiction over the matter; (2) because the court has not judicial cognizance of the matter by virtue of any statute of the United States; or (3) if such jurisdiction is to be implied, that then the decisions of the court of errors of New York supplies the rule of law, or furnishes the highest evidence of the common-law rule, which is to be the rule of decision in the case; and (4) because by that rule the father is not entitled, on the case made by this petitioner, to take this child out of the custody of its mother. Petition denied.

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### UNITED STATES v. RIED.

(District Court, W. D. Michigan, S. D. April 5, 1890.)

#### 1. POST-OFFICE—USE OF MAILS TO DEFRAUD—SPIRITUALISM—EVIDENCE.

Defendant was indicted for using the mails in furtherance of a scheme to defraud, by soliciting money upon the representation that by an unknown power he was able to answer sealed letters addressed to spirit friends. The government, to show the fraudulent character of the defendant's business, introduced admissions of defendant that the business was fraudulent. *Held*, not competent for defendant to show by the testimony of persons sending him such letters that in particular instances he had answered them satisfactorily, and that the questions were of such a character that he could not have answered them except by supernatural power.

#### 2. SAME—DEMONSTRATIONS OF OCCULT POWER.

In such a case the defendant will not be permitted to give a test or exhibition of his unknown power in open court.

#### 3. SAME—FRAUDULENT INTENT—EVIDENCE—BELIEFS.

The belief of the defendant as to his capacity or power to get answers to questions contained in sealed letters from the spirits of the departed is one of the questions of fact bearing upon intent.

#### 4. SAME—CONDUCT—EFFECT.

A man may believe what he will, and the right of association for the promulgation of his belief is complete; but he will not be allowed to carry his belief into conduct which is injurious to the public, and contrary to law. This is the difference between belief and action, of opinion and conduct, in practical matters.

#### 5. SAME—FRAUDULENT INTENT.

Upon the question whether there is an intent to devise a scheme to defraud, the rule is this: If the scheme be adapted in its plan to work a fraud upon others, and

the defendant knew that a material representation therein contained, and calculated to deceive, was not true, or if he did not believe that it was true, then the intent is made out.

6. SAME—PROVINCE OF HUMAN UNDERSTANDING.

No man has a right to embark in a business, and insist that the legality of it shall be tested by principles beyond the understanding of others, and not by the apprehension of the courts and juries of the country, if when tried and tested by common human understanding the purpose is found mischievous and unlawful. The jury are not to disregard their own convictions by reason of a cloud of mysteries which they cannot penetrate.

(*Syllabus by the Court.*)

At Law.

Defendant was indicted for a violation of section 5480 of the Revised Statutes. The testimony on the part of the government showed that defendant had for some time made use of the mails in sending out circulars and advertisements, of which the following is a sample:

"Dr. W. E. Ried, the Spirit Postmaster; or, how to obtain a sealed letter from your spirit friends. In the first place, take a moment's time to understand fully what a sealed letter consists of. If you are troubled about financial matters, sickness of any description, family troubles, or are undecided what to do about any special matter, think your matters over carefully, and then follow the directions given below implicitly, and your letter will receive prompt attention: *First.* Write the full name or names of your spirit friends on slips of paper. *Second.* Address them by terms of relationship or friendship. *Third.* Ask your question. *Fourth.* Sign your own name in full. When this is done, place your question in an ordinary envelope, and seal it. Write a few lines on another sheet of paper, giving instructions to whom the replies should be sent, and place your sealed letter and note of instructions in a larger one, and address, Dr. W. E. Ried, 28 Canal St., Grand Rapids; 'Personal' in one corner. Dr. Ried has answered several thousand letters during the past two years, and has been uniformly successful. Of course, there are cases where nothing can be obtained, and invariably the money will be refunded if no answer can be given. Fee for answering sealed letter, \$1.00, if above directions are followed, and 6 cents extra for postage. If sewed in any manner, \$5.00. If sealed with wax, \$5.00."

The government showed that in answer to such circulars and advertisements the defendant had received a large number of letters with the required fee inclosed. As bearing on the fraudulent character of the business, numerous statements of the defendant were shown tending to prove the business to be a fraud, as also evidence tending to show that some time previous to the dates alleged in the indictment defendant had acquired a knowledge of the "trick" of opening a sealed letter by an exchange of "tricks" with another person. The defense offered to show that in particular instances the defendant had satisfactorily answered sealed letters, by the testimony of persons sending them, and that the questions answered were of such a character that defendant could not have answered them except by supernatural power. This testimony was excluded, as not meeting the case made by the government, and as amounting merely to evidence of the opinions of others upon the merits of particular performances. The defendant's counsel also asked the privilege of allowing the defendant to give an exhibition or test of his power in open court. This was denied. The defendant was not sworn as a witness.

*L. G. Palmer, U. S. Atty., and F. W. Stevens, Asst. U. S. Atty.  
F. S. Donaldson, L. V. Moulton, and Dennis L. Rogers, for defendant.*

SEVERENS, J., (*charging jury.*) The indictment in this case, in several counts charges what, for practical purposes, may be regarded as substantially the same offense. The substance of the charge is that the defendant, having contrived a scheme to defraud the public, employed the mails of the United States in the prosecution of that scheme. That, shortly stated, is the substance of the offense with which the defendant is charged. There is a statute of the United States upon which this indictment is framed, which, in effect, makes the use of the United States mails in furtherance of a scheme to defraud, previously formed by the party so using the mails, an offense; the policy being to prevent the facilities afforded by our postal arrangements from being employed in uses which are prejudicial to the interests of the public. The defendant in this case founds his defense upon the claim, as urged by his counsel, that this was not a scheme to defraud. In order to lay the foundation, and establish the first ground of the accusation contained in this indictment, as the jury will see from what the court has just said, it is necessary that the scheme should be fraudulent; and, secondly, that the mail should be used in the prosecution of that scheme. The question of fact is, upon this first head, what was the intention, or, more precisely, what was the belief, of the defendant as to his capacity or power to get answers to questions contained in sealed letters from the spirits of the departed? Now, gentlemen, every man has an absolute right to believe what he will. It is a phase of religious privilege which is guarantied by the fundamental law of the land to every citizen. This right of belief, and the right of association for its promulgation, is complete, and the party holding any belief may engage in any practice founded upon it, unless he thereby injures the peace and welfare of the public. A man may not carry his belief into conduct which is injurious to the public, and contrary to law. This is a distinction of great importance, in view of the guaranty of religious freedom and of opinion in all matters of belief which is secured by the constitutions of the several states, and in large measure by the constitution of the United States. It is the difference between belief and action, of opinion and conduct, in practical matters. If a man carries his belief into a practice or business involving a fraud, and known by him to be such, he is liable to be dealt with by the law; and if he also uses the mails to promote such business, he is liable to indictment and punishment in the courts of the United States. The interests of society require that every man's conduct should conform to the law; and while it protects him in his freedom of opinion and belief in all religious or spiritual matters, it will not permit him, under the guise of that belief, to do a thing which the laws of the country condemn. To permit this (to employ the language of the supreme court of the United States in dealing with an analogous question) would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to per-

mit every citizen to become a law unto himself. There could be no government under such circumstances, and it could not be tolerated.

Upon the question whether there is an intent to devise a scheme to defraud, the rule is this: If the scheme be adapted in its plan to work a fraud upon others, and the defendant knew that a material representation therein contained, and calculated to deceive, was not true, or if he did not believe that it was true, then the intent is made out. So that the material question here is, did the defendant devise his scheme of business in good faith? Did he believe that he could obtain answers to sealed letters from the spirits of the departed relatives and friends of the inquirers? Evidence has been laid before you bearing upon this question, and you are the sole judges of its weight, credit, and the effect to be given to it. You are to look at this proof, and determine the issue by the exercise of your own sound sense. You must not abandon the search of truth upon the suggestion that the elements of inquiry are not open to your pursuit, if your reason seems to you sufficient to see the facts. In other words, you are not to disregard or fail to give effect to your own convictions upon the testimony about the facts by reason of a cloud of mysteries which you cannot penetrate. For the purpose of administering the law, we must adhere to what is practical, and solve all questions by the best practical means at hand. No man has a right to embark in a business, and insist that the legality of it shall be tested by principles beyond the understanding of others, and not by the apprehension of the courts and juries of the country, if, when tried and tested by common human understanding, the purpose is found mischievous and unlawful. In order to convict this respondent, you must find upon the evidence, beyond a reasonable doubt, that he did not believe that he could do what he pretended he could do. All the other questions in the case are eliminated by concessions, so that the whole case is resolved into the questions of the defendant's good faith in the conception and prosecution of his scheme. If he acted in good faith, then there was nothing criminal in what he did; because the law looks, in determining this question of fraud, to the intent with which the act charged to have been done was done. The court does not feel called upon to elaborate any more fully in these instructions to the jury in this case, for the reason that, as already stated, the point is simple. There is but one question of fact for you to determine in view of the testimony in the case, and that is, to repeat it again, did the defendant believe that what he pretended he could do he could do? It is a question of actual good faith. If this was a scheme gotten up by him, without any belief on his part that he could get answers to sealed letters from the spirits of the dead, and if, without regard to the question of his ability to do this, he devised this scheme for the purpose of imposing upon and gulling the public, and getting money through that means, it was a fraud, and should be denounced as such. If, on the other hand, he honestly believed that he could do this which he advertised he could do, then there is no fraud.

Now, gentlemen, you must apply your own sound discretion and common sense to the case, and determine it, in view of what is conceded, upon the effect which you give the testimony in the case upon the point which has been presented as the issue.

An officer may be sworn.

The jury having found the defendant guilty, a motion for a new trial was subsequently argued before the district judge, the circuit judge sitting with him upon the request of the defendant, upon alleged errors in the rejection of testimony, the refusal to permit a test, and in the charge to the jury. After full argument, the motion was denied.

### UNITED STATES v. WHITE.

(District Court, W. D. Michigan, S. D. March 26, 1890.)

#### 1. INTERNAL REVENUE—SALE OF LIQUORS BY DRUGGIST—SPECIAL TAX.

A druggist is liable criminally for unauthorized sales of liquor by his clerk, if the sales made by the clerk were made within the scope of the authority delegated to him by the druggist, or the authority which may fairly be presumed from the instructions of the druggist, or the course of dealing by him, with reference to such matters.

#### 2. SAME—COMPOUNDING MEDICINES.

In determining whether sales by druggists come within that provision of the statute which allows the use of intoxicants in the compounding of medicines, he is to be bound, and his conduct is to be tested, by his good faith.

#### 3. SAME—MECHANICAL PURPOSES.

A druggist has the right to use alcohol in the making of a toilet preparation such as cologne, and he can sell it as cologne for toilet purposes; but to put into alcohol something else, for the mere purpose of modifying its character, as by placing a little bergamot, or some of the ingredients of cologne, into alcohol, and selling it for mechanical purposes, is a make-shift which the law will not tolerate.

#### 4. SAME—ILLEGAL SALES—INTENT.

The intent, as involved in these cases, is not a general question of good conduct and uprightness in the transaction of a man's business, but whether the defendant intended to make the sale or sales under circumstances which are prohibited by law.

(Syllabus by the Court.)

#### Indictment for Retailing Liquors without Paying the Special Tax.

Defendant was a druggist at Eaton Rapids. The indictment charged sales of liquor at various times from April 1, 1887, to January, 1890. The evidence on the part of the government tended to show that, for a period of about two years, defendant had been selling to a dentist, at frequent intervals, alcohol for burning in a lamp, used by the dentist in his business. The defense introduced testimony tending to show that the article sold to the dentist was cologne, or rather alcohol into which bergamot, or some of the ingredients of cologne, had been placed. There was also testimony on the part of the government tending to show sales of liquor mixed with small quantities of glycerine, oil of cloves, and quinine.

*L. G. Palmer*, U. S. Atty., and *F. W. Stevens*, Asst. U. S. Atty.

*H. S. Maynard* and *P. A. Dean*, for defendant.

SEVERENS, J., (*charging jury.*) I instruct you, as to the liability of the defendant for the sales made by his employes, that, if the sales made by his employes were made within the scope of the authority delegated by him to them, he would be responsible for such sales; but, if they made sales without his knowledge and consent, and which were outside of and beyond the limits in which he permitted them to act, in the transaction of his business, he would not be liable for the sales made by such employes. In other words, a party is not criminally responsible for the unauthorized acts of an agent. He is liable for the act of an agent where it is done within the scope of his employment, and within the scope of his authority. I mean the authority which may fairly be presumed from the instructions of the principal, or the course of dealing by him, with reference to such matters.

Coming to the classes of sales shown by the government, I instruct you that, if those sales of whisky were made by the defendant for the *bona fide* purpose of making a sale of it, compounded with other materials, as a medicine, for a legitimate purpose, he is not liable for making such sales. The law permits druggists to use whisky in compounding medicines. In the exercise of that right and privilege, he is to be bound; and his conduct is to be tested by his good faith. If he combines whisky in good faith, with some other materials, for medicinal purposes, he is not responsible as a retail liquor dealer. If, on the other hand, he uses some other admixture or element to put with the whisky, to make it go for something else, without having regard to the medicinal character or its medicinal purpose, then he is liable as a retail liquor dealer, because the law would not permit a make-shift and sham to stand in the way. You must look to the substance of the thing itself, and its real essence and character.

Coming to the other class of sales, I will adopt the rule that the defendant had the right to use alcohol in compounding it for the purpose of making a toilet preparation. He had the right to combine alcohol with other materials for the purpose of making cologne, and he could sell it as cologne for toilet purposes. Here again, you will bear in mind that the same principle of good faith is to be applied that I have stated to you is applicable to the other side of the case. The law would not permit or tolerate for an instant any such idea as that a man, knowing that he could not sell alcohol pure and simple, should put into it something else, knowing it was to be used for mechanical purposes, with the intent of modifying its character to that extent that it would not be pure alcohol, and so sell it that way. That, also, would be a make-shift which the law would not justify. But if, confining the rule to the present case, this defendant compounded alcohol with other materials for the purpose of making cologne, which, as a toilet article, he sold for the purposes of such, he would not be liable. But if he mixed any other ingredients with alcohol in order to get around and avoid the provisions of the internal revenue law, and so fixed up something that could not be called "pure alcohol," and sold it as a compound, for the purpose of evading the law, then he would be liable.

Coming to the question of the good faith of the defendant, and his intention, did he intend to combine something with alcohol for the purpose of making cologne, and selling it as cologne, or did he intend to put some other article with the alcohol and sell it, not for the purpose of cologne, and to be used as cologne, but for mechanical purposes, with its character more or less changed. Something has been said with regard to the question of intention. Intention is not a general question of good conduct or any general question of uprightness in the transaction of a man's business. The question is whether the defendant intended to make the sale or sales which he is accused of making. Did he intend to make those sales under the circumstances which are prohibited by law? That is the intent we have to look after, and nothing else.

Verdict, guilty. Motion for new trial subsequently denied.

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UNITED STATES v. FRASER.

(Circuit Court, D. South Carolina. April 16, 1890.)

SMUGGLING—EVIDENCE—POSSESSION OF SMUGGLED GOODS.

Where defendant is found in possession of smuggled goods, it is incumbent on him to explain his possession to the satisfaction of the jury; otherwise, he will be found guilty.

Indictment for Smuggling.

John Wingate, Asst. Dist. Atty.

C. S. Bissell, for defendant.

SIMONTON, J. The defendant, a seaman, is indicted for fraudulently importing into the United States 1,600 cigars, smuggling them. You will decide from the evidence these facts: Was the defendant found in possession of these cigars? Were they fraudulently imported into the United States? Did the defendant fraudulently import them, or assist in doing so, or did he receive, buy, or sell them, or in any manner facilitate the transportation, concealment, or sale of these cigars, knowing that they were imported contrary to law? If you believe that defendant was found in possession of the cigars, and that they had been fraudulently imported into the United States, you are authorized to find him guilty, unless he has explained his possession to your satisfaction. He need not, however, explain his possession, unless you believe that the cigars had been imported fraudulently,—smuggled.



ILLINGWORTH v. ATHA *et al.*

(Circuit Court, D. New Jersey. March 26, 1890.)

## 1. PATENTS FOR INVENTIONS—FRAUDULENT APPLICATION—INJUNCTION.

A complainant who alleges that defendant induced the commissioner of patents to decide in his favor, as to the priority of an invention, by means of false testimony and misleading statements, but who nowhere particularizes the falsehood or perjury, and who introduces practically the same evidence on the hearing of a motion to restrain defendant from receiving letters patent that had already been considered by the commissioner, is not entitled to a preliminary injunction.

## 2. SAME—UNSUCCESSFUL APPLICATION—EQUITABLE JURISDICTION.

Rev. St. U. S. § 4915, which gives an unsuccessful applicant for a patent the right to apply to a court of equity, and which provides that an adjudication by the court in the applicant's favor "shall authorize the commissioner to issue such patent" to the applicant, confers on the court no power to enjoin the commissioner from issuing letters patent in favor of one whom he has adjudged entitled thereto.

## 3. SAME—INJUNCTION.

Rev. St. U. S. § 4921, which confers power on courts having jurisdiction of patent cases to grant injunctions to prevent the violation of any right "secured by patent," does not confer any authority on such courts to issue an injunction in favor of one who has failed to secure a patent.

## 4. FEDERAL COURTS—JURISDICTION—COMMISSIONER OF PATENTS.

Under Act Cong. March 3, 1875, (18 U. S. St. 470,) as amended by Act March 3, 1887, (24 U. S. St. 552,) and by Act Aug. 18, 1888, (25 U. S. St. 484,) which provide that no civil suit shall be brought in the federal courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, the circuit court of New Jersey has no jurisdiction over the commissioner of patents, whose official residence is the District of Columbia.

In Equity. On bill for injunction.  
*Briesen & Knauth*, for complainant.  
*Edwin H. Brown*, for defendant Atha.

GREEN, J. This suit is brought under section 4915 of the Revised Statutes of the United States, which is as follows:

"Whenever a patent on application is refused, either by the commissioner of patents, or by the supreme court of the District of Columbia upon appeal from the commissioner, the applicant may have remedy by bill in equity; and the court, having cognizance thereof, on notice to adverse parties, and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the patent-office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served upon the commissioner, and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

The complainant, in his bill of complaint, alleges that he was the first and original inventor of certain improvements in ingot moulds, for which he, on the 26th day of August, 1886, made formal application for letters patent; that, prior to the date of the filing of his application, he constructed a model representing said invention, and in the month of July, 1886, he exhibited and explained it to his partner, Benjamin Atha, one of the defendants in this cause; that, after seeing said model, and

after having it explained, Atha, with the intent of defrauding the complainant, and with the purpose of depriving him of his right to letters patent for said invention, surreptitiously prepared an application for a patent for said invention in his own name, and, by the exercise of unusual haste and secrecy, succeeded in filing the same in the patent-office on August 23, 1886, three days prior to the application of the complainant. Upon the filing of complainant's application, an interference between the two applications was declared by the commissioner of patents, and the usual course of procedure in matters of interference was had. Much testimony was taken, but the defendant Atha succeeded in inducing the commissioner of patents to adjudge that he, and not the complainant, was the original inventor of the improvements involved in the issue in said interference, and ordered a patent to be issued to him, and not to the complainant. The bill prays that the defendant Charles E. Mitchell, commissioner of patents, may be restrained and enjoined from directly or indirectly issuing, or causing to be issued, to the said defendant Atha, letters patent for said improvement in ingot moulds, which are in controversy in the said interference; that Atha may be restrained from receiving letters patent for the same; and that the commissioner of patents may be decreed to issue to the complainant letters patent for the invention, of which he claims to be the true and original inventor. The matter now comes before the court upon a motion to make absolute a temporary restraining order, and for a preliminary injunction against both defendants in terms pursuant to the prayer of the bill. The testimony taken in the interference controversy is to be considered testimony in this cause, upon this motion.

The granting of a preliminary injunction is a matter almost wholly, if not entirely, within the discretion of a court of equity. It will never be ordered unless from the pressure of a most urgent necessity, and upon facts from which the resulting equity must be as clear as crystal. The damage threatened to be done, and which it is legitimate to prevent, must be, in an equitable point of view, of an irreparable character. Inconvenience, vexation, even serious pecuniary loss, do not afford justification for the exercise of the power to enjoin,—a power, as Judge BALDWIN, in *Bonaparte v. Railroad Co.*, Baldw. 217, emphatically says, “the exercise of which is most delicate, requiring the greatest deliberation and sound discretion, and which is most dangerous in a doubtful case.” In the case now under consideration, it is claimed that the right of the complainant to this especial relief arises in this manner: Being, as he asserts, the original inventor of a new and useful improvement in ingot moulds, he exhibited and explained to his partner in business, Benjamin Atha, one of the defendants, a model prepared for the purpose of obtaining letters patent; that Atha, in fraud of the rights of the complainant, surreptitiously prepared an application for letters patent covering the entire invention of the complainant, and, by the exercise of unwonted haste and diligence, succeeded in having it filed three days before the complainant filed his application. The two applications were practically similar in their claims, and necessarily an interference was

declared. In the controversy which followed, the main issue was the priority of the invention. This issue was decided against the complainant, and in favor of defendant Atha, first by the examiner of interferences, next by the examiners in chief, (although they suggested, as an amicable settlement, a joint patent to the complainant and defendant,) and lastly by the commissioner of patents; and it is chiefly upon the alleged impulsive cause of this last decision that the complainant now appeals to the court. In his bill of complaint, he charges that the defendant Atha, by "means of false testimony and misleading statements," induced the commissioner of patents to decide that the defendant Atha, and not the complainant, was the first inventor of the said invention, to the great and irreparable damage of the complainant, and the loss of complainant's rights in and to said invention, and letters patent which might be granted therefor. Parenthetically, it may be remarked that the evidence presented to this court upon the hearing of this motion was the identical evidence presented to and passed upon by the examiners and by the commissioner of patents in the interference controversy, and *that* only, save an affidavit made since that contest, and for the purpose of this suit, by the complainant, in which, *inter alia*, following the wording of the bill of complaint, he declares—

"That, upon false testimony and representations and misleading statements adduced by the defendant Atha, and filed in his behalf, the defendant Charles E. Mitchell, who was then, and now is, the commissioner of patents, was induced to decide that the said defendant Atha, and not your orator, was the first inventor of the improvements in interference."

It is also noticeable that neither in the bill of complaint, nor in the affidavit just quoted from, does the complainant do more than charge, in the most general way, false swearing, false representations, and misleading statements. He nowhere condescends to specify or particularize the perjury or the falsehood. His allegations are most vague. Now, it is a principle settled in equity practice that all the facts and circumstances upon which an application for an injunction is founded must be carefully, positively, and specifically proved. There is a class of cases, as, for example, bills charging fraud and praying a discovery, where, in the very nature of things, positive proof cannot be expected. But these form the only exceptions to the operation of the principle. In other cases it is imperative, and it cannot be contended that this case falls within the exception. So that this case now stands before the court upon the same, and only the same, evidence, as to priority of invention, that has already been acted upon by three different tribunals, each of which, practically, reached the same conclusion, and that conclusion one adverse to the complainant,—a conclusion, too, which the complainant, in effect, admits was justified by the evidence; for his allegation is not that the commissioner adjudged without sufficiency of evidence, but that the evidence upon which the judgment was rendered was false and misleading; and this charge the complainant purposes and expects to substantiate by proof hereafter. I do not think that any case has been made by the complainant to call for the interference by this court with

the rights of the defendant Atha by preliminary injunction. The most that can be said in review of the testimony is, it may be that the commissioner of patents has made a mistake in awarding priority of invention to Atha. At this stage of the controversy, I would be very unwilling to make even that mild criticism. My first impression of the testimony submitted would not justify it. But, if it were otherwise, I should adopt, with full concurrence, the language of Judge LOWELL in *Whipple v. Miner*, 15 Fed. Rep. 117:

"I adhere to the opinion given in *Paper Bag Machine Co. v. Crane*, 1 Holmes, 429, \* \* \* that the decision of the commissioner of patents is not final, on a question of priority of invention, even between those who were fully heard in the interference; but his decision has great weight, and it would be highly improper to enjoin the successful applicant from receiving his patent upon the mere suggestion that the commissioner was mistaken."

The motion for a preliminary injunction against the defendant Benjamin Atha is refused, and the restraining order heretofore granted is discharged.

Nor can the like motion against the commissioner of patents be granted, and for two reasons: First, in my opinion, this court can derive no power to enjoin the commissioner from the statute relied upon by complainant. This is purely a statutory proceeding, and the court cannot go outside the statute which is the foundation of the action to assume to itself powers not found in the purview of the act. The section under consideration has but a single object,—to provide a way by which an unsuccessful applicant for letters patent, notwithstanding the rejection of his claim by the commissioner of patents, may obtain them through an adjudication, in favor of his right thereto, by a court of equity having cognizance of the subject-matter; and, as the object of the section is single, so is the power of the court plainly limited under it to the accomplishment of that object. The prayer of a bill of complaint exhibited to the court under and by virtue of this section would be for a decree that the complainant has established his right to have letters patent issued to him. So far may the decree of the court go, but no further. It may adjudge an issue of the letters, or it may declare the complainant to be without right. In either case the power conferred by this section is exhausted. Nowhere can be gathered, either from the words of the section, nor from its spirit and purpose, an intention on the part of the national legislature to authorize an interference with the commissioner of patents, in the performance of his plain duty, by writ of injunction. I think this is very manifest; but, were it a matter of doubt, such doubt should be resolved against the exercise of so delicate and dangerous a power upon application for a preliminary injunction.

Nor does section 4921, Rev. St., afford any aid to the contention of the complainant. That section does confer upon "courts vested with jurisdiction of cases arising under the patent laws power to grant injunctions according to the course and principles of courts of equity;" but the exercise of the power is limited to a specific purpose, namely, "to prevent the violation of any rights secured by patent." Manifestly the

"right" which is thus declared entitled to claim the protection of the court is that which is "secured by patent;" not that which may thereafter be so secured, but that which is secured at the very time the application for protection is made. There is no pretense of any such right in this case.

But, if I am wrong in this construction of the sections referred to, there yet remains an objection to the granting of this motion against the commissioner of patents which is insuperable. It appears that he has not been served with process in this action, nor has any appearance been entered for or by him. Has this court obtained any jurisdiction over him? I think it has not. By the act of March 3, 1875, (18 U. S. St. 470,) as amended by the Acts of March 3, 1887, (24 U. S. St. 552,) and the act of August 13, 1888, (25 U. S. St. 434,) it is, *inter alia*, provided that no civil suit shall be brought before either of said courts (circuit or district) against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant. There is no allegation in the bill of complaint that the commissioner of patents is an inhabitant of the district of New Jersey. Such statement would be contrary to the fact. Officially, he resides at the seat of the national government, in the District of Columbia. This, then, is an attempt to bring the commissioner of patents within the jurisdiction of the court, not by service of process, but by a motion. But a federal court acquires jurisdiction only by a service of process, or by a voluntary appearance of the party. *Herndon v. Ridgway*, 17 How. 424. In this case, neither of these necessary precedent conditions appears. Under exactly similar circumstances, in a suit brought under this section 4915, the Supreme Court has determined that the circuit court for the district of Vermont had no jurisdiction over the commissioner. *Butternorth v. Hill*, 144 U. S. 128, 5 Sup. Ct. Rep. 796. The restraining order heretofore granted against the defendant Charles E. Mitchell, Commissioner of patents, is set aside, as improvidently granted, and as to him this bill is dismissed for want of jurisdiction.

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### SMITH *et al.* v. PITTSBURGH GAS CO.

(Circuit Court, W. D. Pennsylvania. April 19, 1890.)

#### 1. PATENTS FOR INVENTIONS—EXTENT OF CLAIM—PRIOR STATE OF ART—ILLUMINATING GAS.

Letters patent No. 830,747, granted to Roland H. Smith on November 17, 1885, for a process of producing a fixed compound illuminating gas "by heating natural gas to a sufficient temperature to decompose and convert a fluid hydrocarbon into a fixed gas, and then bringing such hydrocarbon into contact with the heated natural gas," in view of the prior state of the art of gas making and the proceedings in the patent-office, must be confined to a process in which the natural gas is first heated to the required degree, and the fluid hydrocarbon is then brought into contact with the natural gas thus heated.

#### 2. SAME—INFRINGEMENT.

In the process practiced by the defendant, water gas hot from the generator, hydrocarbon oil and natural gas in its cold state, enter a sub or mixing chamber at v.42f.no.2—10

the same time, and, there intermingling, the gases and petroleum vapor pass up into a superheater, where they are subjected to a second heating, and combined fixedly. *Held*, that this is not an infringement of Smith's patent.

3. **SAME—ANTICIPATION.**

The patent granted to Asa W. Wilkinson on June 17, 1878, describes and covers a process for manufacturing an illuminating gas by taking "the natural light carbureted hydrogen gas escaping in some places from the earth," and, after purifying it in the usual way, passing the purified gas into and through retorts kept at or near a cherry-red heat into which a rich hydrocarbon, such as petroleum, is introduced. *Held*, that Wilkinson's process was an anticipation of Smith's patent.

4. **SAME.**

Smith was also anticipated by the process practiced as early as the year 1878 at the Beaver Falls Gas-Works.

*In Equity.*

*George Harding and D. F. Patterson, for complainant.*

*W. Bakewell & Sons, for defendant.*

ACHESON, J. The bill of complaint charges the defendant with the infringement of two letters patent granted to Roland H. Smith,—one dated November 17, 1885, and numbered 330,747, for a "process of producing illuminating gas;" and the other dated May 4, 1886, and numbered 341,354, issued upon an application made after the grant of the former patent, for a "process of manufacturing gas." But the witnesses on both sides agree that the two patents cover substantially the same process, and as this, undoubtedly, is the fact, in treating the case, attention need only be given to the specification and claim of the earlier patent, No. 330,747.

The declared object of the invention is to provide for the production of an illuminating gas "in conjunction with any suitable enriching agent, such as the various fluid hydrocarbons;" and it consists, the specification states, "in an improved process of producing illuminating gas by heating natural gas to a temperature sufficient to decompose fluid hydrocarbon, forming a fixed gas of any desired illuminating standard." The apparatus shown and described consists of an ordinary bench of retorts, the several retorts being connected successively by a pipe extending from one to another. The first of the lower line of retorts is connected by a supply pipe with the natural gas main, while a pipe enters the top of the uppermost retort to supply it with the fluid hydrocarbon. The retorts being heated, the natural gas is admitted to the first retort, and thence is passed up through the entire series of retorts until it reaches "the proper temperature to form a fixed gas with the fluid hydrocarbon subsequently admitted." The fluid hydrocarbon is so admitted into the uppermost retort, and from that retort an eduction pipe leads for the delivery of the resultant gas to the storage tanks, or to the point of consumption. The patent does not specify the degree of heat necessary, nor indicate what the relative proportions of the natural gas and the fluid hydrocarbon should be, in the practice of the process. The claim of the patent is in these words:

"The process herein described, of producing illuminating gas by heating natural gas to a sufficient temperature to decompose and convert a fluid hydro-

carbon into a fixed gas, and then bring such hydrocarbon into contact with the heated natural gas, whereby a fixed compound gas of suitable illuminating properties is produced, substantially as specified."

The proofs show that before the date of Smith's invention an apparatus, designated the "Granger Water-Gas Apparatus," was publicly known and in use in the United States, whereby water gas is first produced in the usual way, and then, under the action of high heat, is enriched by the incorporation therewith of the gasified vapor of hydrocarbon oil, or petroleum, so as to form a highly illuminating gas. The apparatus, as described by the witnesses, consists of a tall, cylindrical superheater filled with brick checker-work, and having at its base a hollow mixing or subchamber, in the arched cover of which are numerous perforations leading into the superheater. An ordinary water-gas generator is connected with the subchamber by a flue, and directly opposite to the point of entrance of the flue an oil-supply pipe enters the chamber. In the operation of the apparatus the generator is charged with coke or anthracite coal, which is ignited, and by the use of an air-blast is carried up to a state of glowing heat; the products of combustion passing up through the superheater, and heating the checker-work to a cherry-red color. The blast is then cut off, and, the waste product outlet being closed, steam is admitted beneath the incandescent coke or coal, and, passing up through the same is converted into a water gas, consisting, as it leaves the bed of incandescent carbon, of free hydrogen gas and carbonic oxide gas in nearly equal parts. The water gas, in an intensely heated state, passing through the flue into the subchamber, there meets and mixes with the incoming oil, which, under strong pressure, enters the chamber in the form of a spray or mist, and the mingled gas and oil vapor pass up through the heated checker-work of the superheater; and the resultant illuminating gas passes thence through the hydraulic main and purifiers to the storage tanks.

Now, the defendant uses the old Granger apparatus and process, as above described, but with this addition, viz.: The defendant has introduced a pipe for supplying natural gas to the subchamber; that pipe and the oil supply pipe approaching the chamber in converging lines, and their orifices being close together. When the superheater is blown up to a cherry-red color, the water gas in its heated state, the spray of the hydrocarbon oil, and the natural gas in its cold state, are admitted at the same time into the subchamber, and in their mingled condition the gases and oil vapor pass up through the superheater. The defendant has given evidence tending to show that nearly equal parts of water gas, petroleum gas, and natural gas enter into the composition of the resultant gas. It should here be mentioned that, in connection with the Granger plant, the defendant company manufactures by the old retort process common coal gas, which is mixed with the "Granger gas," so called, in the purifiers and storage tanks, in the proportion of half of each in volume.

The position taken by the plaintiffs is that the defendant infringes the Smith patent in subjecting the natural gas and the liquid hydrocarbon

to the degree of heat stated, thus uniting them, and that it is immaterial that water gas also enters into the resulting fixed compound gas. The plaintiffs' expert witness, Mr. Coombs, speaking of the Smith patent, declares that "the gist of the invention is combining the natural gas and the hydrocarbon while they are in a heated condition;" and the plaintiffs' learned counsel contend that Smith's patent, No. 330,747, "covers the process of making a fixed compound gas by the union of gases resulting from the decomposition of petroleum with natural gas when heated to the degree required to decompose the petroleum, regardless of the mode or apparatus employed to heat and unite the gases, and regardless of the addition of non-illuminant water gas to dilute and expand the volume of the compound." But, in view of the prior state of the art of gas making, and the proceedings in the patent-office, I do not see how it is possible to give to the claim of the patent a construction so broad. It was a matter of common knowledge among gas manufacturers, long before the date of Smith's invention, that lean gases—that is, gases deficient in carbon—could be enriched, and their illuminating power increased, by combining with them, through the instrumentality of heat, the gases of decomposed hydrocarbons. The proofs here show several instances of the previous actual practice of such processes in several places in the United States, and a number of prior patents in evidence describe and cover such processes, and show suitable apparatus for the work. For example, the patent granted to Moses W. Kidder on June 12, 1877, shows a process for manufacturing illuminating gas consisting—*First*, in heating bituminous coal in a closed distilling chamber sufficiently to expel the hydrocarbon vapors from the coal without decomposing said vapors; and, *secondly*, in introducing a combustible non-luminant gas beneath the coal in said chamber, and passing it upwardly through such heated coal, whereby the nascent hydrocarbon vapors are taken up and lifted out from the coal, and the non-luminant gas carbureted, the mixed gas and vapors being subsequently superheated, and thus permanently combined. Kidder's patent covers combustible non-luminant gases generally; but, by way of example, the specification names water gas, hydrogen gas, carbonic oxide gas, and marsh gas. Now, there is a conflict of opinion between the witnesses in this case as to whether "marsh gas" and what is now known by the term "natural gas" are one and the same. But, if not absolutely identical, certainly the difference between them is so very slight that it may be safely affirmed that, as respects the process by which they may be carbureted, it is an unimportant difference. To the suggestion that, at the date of Kidder's patent, no analysis of natural gas, so far as appears, had been made to determine its elements, it can be answered that, at any rate, so soon as it came into use as a fuel and illuminant, it was known to belong to the class of lean gases.

But Mr. Smith was not the first to show to the public a process for combining fixedly, by the agency of heat, the gases of decomposed hydrocarbons and *natural gas, eo nomine*. The patent granted to Asa W. Wilkinson on June 17, 1873, distinctly sets forth a process for manufacturing an illuminating gas by taking "the natural light carbureted hydro-



gen gas escaping in some places from the earth," and, after purifying it, passing it through a retort or retorts, heated at or near a cherry red, into which petroleum or other rich hydrocarbon is introduced. The claim of the patent deserves to be here quoted at large.

"A process of manufacturing a rich and superior illuminating gas by first producing ordinary illuminating gas from bituminous coal, or taking the natural light carbureted hydrogen gas escaping in some places from the earth, then purifying the same by the usual process, and finally passing the purified gas through a retort or retorts kept at or near a cherry-red heat, into which a rich hydrocarbon, such as petroleum, naphtha, oils, resin, &c., is introduced, substantially in the manner set forth."

The defendant cites Wilkinson's patent as anticipatory of the Smith invention, and the point will be considered hereafter. That patent is now referred to as illustrative, in part, of the prior state of the art; and, surely, it evinces, in connection with the other proofs under this head, that Smith's patent cannot be construed so broadly as to cover every mode whereby a fixed compound illuminating gas is produced by combining natural gas with the gases of fluid hydrocarbon by means of heat.

Turning now to the proceedings in the patent office, we find that, in view of the several prior patents referred to by the examiner, Smith's application was twice rejected. Upon the first rejection, in a written communication to the commissioner, Mr. Smith called particular attention to the fact that his invention "consists essentially in heating natural gas under pressure to a temperature sufficient to decompose a liquid hydrocarbon, and then decomposing such hydrocarbon by mixing with the heated fixed gas while under pressure." And in a further written communication to the commissioner, upon the second rejection, after stating that in his case it was plainly set forth that "the temperature should be sufficient to decompose the admingled hydrocarbon so as to form a fixed gas," Mr. Smith added this significant language:

"In other words, applicant employs the natural gas as a vehicle for conveying the necessary heat to the fluid hydrocarbon, to decompose it. This has not been even hinted at in any reference, and, as it forms an essential element of the present invention, it is submitted that the case should be allowed."

Then, upon the examiner's calling for "a full and fair acknowledgment of the state of the art as shown by the references, to distinguish between what is old and what is claimed as the improvement," the specification was amended by inserting the following statement of the invention and disclaimer:

"My invention consists in an improved process of producing illuminating gas, by heating natural gas to a temperature sufficient to decompose fluid hydrocarbon, forming a fixed gas of any desired illuminating standard, as more fully hereinafter specified. \* \* \* I am aware that poor gas has been enriched by passing it directly from the retorts in which it is generated through liquid hydrocarbon, so as to take up the vapor of the same, and convert the mixed gases and vapor into a fixed gas by re-retorting; also, that natural gas has been, together with steam, passed through highly-heated carbon, the re-

sultant gases being combined with liquid hydrocarbon, and the mixed gases and vapor converted into a fixed gas by subjecting the same to intense heat; and such processes I do not claim."

After this amendment, there was an allowance of the patent with the claim as hereinbefore quoted. Applying, then, to the Smith patent, the principles of construction laid down by the supreme court in the cases of *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 5 Sup. Ct. Rep. 475; *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. Rep. 1021; *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. Rep. 493; and *Sutler v. Robinson*, 119 U. S. 530, 7 Sup. Ct. Rep. 376,—a more limited effect must be given to the claim than the plaintiffs insist on. The above citations from Mr. Smith's written communications to the commissioner, upon the faith of which the office acted, cannot now be excluded from consideration. They, in effect, restricted his application to a process in which hydrocarbon is decomposed by means of heated natural gas, or, as he himself put the case, to a process which employs "the natural gas as a vehicle for conveying the necessary heat to the hydrocarbon, to decompose it." And, when we read the claim in connection with the amended specification, it is not difficult to see that it is so limited; for, as there defined, the patented process consists of two steps,—first, "heating natural gas" sufficiently "to decompose and convert a fluid hydrocarbon into a fixed gas," and "then bringing such hydrocarbon into contact with the heated natural gas." Now, it seems to me clear that the defendant does not practice that process, for the natural gas enters the mixing or subchamber of the Granger apparatus at the defendant's works in its natural, cold state, and, there intermingling with the heated water gas and the hydrocarbon oil, the gases and the petroleum vapor together pass into the superheater, and up through the heated brick checker-work.

If the foregoing views are correct, the defense of non-infringement must prevail, and hence this opinion might well here end. But the defense of anticipation has been fully argued by counsel, and it is perhaps better that the court pass directly upon it, also. The evidence to sustain this defense is the Wilkinson patent, already referred to, and proof by John M. Critchlow of the alleged prior use at the works of the Beaver Falls Gas Company in Beaver county, Pa. Comparing the Wilkinson and Smith patents, it is quite plain that the respective processes therein described are alike in purpose and in the apparatus employed; that in the practice of each the natural gas is heated, and the fluid hydrocarbon then brought into contact with it in its heated condition; and that the result in each case is the same. It is, however, here worthy of note that, while Smith does not mention any specific degree of heat, Wilkinson directs that the retorts be kept at or near a cherry-red heat, which the plaintiffs' proofs show is the proper temperature. The only difference, then, between the two patents, is that Wilkinson provides for the purification of the natural gas by the usual process—that is, by passing it through lime purifiers—before heating the gas, whereas Smith says nothing about its purification. Doubtless Wilkinson supposed that

natural gas, like coal gas,—to which his patent also applies,—contains some impurity which should be eliminated; and in his specification he explains the advantage of purifying the gas, whether natural gas or coal gas be under treatment, before it enters the retorts. His language is this:

“The gas requires no purification after having left the last retort, and is now ready for the holder, thus avoiding the loss in illumination that rich gas suffers in passing through the purifiers.”

From this I think it is evident that Wilkinson did not regard the previous purification of the natural gas as at all necessary in order to carburet it. It might as well be argued that he supposed that the pre-purification of the coal gas was necessary before it could be enriched. In my judgment, his patent does not teach, or even intimate, that, in order to carburet natural gas, its purification is a prerequisite. Manifestly the prescribed purification is simply preliminary to the practice of the enriching process described in the patent, and here in question, and is no part of the process itself. Moreover, the uncontradicted evidence—coming, too, from the plaintiffs' expert—is that the purification of natural gas by the usual process does not in any wise change the nature of the gas, but simply removes any carbonic acid that may be present; and the witness says:

“It would leave it in a better condition to combine with the hydrocarbon by reason of the removal of the carbonic acid. Except by the removal of the carbonic acid, the gas would be the same.”

But, if previous purification puts the natural gas in a more suitable state for combining with the fluid hydrocarbon, by what mode of reasoning can the conclusion be reached that the omission by Smith of such purification involved invention? Again, can it be doubted that, had Wilkinson's process been later than Smith's, it would have infringed Smith's patent? But, if so, being earlier, it anticipated it. *Peters v. Manufacturing Co.*, 129 U. S. 530, 537, 9 Sup. Ct. Rep. 389.

The enrichment of natural gas, to increase its illuminating power, by mixing it, in a heated condition, with petroleum, was practiced at the works of the Beaver Falls Gas Company in the years 1877 and 1878; and the mode of operation is thus described by Mr. Critchlow, whose testimony is uncontradicted, and may be accepted as truthful in its statements of fact. The natural gas, as it came from the earth, was conveyed in a pipe inserted through the lid of the mouth-piece of an ordinary retort, and delivered at the rear end of the retort, which was heated to the degree common in the distillation of coal,—say from 1,800 deg. to 2,100 deg. From the rear end of the retort the natural gas passed to the forward end, and thence upwardly through a vertical stand-pipe which connected the retort with the hydraulic main. The hydrocarbon oil for carbureting the natural gas was introduced into the stand-pipe, and, falling from the point of introduction, met and came in direct contact with the ascending hot natural gas, and “was thereby volatilized to a large extent,” and, mixing with the hot natural gas, was carried to the hydraulic main. That part of the oil which was not immediately so affected by direct contact with the heated natural gas fell to the forward

end of the retort, and was there "more slowly volatilized" and mixed with the natural gas. The product of this operation was mingled with ordinary coal gas, and the admixture supplied to consumers. This process was practiced at the Beaver Falls Gas-Works, constantly, for the period of a year or more, and was then discontinued because the result was unsatisfactory; the compound gas, when any great quantity of oil was used, burning with a smoky flame, and the diminution of the quantity of oil producing gas of low candle power. Such being the facts, I do not see how it can be denied that the process so practiced at Beaver Falls was the same as that described in Smith's patent, and was an anticipation. What more does the patent disclose than was there known and pursued? As to the proper proportions in the admixture of the natural gas and the fluid hydrocarbon, the patent is silent. It gives no instruction whereby the excessive employment of the enriching agent may be avoided. Nor can the transaction at Beaver Falls be deemed an unsuccessful and abandoned experiment, within the meaning of the patent law. An illuminating compound gas was there actually produced, and for a long time was extensively used. The cessation of the use was not because the process was impracticable, but by reason of the unsatisfactory nature of the product, in that the compound gas burned with a smoky flame. And here it must be observed that there is testimony in the case tending very strongly to show that smokiness is a defect inherent in gas produced by combining natural gas and petroleum gas, for the reason that natural gas is deficient in hydrogen. I will not, however, discuss that subject. It is enough here to say that in my opinion the defense of anticipation is made out.

The defendant sets up other defenses, which have not been alluded to and will not be considered here, inasmuch as, for the reasons already given, the bill of complaint must be dismissed. Let a decree be drawn dismissing the bill, with costs.

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**MCCORMICK HARVESTING MACH. CO. v. MINNEAPOLIS HARVESTER WORKS.**

*(Circuit Court, D. Minnesota. April 7, 1890.)*

**PATENTS FOR INVENTIONS—PRIORITY—LACHES.**

An improvement in grain-binders was conceived, and orally explained by the inventor, in June, 1879, to persons skilled in the operation of harvesters, and their construction. His devices were constructed and in operation on a machine in the harvest of 1880, and a patent was applied for in June, 1881. Complainant's assignor applied for a patent in April, 1880. *Held*, that the first inventor did not lose his claim to priority by delay.

In Equity. Bill to determine priority of invention.  
*Parkinson & Parkinson*, for complainants.  
*J. R. Bennett*, for defendant.

NELSON, J. This is a suit in equity, brought, under section 4915 of the Revised Statutes of the United States, by the complainant, to whom a patent on application was refused by the commissioner of patents, praying a decree that he is entitled, according to law, to receive a patent for his invention relating to improvements in grain-binders, as specified in the following claim:

"In combination with the knotter, a cord-holder, mounted on a swinging frame, pivoted as described, to oppose its weight to the stress of the cord, a projecting arm from said frame, and a cam upon a revolving shaft, adapted to force said holder down, after the knotting operation terminates."

The complainant brings the suit as assignee of Charles Jewell, and against the defendant, who is the assignee of John F. Appleby. The answer denies that Jewell was the first inventor, and entitled to a patent therefor. The cause is put at issue by replication, and the only proofs submitted were those taken in the patent-office, during the pendency of an interference between the invention of Jewell, as heretofore set forth and claimed, and the second claim of Appleby, which is in the following words:

"In combination with the tyer and cord-holder, mounted on the swinging frame, *a*<sup>2</sup>, pivoted as described, to oppose its weight against the cord; the arm, *f*<sup>2</sup>, on said frame, and the cam, *f*<sup>3</sup>, on the shaft, *f*, adapted to control the action of the cord-holder, substantially as and for the purpose hereinbefore described."

The examiner of interferences, the board of appeals, and the commissioner of patents adjudged priority of invention in favor of Appleby, and refused a patent to Jewell's assignee.

Subsequent to the commencement of this suit, a bill in equity was filed by the defendant against the complainant in this cause, a patent having been issued to it, as assignee of Appleby, embracing the claim above set forth; and all the copies of the patent-office records in the latter cause, which are now pending in this court, are stipulated into this cause. The application of Jewell was formally filed on the 23d of April, 1880. The application of Appleby was filed June 29, 1881, and a patent was issued, embracing this claim, August 15, 1882. On the testimony before the patent-office, the examiner and the board of appeals promptly decided in favor of Appleby. The commissioner of patents, however, expressed grave doubts about the correctness of the award of the board of examiners, but refused to overrule it. The claim of Appleby to priority rests upon the testimony of Dixon, Carver, and Appleby himself. Dixon, who is an expert in patent matters, testifies that Appleby explained to him the invention for which Jewell's assignee now asks a patent about the 15th of June, 1879, and that his explanations were made in the presence of a grain-binder, and that they were perfectly intelligible to him, and that Appleby pointed out on the grain-binder present how he would apply the invention; and in fact that the explanations were made so clear that he or any good mechanic could have made the device from the descriptions given. He says in his deposition, in answer to the second question—

"Are you acquainted with John F. Appleby, now present, and a party to this interference? *Answer.* Yes, sir. Q. 3. How long have you known him, and when and where have you principally met him? A. I have known him since the fall of 1878. Met him in Plano, Illinois, in 1879 and 1880. \* \* \* Q. 4. What was he doing, and what were you doing, when you met him in Plano, Illinois? A. He was adapting his binder to our harvester. I was looking after Mr. Deering's business, as I am now. Q. 5. Had you any conversation with Mr. Deering \* \* \* in reference to the device which holds the cord below the knot-tying device? If so, state when. A. I had, about the 15th of June, 1879. Q. 6. State what the conversation was. A. Well, we were trying cord,—different kinds of cord,—and there was one kind—'jute cord,' I think they called it—that we couldn't make work. It would pull in two before it would draw through the disk. Mr. Appleby remarked to me that he had a device by which he could float the disk, the notched wheel forming part of the cord-holding mechanism, and use that cord. He went on to explain it to me, and I objected to it on the ground that he could not cam it up in correct time with the knoter, and would break the cord. He explained that he had that fixed all right, as he would cut away the cam, and let the cord draw the cord-holder up to the knoter, as the knoter required the cord, and only cam it down. I remarked to him that I thought that was all right, and I had no more conversation on that subject with him until I saw the device."

Jewell conceived the invention not earlier than the time when Brown, the blacksmith, according to the testimony, placed the arm in the binder in September, 1879. Cable testifies that he saw Brown put it in at that time. Brown swears he did the work in the summer or fall of 1879, and Van Tassell is certain the cord was not operated by the depending arm and cam in July, 1879, and that the arm was not on the cord-holder at that time. Appleby conceived the invention as early as June, 1879, as appears from the testimony of Dixon and Carver, which corroborates Appleby. Shufeldt, employed by the Minneapolis Harvester Works at the time Appleby was superintendent, made the patterns of Appleby's device the latter part of July or the 1st of August, 1880. He testifies that Appleby took him to a machine (an Appleby binder) that had no swinging frame upon it, and orally described the device, and pointed out with his hand what he wanted put upon the binder, and from that description he understood how to make the patterns, to apply the device to the machine, and how it was to operate. The machine was made as soon as the patterns were finished, and was completed not later than August 15, 1880, and was operated in the field the same month.

The real question is, was the patent-office decision, giving priority to Appleby, correct; or did the delay of Appleby in putting his device in operation in the field, and in filing his application for a patent, deprive him of his claim to priority of invention? The true rule is, as between two independent inventors, each claiming priority of invention—

"That if the first person to adequately conceive and disclose an invention, actually reduces it to practice, and connects his conception and completion by such diligence as his circumstances and the character of his invention admit of, his right to a patent cannot be defeated by any amount of diligence in coming to the patent-office of an inventor whose conception is of later date." *Hunter v. Miller*, 50 O. G. 1766.

He who first conceives and gives expression to the idea of an invention in such clear and intelligible manner that a person skilled in the business could construct the thing, is entitled to a patent, provided he uses reasonable diligence in perfecting it. Such description or expression of the idea may be oral, and need not necessarily be in writing, or accompanied by a drawing, and the right of the first inventor is not lost merely by lapse of time between the invention and application for a patent. *Dietz v. Burnham* and *Gibbs v. Johnson*, MORRELL, J. See Laws. Patent Dig. 429. Judge STORY states that rule in *Reed v. Cutter*, 1 Story, 590, as follows:

"He who invents first shall have the prior right, if he is using reasonable diligence in adapting and perfecting the same, although the second inventor has in fact first perfected the same, and reduced the same to practice in a positive form."

And in *Hubel v. Dick*, 28 Fed. Rep. 140, Judge SHIPMAN, in the case under consideration by him, where the time during which the inventor being chargeable with laches was 19 months, and 10 months elapsed after the completion of the machine, and before he applied for a patent, said: "I cannot say that there were such laches as should deprive him of the reward which ordinarily attends priority of invention."

I think the testimony also justifies me in saying that Appleby used proper diligence during the period between his conception and description of the machine to Dixon and Carver and the completion of his invention, when the castings were made from Shufeldt's patterns, and the machine put in the field. Appleby was entitled to a reasonable time, to be judged of according to the circumstances of the case, in which to perfect his invention, and reduce it to practice, without impairing his claim to priority. His invention was an important one, and he had a machine with it on in the field before the close of the next year's harvest, after his description and explanation of his invention to Dixon and Carver. He might have been more expeditious in having a machine made embodying his invention, but did he delay for an unreasonable period the practical embodiment of his mental conceptions, so as to deprive him of his claim of priority? The answer to this question is not free from doubt; but, considering the nature of the invention, and also the fact that Appleby was engaged in making application for other important improvements then in use connected with harvester machines, I do not think such delay fatal to his claim of priority. A decree will be entered dismissing the bill.

SCHUETTE *et al.* v. ANDERSON.

(Circuit Court, W. D. Pennsylvania. May 6, 1890.)

## PATENTS FOR INVENTIONS—NOVELTY—INFRINGEMENT—MANTEL FRAMES.

Letters patent No. 389,340, granted September 11, 1888, to Schuette & Co., assignees of Robert B. Thompson, for an improvement in the construction of mantels, whereby one size of mantel frame may be fitted to fire-places of different sizes, do not disclose an invention of any primary character; the same general result having already been achieved. The patentees are to be confined to their specific form of construction; and their rights are not infringed by mantels made under letters patent No. 409,596, granted to William Anderson on August 20, 1889.

In Equity.

*W. Bakewell & Sons*, for complainants.

*Joseph R. Edson*, for defendant.

ACHESON, J. The plaintiffs, to whom, as assignees of Robert B. Thompson, the inventor, letters patent No. 389,340, for an improvement in the construction of mantels, were issued on September 11, 1888, sue the defendant for the alleged infringement of the same. The declared object of the invention is to provide a construction for mantels whereby one size of mantel frame may readily and accurately be fitted to fire-places of different sizes; and the specification thus states what the invention is:

"The improvement consists in combining with the frieze and pilasters of the mantel frame a lintel, extending below the frieze, and jambs extending inward from the pilasters, the jambs and lintel being connected by a tongue and groove slide joint, substantially in the manner hereinafter described, and as pointed out in the claim."

Then, after a reference to the accompanying drawings, follows this particular description:

"A designates a mantel, which may be constructed, as usual, of wood or kindred material, with a more or less ornamental frieze, B, and pilasters, C, forming an inclosure which is to be fitted to the fire-place, in front of which the mantel is to be arranged. To this end, in my improvement, a wooden or other lintel, D, having a longitudinal groove, D', in its lower edge, is fastened along the back of the frieze, B, with its lower edge extending below the same, so as to make the opening the desired height. Jambs, E, having tongues, F, on their upper ends adapted to the groove, D', in the lintel, are then cut to the desired length, and suitably fastened to the backs of the pilasters, C, with their tongues, F, resting in the groove, D', and at an equal and such a distance from the center line of the fire opening as to make the width of the same correspond to that of the fire-place."

The claim of the patent is in these words:

"A mantel constructed of a frieze, pilasters fixed to opposite ends thereof, a lintel secured detachably to the back of the frieze, and projecting below the same, and jambs secured detachably to the backs of the pilasters, projecting inward beyond the same, and connected by an adjustable slide joint to the detachable lintel, substantially as described."

The "adjustable slide joint" designated in the claim is, of course, the tongue and groove joint to which, as we have seen, such prominence is



given in the specification; first, in the general statement of the invention, thus, "the jambs and lintel being connected by a tongue and groove slide joint, substantially in the manner hereinafter described, and as pointed out in the claim," and then in the after and more complete description, viz.:

"\* \* \* Lintel, D, having a longitudinal groove, D', in its lower edge.  
 \* \* \* Jambs, E, having tongues, F, on their upper ends adapted to the groove, D', in the lintel, \* \* \* and suitably fastened to the backs of the pilasters, C, with their tongues, F, resting in the groove, D'."

It is needless to state that this joint was old, and commonly used for many purposes in carpentry. The word "detachably" found in the claim does not elsewhere occur, nor does the specification contain any statement explanatory of the sense in which the term is used. But Fig. 2 of the drawings shows that the lintel is fastened to the back of the frieze, and the jambs to the backs of the pilasters, by means of screws; and, having regard to the avowed object of the invention, it may fairly be concluded that by the phrase "secured detachably" is meant by a fastening, by screws or otherwise, which admits of the ready removal and adjustment of the lintel and jambs without further disturbing the mantel frame.

In behalf of the plaintiffs, it is contended with great earnestness that the secure union of the non-adjustable parts of the mantel, viz., the frieze and pilasters, so as to form a strong, self-sustaining frame-work, which will bear transportation and handling, and is not at all dependent on the jambs and lintel for strength or support, is a distinguishing characteristic, if not the chief feature, of Thompson's invention. But, certainly, this is not to be discerned on the face of the patent. There is not a word in the body of the specification descriptive of the manner in which the frieze and pilasters are connected, and all on that subject we learn from the claim is that the pilasters are "fixed to the opposite ends" of the frieze. Nor do the drawings show how the frieze is connected with the pilasters. But, looking into the specification, we discover the inventor unfolding his invention in this wise:

"A designates a mantel, which may be constructed, *as usual*, of wood or kindred material, with a more or less ornamental frieze, B, and pilasters, C, forming an inclosure which is to be fitted to the fire-place in front of which the mantel is to be arranged. *To this end*, in my improvement, a wooden or other lintel \* \* \* is fastened along the back of the frieze:"

—and then follows the further description, already quoted, respecting the lintel and jambs, and the mode of their adjustment to the fire-place. In my judgment, then, the substance of Thompson's invention as disclosed by his specification is the adjustability of the lintel and jambs whereby one size of mantel frame may readily be fitted to fire-places of different sizes. But certain is it that Thompson was not the first to devise an adjustable mantel. The patent to Thomas Scautlin, No. 245,095, dated August 2, 1881, which, it is noticeable, only professes to be for "improvements" in adjustable mantel-pieces, shows provision—*First*, for an adjustable shelf and outside jambs adapted to fit a variety of sizes of

chimney; and, *secondly*, "adjustable jambs to the fire-place opening adapted to increase or diminish the size of the fire-place, and fit a variety of sizes of grate baskets." And the patent to Robert H. Gudgeon, No. 254,868, dated March 14, 1882, shows such a construction of the parts constituting the chimney-piece, chimney-piece covering, mantel-board and super-mantel, that by sliding one on the other they can be adjusted to different sizes or forms of grates or chimney openings "without requiring to be specially made, and without the assistance of skilled labor to fix them." The following clause of Gudgeon's specification has special significance here:

"The jambs, *a, a*, are provided at their upper ends, where joined by the frieze, with dove-tail grooves, *e, e*, to receive the ends of the frieze, *f, f*, formed with a dove-tail, *g*, at each end, to fit and slide in the said grooves."

Again, one of the exhibits in this case, illustrating the prior state of the art, is a mantel made in 1880, and a specimen of others made before and since, in which the lintel projects below the frieze, and is secured to the back of the frieze by screws, and the inner jambs, those next the fire-place, are secured by screws to the backs of the pilasters, and project inwardly beyond the same. That mantel has also outer grounds or jambs running the whole length of the pilasters and frieze, fastened thereto by screws, and binding them together. There is direct testimony that those mantels were made and sold as mantels which could be adjusted and fitted to fire-places of different sizes.

The mantels complained of as infringing the plaintiffs' patent are made under letters patent No. 409,596, granted to the defendant on August 20, 1889. In the construction of these mantels the lintel is not attached to the back of the frieze, but its ends are attached to the backs of the pilasters, and an air space is left between the lintel and frieze, which is claimed to be a great advantage; and the mode of connecting the jambs and lintel is this, viz., the lintel, at each end, on the rear side, for the distance of about one-third its length from the end, and for some inches upwardly from its lower edge, is rabbeted or "halved out," and each jamb, at its upper end and outer side, is correspondingly rabbeted or halved out; and these reduced parts of the lintel and jambs are lapped, and, when thus fitted, are secured together by wood screws which pass through the jambs from the rear side into the lintel. Now, if it be conceded that the plaintiffs' patent reveals a patentable invention, yet, surely, in view of the prior state of the art, it cannot be held to be an invention of any primary character. As we have seen, the same general result had already been achieved by prior patentees. At the most, Thompson was an improver only, and that, too, within narrow limits. The claim of the patent, then, is not to be interpreted so as to embrace the improvements of others. *Railway Co. v. Sayles*, 97 U. S. 554, 556; *Duff v. Pump Co.*, 107 U. S. 636, 2 Sup. Ct. Rep. 487. And, upon the whole, I am of opinion that the plaintiffs must be confined to the specific form of construction shown by their patent, and that the defendant does not infringe upon their rights. Let a decree be drawn dismissing the bill of complaint, with costs.

## CELLULOID MANUF'G CO. v. EASTMAN DRY PLATE &amp; FILM CO.

SAME v. EASTMAN CO.

(Circuit Court, N. D. New York. April 25, 1890.)

## PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.

A preliminary injunction for infringement of letters patent Nos. 269,340, 269,343, and 269,344, issued to John H. Stevens December 19, 1882, for improvements in the manufacture of pyroxyline compounds, will be denied where it appears that defendants are responsible, and are manufacturing under letters patent No. 417,202, granted to Henry M. Reichenbach, thin films for photographic purposes used only on rolls owned by defendants, and alleged to be patented, and that plaintiffs have never manufactured films in that form or for that purpose.

## Motions for Preliminary Injunctions.

*Frederic H. Betts*, for the motion.

*M. B. Philipp*, opposed.

COXE, J. This action is founded upon three letters patent, granted to John H. Stevens on the 19th day of December, 1882, for improvements in the manufacture of pyroxyline compounds. They are numbered respectively 269,340, 269,343 and 269,344. No. 269,343 was, after litigation, declared valid by this court. *Celluloid Manuf'g Co. v. American Zylonite Co.*, 35 Fed. Rep. 301. The other two have not been adjudicated, but they are for analogous improvements. The principal contention here is upon the question of infringement. The defendants manufacture a film for photographic purposes pursuant to the formula of a patent, No. 417,202, owned by them and granted to Henry M. Reichenbach. These films are very thin, are made in long lengths wound on spools, and are intended for use in cameras provided with roll-holders. The complainant has never made for sale photographic films in this form or adapted to this use. It has, therefore, no customers to supply in this particular branch of industry. It is entirely clear that an injunction will subject the defendants to injury of the most serious character without corresponding advantage to the complainant. The defendants are not interfering with complainant's market. The films which they manufacture have no market except as they are used in roll-holders sold by them, and protected, it is alleged, by their patents. Should the defendants cease making these films the complainant would not be materially benefited, unless the defendants abandon their defense and take a license under the patents in suit. That the defendants are amply responsible and able to pay any amount which the complainant may recover against them is not questioned. If the case were one where the defendants' conduct is destroying or may destroy complainant's business the situation would be different. The complainant may acquire the right to furnish these films and increase its business to this extent, but there can be no great hardship in holding this right in abeyance during the few months that will elapse pending the final hearing. The defendants strenuously

maintain that they do not infringe. There is no reason to dispute their good faith in this regard. Their process is covered by a patent and their experts are confident that they do not use the Stevens process. This important question ought not to be determined on affidavits. The present aspect may be changed when the *ex parte* opinions of the affiants have passed through the alembic of a trial and have thus been distilled and purified. Many theories now advanced may not be able to stand the test of cross-examination. It is sufficient that the question of infringement should not be determined upon affidavits in a case where no serious injury will be done by postponing the decision until the final hearing. *Fire Hose Manuf'g Co. v. Callahan Co.*, 41 Fed. Rep. 50; *Carey v. Miller*, 34 Fed. Rep. 392; *New York Grape Sugar Co. v. American Grape Sugar Co.*, 20 Blatchf. 386, 10 Fed. Rep. 835. The motions are denied.

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### THE BARRACOUTA.<sup>1</sup>

#### UNITED STATES *v.* THE BARRACOUTA.

(District Court, E. D. New York. April 9, 1890.)

#### CUSTOMS DUTIES—INCOMING VESSELS—OBSTRUCTING BOARDING OFFICER.

Where it was proved that the steam-ship B., on entering the Bay of New York, was signaled by the revenue cutter to slacken her speed, in order that a boarding officer might be put aboard of her, but that the B. did not slacken her speed, but continued to increase the distance between herself and the cutter, until the latter sheered off, and that during this time the master of the B. was on the bridge, it was held, on proceedings brought against the B. by the government, under sections 3068, 3088, Rev. St., that the action of the B. was a hindering and obstruction to the boarding officer, within the meaning of the statute, and that the vessel should be fined \$250.

In Admiralty.

*Jesse Johnson*, U. S. Dist. Atty., for libelant.

*Wing, Shoudy & Putnam* and *C. C. Burlingham*, for claimant.

BENEDICT, J. This is a proceeding against the steam-ship Barracouta, taken under the provisions of law contained in sections 3068 and 3088 of the Revised Statutes. In order to maintain the action it is necessary for the government to show that the master of the Barracouta, on the day of her arrival in the Port of New York, in the month of September last, obstructed or hindered, or intentionally caused an obstruction or hindrance to, the custom-house officer in his effort to board the steam-ship for the purpose of carrying into effect the revenue laws of the United States. In support of the prosecution the government has proved that on the day in question the revenue officers were on board of the revenue cutter in the lower bay for the purpose of boarding incoming vessels; the Barracouta, then moving up the bay, being one of

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

them. In order to enable the revenue officer to board the Barracouta, it was necessary for her to slacken her speed, and she was signaled by the cutter to do so. The cutter was at this time proceeding towards the Barracouta, for the purpose of putting the officer on board, and her character and mission was made evident to those on board the Barracouta. The Barracouta, instead of heeding the signal from the cutter, kept up her speed, and, although repeatedly signaled from the cutter, continued to increase the distance between herself and the cutter. Finally the cutter, after having followed the steam-ship some five minutes without observing any slackening of the steam-ship's speed, abandoned the chase, and turned back to put officers on board other steam-ships below. These facts make a case of hindering and obstruction to the boarding officer, within the meaning of the statute. The statute, however, is confined by its terms to the master of the vessel. Accordingly it became necessary for the government to make it appear that the master of the Barracouta was in control of her movements at the time when she steamed away from the cutter. In behalf of the government two witnesses are produced from the cutter, who positively testify that at the time the Barracouta was steaming away from the cutter they saw the master of the Barracouta on the bridge of the steamer, looking at the cutter as she was pursuing. At this time the pilot, the third officer, and a quartermaster were on the bridge of the Barracouta, and the case turns upon the question whether the master also was there. The pilot is produced as a witness for the steamer. He testifies that he thinks the master was not on the bridge at the time; but his manner on the stand was not assuring, and his testimony furnishes little satisfactory evidence upon the point in issue. The deposition of the master was also read in behalf of the steamer. He testifies that he went below to a water-closet, and remained there some 15 minutes after the steamer passed the Narrows; and he evidently desires to afford ground for an inference that he was below at the time when the cutter was in pursuit. But the master nowhere states that he was below at the time of the cutter's pursuit, and his deposition when examined discloses facts which point to the conclusion that he did not leave the bridge to go to the closet until after the cutter had abandoned the chase. Moreover, the master, when afterwards charged by the commander of the cutter with having steamed away from the cutter, made no denial of the charge, but said nothing, leaving it to the pilot to assert that the master was not on the bridge. Furthermore, neither the third officer nor the quartermaster, who were on the bridge, are called as witnesses, nor is the absence of their testimony accounted for. This state of the testimony leaves the decided weight of the evidence in favor of the assertion of the government that the master of the Barracouta was on the bridge of his steamer at the time when she steamed away from the cutter. The master, if upon the bridge, was responsible for the movements of his vessel, and his refusal to permit the officer to board her renders his steamer liable under the statute. Let the steamer be condemned to pay the sum of \$250, with costs.

MOORE *et al.* v. THE ROBILANT.

(Circuit Court, E. D. Louisiana. April, 1890.)

## 1. CHARTER-PARTY—CONSTRUCTION—LIEN FOR SUPPLIES.

When a charter-party provides that, for supplies furnished on the order of the master, the charterers shall have a draft or obligation of the master and a lien on the vessel, and necessary supplies are furnished by the charterers on the order of the master and the credit of the vessel, the charterers have a lien on the vessel, both under the general maritime law and the contract of charter.

## 2. SAME—ACTION IN PERSONAM—WAIVER.

The institution of an action *in personam* against the agents of the vessel is not a judicial concession that the vessel is without liability.

## 3. SAME—PLEADING—EVIDENCE.

Admiralty rule 51 provides that, when the answer alleges new facts, these shall be considered as denied, and no replication shall be allowed. Where the obligation sued on was entered into by the master, and the answer alleges that it is governed by the laws of England because payable there, that thereunder it is void unless specially authorized by the owners, and that "no such authority was obtained, or even asked for," claimants cannot object to the introduction of the charter-party to prove such authorization, even though no such issue was raised by the libel.

In Admiralty. Appeal from district court.

*E. W. Huntington*, for libelants.

*James McConnell*, for claimants.

PARDEE, J. The libelants, in their libel and amended libel, propound as follows:

"The libellant is the owner by purchase of an obligation for eight hundred and two pounds two shillings and eight pence executed by the master of said steam-ship, she being then in a foreign port and destined on a voyage to Liverpool, dated at Newport News, June 6, 1888, and payable to the order of Barber & Co., five days after the arrival of said vessel at the port of Liverpool, and by said firm indorsed in blank, as by said obligation marked 'Exhibit A,' filed herewith as part of his libel: that the said vessel, having, by means of the disbursements mentioned in said obligations, been fitted for sea, proceeded to the port of Liverpool, where she arrived in safety; that the aforesaid sum has not been paid, in whole or in part, to the libellant, or to any one else empowered to receive the same in his behalf, although payment has often been requested; that the said steam-ship is lying within the port of New Orleans, La., and within the jurisdiction of this honorable court; that the money advanced on the obligation sued on was absolutely necessary for the vessel to prosecute her voyage, and the master had no other means of raising funds for that purpose."

Exhibit A, attached to the libel, is as follows:

"Disbursements. (Form A.)

£. s. d.

"803—2—8.

June 6, 1888.

"Five days after arrival, or upon collection of the freight, if sooner made, of the Italian S. S. Robilant, under my command, at the port of Liverpool, or any other place at which her voyage may terminate, I promise to pay to the order of Barber & Co., the sum of 803 pounds 2 8, in approved bankers' demand bills on London, for value received, for necessary disbursements owed by my vessel at this port, for the payment of which I hereby pledge my vessel and her freight, and I hereby assign to the legal holder of this obligation all

my lien and claim against freight, vessel, and owners, with power to take, in my name, any and all necessary steps to enforce the same; and my consignees at the port of discharge are hereby instructed to pay this obligation, and to deduct the amount thereof from the freight due said vessel. In case of non-payment, the holder shall also be entitled to the benefit of all liens, in law, equity, or admiralty, which the master or owners of the vessel may be entitled to, against any part of the cargo or its owners, for freight, compress, or other charges on cargo paid by the vessel or master at the port of loading; this claim to have priority of payment over all others that may be presented against the said freight and vessel. My vessel is now lying at the port of Newport News, loaded with gen'l cargo, and ready to sail for Liverpool.

"Signed in triplicate; one being accomplished, the others to stand void.  
[Signed] "F. FELUGA, Master of the S. S. Robilant."

On the reverse side of the said Exhibit A: "[Signed] BARBER & Co."  
The claimant excepts to the said libel:

"(1) That the said libel upon its face presents no valid or legal cause of action against the said steam-ship. (2) That upon the face of the libel and exhibits therewith filed, as part thereof, no sufficient legal showing is made to justify or sustain the proceedings and seizure *in rem* made herein against the said steam-ship, and no authority therefor under the law and practice in this honorable court in admiralty."

These exceptions being overruled, or rather disposed of by an amendment to the libel, claimant answered the said libel and amended libel by reserving the exceptions herein filed, and not waiving the same. He denies that libelants are the owners of the obligation sued on, or have any legal title thereto. Denies that it was by means of the disbursements mentioned in said obligation that the said vessel was fitted for sea. Denies that the money advanced on the obligation was absolutely necessary for the vessel to prosecute her voyage, and that the master had no other means of raising funds for that purpose. Further answering, says:

"That on the face of the pleadings there is no sufficient cause of action against said steam-ship to authorize seizure *in rem*; that, the obligation sued on being payable in England, the rights and obligations thereto are governed by the laws of the kingdom of Great Britain, according to which a special authorization from the owners to the master of said ship was necessary before such an obligation could be legally made or issued; that no such authorization was ever obtained, or even asked for, although the respondent, owner of said steam-ship, resided then, as now, in England, and could have been communicated with by cable or mail; that the obligation sued on is not negotiable, and is sued on by libelants to enable Barber & Company to escape the offset of a counter-claim for damages; that a joint action was instituted in July, 1888, in Liverpool, England, by libelants and Barber & Company against Allen Bros. & Company and F. Feluga, declaring them to be the real debtors of said obligation, and thereby respondent, as owner of said steam-ship, was judicially conceded to be without liability for said obligation."

The proof shows Allen Bros., agents for owners of the Robilant, chartered the Robilant, May 2, 1888, then at New York, to Messrs. Barber & Co., of New York, for a voyage from the port of Newport News, Va., to Liverpool, for a general cargo of lawful merchandise. The charter provided, among other things, as follows:

"Cash for ship's ordinary disbursements at the port of loading to be advanced to the master by charterers, if desired by the captain, subject to two and a half per cent. commission thereon, and cost of insurance; but the captain to give the usual draft, payable five days after arrival at the port of discharge, for amount of such disbursements, to the order of the charterers, or of any other parties advancing the said money; and the agents, with the consent of the owners, do hereby authorize the captain to sign such draft, and said disbursements and said draft shall be a lien against the vessel and freight, taking precedence against all other claims, except the one for difference in freight."

The proof further shows that, while at Newport News, the cargo of the Robilant was damaged by fire, necessitating unloading and repairing to some extent; that, for the costs and disbursements on account of this fire, Barber & Co. advanced the sum of \$1,669.91, at the request of the captain of the Robilant; that, under the charter-party, Barber & Co. advanced, for the benefit of the ship, and to pay its ordinary expenses and repairs, consul fees, and pilotage, etc., in order to fit it for the voyage, including commissions, the sum of \$2,180.44, and that Barber & Co. presented these accounts to the master, including items of \$4,090.45, claims for vacant spaces, detention of cattle, and other items; that thereupon settlement was had between Barber & Co. and the master, with the help of experts, resulting in the following agreement:

"NEWPORT NEWS, 6th June, 1888.

"With reference to settlement of account due Barber & Company, charterers of the S. S. Robilant, for disbursements and difference in freight, as per charter-party, in which certain items mentioned below are claimed by Barber & Company as due to them, and are disputed by the captain of said S. S. Robilant, it is hereby agreed, in order to avoid detention, that draft shall be signed for amount of account rendered, less said items; and that the said items shall be discussed hereafter, and shall be subject to settlement by arbitration, or otherwise, as may be arranged between Barber & Company and owners' agents. This agreement is without prejudice to the rights of either party. Items referred to: Towsages incident to efforts to correct steamer's list, two hundred dollars, (\$200.00;) breaking out and restowing cargo, three hundred and sixty and forty-five hundredths dollars, (\$360.45;) claim for vacant spaces not available in consequence of the list, eight hundred and fifty dollars, (\$850.00;) detention of cattle and expense retaining part of same, estimated, twenty-six hundred dollars, (\$2,600.00;) surveyors from New York, eighty dollars, (\$80.00.)

[Signed]

"BARBER & CO.

"F. FELUGA."

And thereupon the draft herein sued upon, for the undisputed items of Barber & Co.'s account, was executed and delivered to Barber & Co. The proof further shows that, within three days thereafter, said draft was sold to libelants herein at nearly its face value, for cash, and that the disbursements made by Barber & Co., which were included in the above draft, were necessary and proper for the ship, and were furnished at the request of the master. It further appears in evidence that a suit was instituted in July, 1888, in Liverpool, England, as claimed in the respondents' answer, but that said suit has been discontinued.

On this state of the pleadings and evidence, it is difficult to see why libelants are not entitled to a decree. The libel claims a lien for the



amount of a draft or obligation, in terms granting a lien, given by the master of the Robilant for necessary supplies to the vessel furnished on his order in a foreign port. "Where a maritime lien attaches to a vessel, and her owner gives a draft for the debt, the draft in terms recognizing, confirming, and continuing the lien, the assignee of the draft and claim can enforce the lien against the vessel." *The Pride of America*, 19 Fed. Rep. 607. This is fully sustained by *The Woodland*, 104 U. S. 180. See, also, *The Serapis*, 37 Fed. Rep. 436. The proof shows that the supplies were necessary; were furnished in a foreign portion of the order of the master, and on the credit of the ship; further, that they furnished by the charterers under a charter-party specifically providing that, for supplies furnished on the order of the master, the charterers should have a draft or obligation of the master, with the lien on the vessel; so that, for the supplies in this case, there was a lien on the vessel both under the general maritime law and under the contract of charter. For the maritime lien, see *The Grapeshot*, 9 Wall. 129; *The Lulu*, 10 Wall. 192; *The Patapasco*, 13 Wall. 329; *The Souder*, 17 Wall. 666. In argument, it is contended that no lien resulted for the supplies furnished, because the furnishers were the general agents of the ship, and are therefore presumed to have advanced on the credit of the owners, and not on the credit of the ship. The evidence negatives the fact claimed, and completely rebuts the presumption supposed to follow.

The exceptions to the libel, as amended, are not well taken. The grounds of defense put forward in the answer are either not tenable or not sustained by the evidence. If it is conceded that the obligation sued on, being payable in England, the rights and obligations thereto are governed by the laws of the kingdom of Great Britain, according to which a special authorization from the owners to the master was necessary before such an obligation could be legally made and issued, still it can have no effect in this case, because the authority of the owners to give the draft in question was specially granted by the charter-party, and the action of the master was ratified by the owner claiming part of supplies in general average. As a matter of law, the lien for necessary supplies furnished a foreign vessel in the ports of the United States is controlled in the courts of the United States by the general maritime law, and not by the laws of Great Britain.

It is probable that the obligation sued on is not negotiable, although by the terms of the charter-party it was to be. In the case of *The Serapis*, *supra*, Judge BROWN decides: "Such an instrument is only quasi negotiable, and is subject to all equities as respects the ship." As no equities are set up against it in this suit, whether the obligation sued on is negotiable or not is immaterial. The answer claims that the institution of the joint action against the agents of the ship in Liverpool *in personam* was a judicial concession that the vessel was without liability. This by no means follows. The district court treated the case made in the libel as a suit upon a bottomry bond, and it is strongly contended in this court by the learned proctor for the claimant that it is only as such a suit that it can be now considered. The libel does not designate

or describe the obligation sued on as a bottomry bond, and the evidence offered and considered is in accordance with the allegations in the libel. As the libel makes a case, it would seem that the libelants are entitled to a decree, although they may have failed to establish the obligation sued on as a valid bottomry bond.

ON APPLICATION FOR REHEARING.

(May 12, 1890.)

PARDEE, J. The main contention of the proctor for claimants on this application for a rehearing is that the charter-party which authorized in advance the making of the particular obligation sued on, and provided that the same should be a lien on the ship, was not admissible in evidence under the pleadings. It is difficult to see how this can be claimed, when the claimant himself distinctly put at issue the want of authority. The answer alleges "that, the obligation sued on being payable in England, the rights and obligations thereto were governed by the laws of the kingdom of Great Britain, according to which a special authorization by the owners to the master of said ship was necessary before such an obligation could be legally made or issued; that no such authorization was ever obtained, or even asked for." The fifty-first admiralty rule provides, among other things, "that, when the defendant in his answer alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be allowed." The ruling in the case of *The Deronda*, (not reported,) decided by this court several terms ago, is relied upon as the authority for excluding the charter-party. An examination of *The Deronda* record will show that the evidence excluded in that case was in relation to matters not put at issue by either libel or answer, and not referred to in either. In the opinion in this case, I did not find it necessary to determine whether the obligation sued on was or was not a valid bottomry bond. The examination that I have made on this rehearing, however, leads me to the opinion that, if necessary in order to justify the decree already rendered, I could find and sustain the same by authority that the obligation sued on was a valid bottomry bond. "If it manifestly appear that the wants of the ship were supplied in implicit reliance upon a lien for the debt which the law of the country would give in the absence of express contract for the purpose, a subsequent bond, being but a performance of the original intention, will be sustained by the English court of admiralty." Macl. Shipp. 54, citing *The Alexander*, 1 Dod. 278; *The Vibilia*, 1 W. Rob. 1; *The Karnak*, L. R. 2 Adm. & Ecc. 289.

The evidence in this case shows that the wants of the ship were supplied in reliance upon a lien authorized by the owner, and under such circumstances that, if furnished by a stranger, the law of the country where they were furnished, would give, in the absence of an express contract for the purpose, a maritime lien for the amount furnished. Again:

"The owners' prior consent to the master's hypothecation of the ship is, in view of the law, the strongest evidence of the necessity for it; the jealousy of the law for their protection is thus allayed; and its ordinary rule, first to com-

municate with the owners, or with the owners of the cargo, according as he means to hypothecate ship, freight, or cargo, or some or all of them, whenever the possibility of communicating corresponds with the existing necessity." *Macl. Shipp.* 56, citing a long line of adjudged cases.

The evidence in this case shows the owners' prior consent to the master's hypothecation; shows the necessity for the supplies, and the maritime risk undertaken. The application for a rehearing is denied.

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THE STARLIGHT.

MENEFEE *et al.* v. THE STARLIGHT.

(Circuit Court, N. D. Florida. March 28, 1890.)

SHIPPING—CHARTER-PARTY—ACTION FOR BREACH.

Under a charter-party providing that the ship should carry "a full cargo of timber, \* \* \* not exceeding what she can reasonably stow and carry over and above her cabin, crew, and fuel spaces, \* \* \* the entire carrying capacity \* \* \* to be at the disposal of the charterers; \* \* \* charterers to have privilege of shipping a deck-load of timber, provided surveyor permits," the charterers are entitled to damages for refusal to carry a deck-load, those acting as surveyors agreeing that the ship was able, when the master uses the deck to carry coal for the voyage, and there is no evidence of any custom allowing it.

In Admiralty. On appeal from district court.

*John C. Avery*, for libelants.

*Blount & Blount*, for claimants.

PARDEE, J. In July, 1888, the owners of the steam-ship *Starlight*, then at New Orleans, through their duly-authorized agents, entered into a charter-party with the libelants for a voyage from Pensacola, Fla., to Liverpool, England, to carry for charterers a full and complete cargo of timber for the lump sum of £1,750. The charter-party provided that the ship should carry "a full and complete cargo, to consist of sawn timber and / or deals, and / or boards, at merchants' option, \* \* \* not exceeding what she can reasonably stow and carry over and above her cabin, crew, and fuel spaces, tackle, apparel, provisions, and furniture; \* \* \* that the entire carrying capacity of the steamer, including all spaces in which steamer may previously have carried cargo, to be at the disposal of the charterers. \* \* \* Charterers to have privilege of shipping a deck-load of timber, provided surveyor permits." Further, the charter provided that, if the vessel should take 1,500 loads cargo or more, the charterers would pay a further sum of £50, or in all a lump sum of £1,800; and authorizing the ship to call at any port or ports for coal and other supplies. When the ship reported at Pensacola her decks were covered with coal said to be required for the voyage to Liverpool. The master, however, stated at the quarantine station, when asked why he had his coal on deck, that it was because he did not intend to take any deck-load. The charterers requested him to remove the coal, so as

to allow of a deck-load; and, in default of removing it entirely, to so stow it as to occupy the least compass, and enable the charterers to use the balance of the deck for a load,—all of which was declined by the master. The surveyors of the port, consisting of port-wardens and pilot commissioners, etc., (there was no certain officer designated as surveyor,) agreed, in the main, that the ship could safely carry a deck-load; in fact, there was no dispute as to this proposition, because the master of the vessel proposed to and did carry a deck-load of coal. During the loading of the ship, one of the hatchways was stowed with timber, but the master required the stevedore to take this out, and throw it overboard, and refused to permit the use of the hatchways for the stowage of cargo. When the vessel was loaded with about 1,250 loads of timber, she was declared full, and could stow no more. The evidence is conflicting with regard to the number of additional loads that the ship would and could have carried, had the deck space and hatchways been utilized for cargo. The weight of the evidence, as found by the district judge, was in favor of libelants, and to the effect that she could have carried 205 additional loads. In the preliminary correspondence, by letter and cable, between the agents of the respective parties, as to the chartering of the *Starlight*, there were representations made that the ship would coal at New Orleans,—whether for the voyage was not mentioned; but no correspondence was had with reference to reserving any other than fuel spaces for stowage of coal, and nothing was said as to reserving any part of the deck space for any such purpose. There is some evidence in the record tending to show that ships in the lumber trade from Pensacola sometimes load with coal for the entire voyage, and sometimes stop at Newport News or Norfolk to coal *en route*. No custom or usage in regard to this coaling matter, however, is proved in the case; neither is any custom or usage proved with regard to stowing fuel on deck. It is a fair presumption, from the terms of the charter-party providing for an additional lump sum, if the ship would carry over 1,500 loads, that the ship was held out (not warranted) as able to carry on the voyage in the neighborhood of 1,500 loads, and that the lump sum for freight was fixed with reference to such capacity. The contract does provide that all the cargo spaces of the ship, including the deck, in a contingency provided for, should be used for cargo. This agreement was violated, to the damage of the charterers. The libel is brought in this case to recover the amount of such damage. On the showing made, the libelants are entitled to recover. The evidence being to a great extent conflicting, with a preponderance in favor of the libelants as to 205 loads of deficiency, and that amount having been found by the district court, I am indisposed to disturb it; particularly as, from the evidence running through the transcript, not necessary to recapitulate, the violation of the charter-party, by reducing and cutting down cargo space, was intended by the master, probably, for the purpose of saving expense of coaling *en route*, and of making a quicker voyage, to the advantage of owners. A decree will be entered to the same effect as that rendered in the district court, with costs.

## THE NATCHEZ.

NATCHEZ & N. O. PACKET CO. *v.* MANNHEIM INS. CO. SAME *v.* LOUISVILLE UNDERWRITERS. SAME *v.* ST. PAUL, FIRE & MARINE INS. CO. SAME *v.* DAKOTA FIRE & MARINE INS. CO.

(District Court, E. D. Louisiana. April 25, 1890.)

1. MARINE INSURANCE—LOSS—PERILS OF RIVER.

A river steam-boat ran upon a bar, and, upon being taken off, it was found that her seams had opened, and that she was leaking badly. To keep her from sinking, she was beached upon another bar. While there the river rose rapidly, and destroyed the vessel. *Held*, that she was lost by a peril of the river.

2. SAME—NEGLIGENCE.

The night being dark when the vessel ran upon the first bar, and the act of running her upon the second bar having been done in good faith, to keep her from sinking, the facts do not show negligence on the part of the master.

3. SAME.

The fact that help could have been obtained after the vessel was grounded the second time, and before she was destroyed, does not make the failure to procure such help negligence, when it is not shown that the help would have been effectual, or that the master knew of its existence.

4. SAME—ABANDONMENT.

Where insurers are notified that a wrecked vessel is abandoned to them, and the owners and master believe that the insurers will take possession of her, the fact that the master and owners take no further steps to save the vessel does not relieve the insurers from liability on the policy of insurance.

5. SAME—PREMIUM NOTE.

The fact that part of the insurance premium has been paid by a note which is overdue and unpaid at the time of the loss does not avoid the policy, but the amount due on the note should be deducted from the amount of the insurance.

In Admiralty.

*O. B. Sansom*, for libellant.

*J. R. Beckwith*, for defendants.

BILLINGS, J. These suits were by consent tried together. They are brought upon policies of insurance upon the steam-boat Natchez, the libellant contending that the steam-boat became a total loss under the policies; and the real question between the parties seems to be whether her destruction was under such circumstances as to make her a loss under the policies. The answers in all the cases are the same, and besides the matters set up with reference to the jurisdiction of this court over the causes, and with reference to the service of respondents through the statutory agent, present the following matters upon the merits: *First*. That the premiums were not paid in cash, but by a promissory note which is unpaid and overdue; and that the insurance was, with certain exceptions, only against the unavoidable dangers of the river, and against fire. *Second*. That the vessel insured was not seaworthy, in that it was not furnished with sufficient tackle and appliances, or with proper master, officers, and crew; and was unskillfully and negligently navigated, and through unskillfulness and negligence was run upon a sand-bar in the Mississippi river, from which she was soon relieved by being backed off, and was thereafter, through negligence and unskillfulness, permitted to fill with water, and voluntarily beached or run aground; that the vessel

was not equipped with pumps and machinery, and, through want of ordinary care and skill those appliances which she had were made ineffectual to keep her afloat; that after the vessel was run ashore her destruction could have been avoided; that additional pumps could have been produced, but were not; that after the vessel was grounded proper care was not used to save her, especially the machinery; that proper proofs of loss have not been presented; that there never was any abandonment. There is also a denial of the value as alleged, viz., \$100,000; and of the insurable interest of the libelants. It thus appears that, with the exception of the execution of the policy of insurance, all of the material facts necessary to enable a party to recover upon the policy are put at issue by denial or affirmative averments.

The facts necessary to be considered are the following: After midnight, and before dawn, on the morning of January 1, 1889, the Natchez, the night being, as some witnesses call, "dark," others "misty," and one witness calls "gray," ran upon a bar. By her own efforts, and the aid of the steam-tug Sunflower, she was gotten off. She was taken over to Lake Providence, and it was found that her seams had been opened; that she was leaking badly, and was sinking, and in danger of careening over in the deep water at Lake Providence; and, under the directions of the master, Capt. Bowling T. Leathers, the pilot took her and beached her upon a bar, which, though there is some testimony as to its character for permanence, was, by them, considered a suitable bar for this purpose. The master telegraphed to T. P. Leathers, who published the fact of her disaster in the papers. This brought Capt. Harpham and Mr. Bailey in the afternoon of the 1st to Capt. Leathers, who was the general manager of the owners of the Natchez. Capt. T. P. Leathers read the dispatch to both of them, and said to Capt. Harpham, in effect, that he abandoned her to the underwriters. He believed Capt. Harpham had authority to receive such abandonment. According to Capt. Harpham's testimony, he had no such authority; but according to Mr. Bailey's testimony, he (Mr. Bailey) had. Capt. T. P. Leathers clearly believed he had abandoned her, though Mr. Harpham urged that it was the duty of the officers of the boat to do all they could to save her. Capt. T. P. Leathers gave Capt. Harpham two letters to his son, they understanding that Capt. Harpham was to start that night for the Natchez, and telegraphed to his son, the master, that Harpham would come and take custody of the Natchez, and that the master must aid him. Capt. Bowling T. Leathers received the telegram, and subsequently the letters by mail, and in consequence discharged the crew, and waited for Capt. Harpham, who, in consequence of a telegram from the agent of the Louisville underwriters, did not go. Capt. T. P. Leathers did not know that Capt. Harpham had not gone, and was not in charge of the boat until Friday night. On Saturday, January 5th, the river had continued to rise rapidly, the Natchez broke open, and became a complete wreck. Nothing was saved from the Natchez, except some cabin furniture, which netted but little. Upon these facts, the conclusions of law are:

1. The steam-boat Natchez was lost by reason of a peril of the river, not excepted, and therefore included in the indemnifying clause of all four policies, viz., grounding or stranding upon a bar of the river. 1 Pars. Mar. Ins. (Ed. 1868,) pp. 546, 547, and authorities cited in note.

2. That the vessel was seaworthy; that her masters, officers, and crew were suitable and proper, and as to the pumps, which was the point to which the evidence and argument were specially directed, that they were adequate. Upon this point the testimony of Wilson Bloodgood, an inspector, who speaks of the Natchez as of the date of his inspection, September 27, 1888, testifies as follows:

"She [the Natchez] had a very large supply of bilge pumps, [bilge pumps means pumps used to free the hold of water.] She had two attached to the 'doctor' or pumping engine, [that is a regular supply pump:] the donkey pump, [that means auxiliary feed pumps:] also pump out of the hold or bilge pumps. In addition, she had ten siphons."

3. As to want of skill and negligence in incurring and causing the grounding on the first and on the second bar. The steam-boat, it would seem, received great injury, which opened her seams and caused copious leakage by running upon the sand-bar. The night was dark, the government light was out, and the objects on the shore were but dimly visible. The capacity of the master and the pilot is unimpeached, and they were reasonably attentive. Therefore, as matter of evidence, the running upon the first sand-bar was not attributable to want of skill or care, but to the class of experiences, which, though connected with navigation, belong to experiences which are termed "inevitable accidents." There is testimony *pro* and *con* as to the wisdom of running the steam-boat or beaching her upon the flat bar at the foot of Stork island. The master gave the proper order to the pilot to beach her upon a suitable bar. The pilot determined in good faith, and with all the consideration which the sinking condition of the vessel allowed, to beach her upon this Stork island bar. I think a decision thus reached, even if mistaken, would justify the insured. But it is not satisfactorily shown that it was a mistake.

4. The most vigorous defense is made upon the alleged negligence of the insured and their master after the beaching upon the Stork island bar, and until the complete destruction of the Natchez four or five days subsequently. There is testimony that boats furnished with pumping and working apparatus were at Vicksburg. The rule is correctly urged by the proctor for the defendants, that the master was bound to do all he could to relieve and save the insured property. But it is by no means certain that the help shown to exist was known to the master, or that, if summoned, it would have been effectual. In this connection should be considered the matter of claimed abandonment. As it is not made reasonably certain that any effective aid could have been obtained, I do not think it necessary to determine whether there was or not in law an abandonment. As to three of the defendants, the case shows that the manager of the insured told the agents of the insurers, one of whom had power to receive an abandonment, that the vessel was abandoned to

the underwriters, and believed they were going into possession of her through one of the agents; and was suffered by the insurers to continue in that belief till Friday evening, the evening before her complete physical destruction, when evidently nothing could be done to save her. I think the responsibility for no further or other efforts having been made to save vessel or machinery was upon the defendants, so far as they were represented by their agents, to such an extent as to leave them liable. It was possible for them to have taken possession. They left the manager of the plaintiffs, and through him the master, in the belief, the former that the insurers had taken, and the latter that they would take, possession, and guide the efforts to rescue. The master, under these circumstances, did what really seemed to him at the time to be wisest and most effective.

Upon these facts, I think the liability of the insurers continues. These facts, too, render it unnecessary to consider the question of total loss by the first grounding. As to the three defendants, if the insurers, by their own conduct, made the acts of the master their own, so far as relates to their obligation to indemnify, and if while a competent master was thus left in charge of the vessel, and was doing the best he could, the vessel became an actual total loss, there is no need of considering the questions of abandonment or of constructive loss. As to all the defendants, the final loss was physically absolute and total, and for this loss, upon the facts established, the insurers are liable. The evidence does not establish that any relief could have been obtained which could have prevented the total ultimate destruction. The master, Capt. Bowling T. Leathers, testifies that he had the opinion that nothing could have been done. With the vessel injured as she was by the first grounding, the river rapidly rising, and the boat ready to sink from her weakened and leaky condition, it is but an unsupported conjecture that a favorable result would have been attained if the attempt had been made to get the wrecking or pumping boats from Vicksburg. I think, therefore, that the libelant must have judgment in each of the four cases. The value of the Natchez is shown to have been about \$150,000. She cost, in 1880 or 1881, \$207,000. The amounts insured were as follows, viz.:

By the Louisville Underwriters	-	-	-	-	-	\$ 7,000
By the Mannheim Insurance Co.	-	-	-	-	-	5,000
By St. Paul Fire and Marine Ins. Co.	-	-	-	-	-	2,500
By Dakota Fire and Marine Ins. Co.	-	-	-	-	-	1,500
Making a total insurance of						\$16,000

—On a valuation of \$30,000, the insurance not to exceed \$20,000.

I think, therefore, the amount of recovery should be in each case the amount insured, *i. e.*, as claimed in the several libels, with the following deductions as credits: I think the amount of the premium note in each case should be deducted upon condition that the note be surrendered; also that there should in each case be deducted the proportionate amount of the net sum realized from the sale of the cabin outfit, etc. The whole



sum was \$623.69. The amount insured is, in each case, subject to a further deduction for the amounts paid for a previous partial loss on the same risk and policies as are here involved. There will be judgment for the libelant in each case for the amount insured, less these deductions, with interest from March 23, 1889, and the matter is referred to Commissioner Loew to make the proper deductions, upon the principles above stated.

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HERON v. THE MARCHIONESS.

(Circuit Court, N. D. Florida. March 19, 1890.)

**WHAERVES—LIABILITY FOR WHARFAGE—MOORING FOR SAFETY.**

A ship compelled by stress of weather to moor to a wharf for safety is not liable to a charge for wharfage where the wharf is a private one, and no fixed rate of charge is in use.

In Admiralty. On appeal from district court. 40 Fed. Rep. 330.

*John C. Avery*, for libelant.

*Blount & Blount*, for claimant.

PARDEE, J. The steam-ship *Marchioness* was at anchor in the port of Pensacola, loading with timber, when a severe gale sprung up, which caused her to drag her anchor and drift towards libelant's wharf. When near the wharf, about 15 to 20 feet away, with timber along-side of her, and with two anchors out, she went aground. To prevent forging ahead, the master put out a side line and chain, and fastened both to a check-post on libelant's wharf. This line and chain remained for about an hour, when they were taken off. Soon after, the gale having abated, a tug towed the *Marchioness* and timber to a safe anchorage. The libel is brought in this case to recover wharfage. To maintain the libel, the court must find an implied contract between the libelant and the ship to use the wharf, and to pay for such use. Whether such contract can be found depends upon the character, public or private, of the wharf, for what purposes it was built, the use to which it has been applied, the place where located, the nature of the structure, and the general circumstances of the case. See *Dutton v. Strong*, 1 Black, 24. If libelant's wharf was a public wharf, in the sense that the owner did not reserve exclusive enjoyment, but was under obligation to concede to others the privilege of landing their goods or mooring their vessels there upon the payment of a reasonable compensation as wharfage, and the said wharf was suitable for the purpose of mooring vessels, and was held out for public use, and was so used, then, as the master and owners of the *Marchioness* voluntarily used the said wharf to moor their ship, it is probable a contract to pay wharfage may be inferred. That is to say, if the libelant, having a suitable wharf for mooring ships, tendered it to the public, so that he may be presumed to have consented to the mooring of the Mar-

chioness, and the Marchioness accepted and used such wharf, an implied contract to pay wharfage may be presumed. Looking to the evidence in the case, we find the following: Louis Daniel, wharfinger, testifies: "The wharf is a private wharf projecting from a lot owned by Dr. Heron." The libellant, Heron, testifies:

"The wharf alluded to is my property, and private. I never had a steamer along-side of my wharf since I have been a wharf-owner. I have, therefore, never made any charges. My charges have always been for vessels lying along-side of my wharf for the purpose of discharging ballast, and that by special rates. I have before charged other vessels similar to those of the Marchioness; that is, they have drifted into wharf, and made fast to same, one small vessel, and one medium-sized bark. One was there a day and a part of a day. The other was there two days. I have made charges for timber rafts laying along-side of my wharf, being put there without orders, in fair weather. This occurred twice."

This is all the evidence there is with regard to the public character of libellant's wharf. It does not appear that any fixed charges or rates were had and maintained for the use of said wharf. It does not appear that the public had a right to use, or did use, the said wharf for the purpose of landing goods or mooring ships. The Marchioness had no business to transact with the libellant. The vessel did not go to the pier for freight, nor for mooring purposes. The fact is that the vessel, in an emergency, used the wharf for the purpose of putting out a safety line, just as it might have used a pile or checking-post. The owner of the wharf had the right, so far as the evidence shows, to compel the removal of the lines of the Marchioness, as put there without authority. *Dutton v. Strong, supra*. The general scope of the evidence is that the libellant's wharf was not intended to be used for the purpose of mooring ships in time of danger. Under these circumstances, it does not appear that the court ought to find an implied contract between the owner of the wharf and the ship for the use of the wharf. Without such contract, as has been said before, the libel must fail.

I have examined the opinion of the district judge in this cause, (40 Fed. Rep. 330,) and consider that we differ on the facts, and not the law, of the case. Whether the evidence is the same on this hearing as in the district court does not appear. A decree will be entered dismissing the libel, with costs.

WAITSHOAIR *et al.* v. THE CRAIGEND.*(District Court, D. Washington, W. D. April 28, 1890.)***1. SEAMEN—CONTRACT—CONSTRUCTION.**

Upon a review of the testimony in this case, the court finds that the libelants entered into a contract to serve as seamen on board the British ship *Craigend* for a definite period, during which time the vessel was to make one or more voyages within specified limits, and to a port of discharge in Europe; and pursuant to said contract they served as seamen on the vessel until their arrival at Tacoma, when, before the expiration of the term of service, the libelants voluntarily left the vessel, and the contract was terminated by mutual consent of the libelants and the master.

**2. SAME—DISCHARGE—MUTUAL CONSENT.**

A contract of shipment, after part performance, may be lawfully abrogated as to the unperformed part by mutual consent of the seamen and master, and such consent may be implied from the conduct and actions of the parties.

**3. SAME—WAGES.**

If a seaman's contract of service be terminated by mutual consent after part performance, a court of admiralty will neither decree payment of extra wages or damages as in case of a wrongful discharge, nor forfeiture of the wages earned by services rendered pursuant to the contract, as in case of desertion, but will allow wages at the rate fixed by the contract for the time of actual service.

*(Syllabus by the Court.)*

In Admiralty.

*Taylor & Hammond*, for libelants.

*Effinger & Abbott*, for claimant.

HANFORD, J. The libelants, fifteen in number, set forth and show in their libel that they severally signed shipping articles by which they agreed to serve, some as able seamen, and the others as ordinary seamen, in the British ship *Craigend*, for a period not to exceed two years, and during that period to make one or more voyages within specified limits, the service to end at any port or place in the United Kingdom or the continent of Europe, at the master's option, for which they were to receive wages at a fixed rate per month. This is an entire contract, and I consider it to be valid, notwithstanding the objections urged by counsel for the libelants on account of indefiniteness in description of the voyages to be made during the term of service. Under this contract, some of the libelants served as seamen on the passage of the *Craigend* from Cardiff to Montevideo, where the others were shipped; and they all so served on the passage from the latter place to Tacoma, at which they all left the vessel. The suit is brought to recover wages, at the rate specified in the shipping articles, for the time each man actually served, after deducting advances and payments admitted to have been received; and also three months' extra wages as damages for breach of the contract on the part of the master, in wrongfully preventing the libelants, as they allege, from returning, after a temporary and lawful absence from the vessel at Tacoma, and completing performance of their contract. The answer denies the alleged wrongful acts of the master, and charges the libelants with having unjustifiably deserted the vessel, for which a forfeiture of all wages is claimed.

From the evidence, it is plainly apparent to me that the master and the libelants are about equally in fault and blameworthy for the termination of this contract. The important facts leading me to this conclusion, as disclosed in the evidence, are, in brief, as follows: The Craig-end, on her way to Tacoma, called and anchored at Port Townsend; and while she was at anchor there the second boatswain became violent and abusive towards the crew. After making a violent and unprovoked assault upon one man, and striking him a heavy blow upon the head with a stick of cord-wood, and making threatening demonstrations towards another with a razor, and striking another with a broken oar, he armed himself with a hatchet, and threatened to use it indiscriminately in cutting down every member of the crew whom he should come in reach of. This misconduct of the second boatswain was by the libelants properly reported to the master, who utterly failed to do his duty by punishing this petty officer for his very grave offense, or in any way assuring the crew of protection from such acts of abuse. The libelants at the same time committed a wrong in declaring that they would not thereafter do any work in the ship, except what should be necessary in actual navigation, unless the second boatswain should be either kept locked up, if he remained on board, or discharged and sent ashore. There is a conflict in the testimony as to whether the libelants did or did not at this time ask permission to go ashore for the purpose of complaining to the British consul, and whether the master did or did not refuse them such permission. This conflict of testimony relates to a question which is material only as to the claim of libelants to extra wages. They make the charge, and therefore the *onus probandi* is on them to prove it; and, as I do not find any decided preponderance of the evidence in their favor, I cannot say as a fact that the master did violate his contract with them, and offend against the laws of his country, by refusing them an interview with the British consul at Port Townsend.

After anchoring at Tacoma the libelants refused to perform their duties until they should first be permitted to make a complaint to the British consul; and, upon being informed that there was no consul at Tacoma, they demanded to go ashore for the purpose of consulting a justice of the peace. It was unnecessary and unreasonable for them to leave the ship in a body; but the master gave his consent to their going after they, at his request, hung an anchor over the bow, in readiness to be dropped if the ship's safety should require it. The master not only consented to their leaving the vessel, but he also gave them forty-eight hours as the limit of time during which they could remain absent; and by his direction they were taken ashore in a boat belonging to the ship. He gave them no money for any expenses they might have to incur, and made no arrangements whatever to enable them to return to the ship, which was anchored a distance of three-fourths of a mile from shore. On shore the men made no attempt to execute their purpose of consulting a justice of the peace; but, after wandering over the town for some time, they begged a postage-stamp, having no money to buy one, and used it to send a letter to the British consul at Port Townsend. They next made

the acquaintance of Mr. Moore, who provided them with their meals and lodging for the next day or two, and with small sums of spending money, and also provided a boat and secured a lawyer to go on board the vessel the evening of the very day the libelants came ashore for the purpose of trying to make a settlement with the master for the wages. What Mr. Moore did for the comfort of these men was not done from disinterested motives. To use his own expression, he "was not doing it for fun." It is apparent from his rapid movements in taking a lawyer on board the vessel to collect the wages, and all the circumstances of his connection with this case, that he is one of the land-sharks of a seaport town who prey upon sailors. Mr. Moore has testified as a witness in the case, being called by claimant. In his testimony, he claims that the libelants consulted with the lawyer before he went to the vessel, and authorized him to proceed to collect their wages. In this he is contradicted by the libelants, and also by the lawyer, Mr. Leo, who was called as a witness. His testimony is to the effect that he had no conversation with the men, but he thinks they knew of his employment, and the object of it, from being informed in regard to it by Mr. Moore. He impressed me as being a candid witness, and I credit his statement as being true; but I think very little time was lost in consulting with the libelants, or making explanations to them, by any one. In the interview between Mr. Leo and the master, the latter, after learning that the call upon him was to collect the wages of the libelants, and while he must have supposed Leo to be authorized to represent them, declared that he would not again receive them on the vessel. This was long before their leave of absence had expired, and before the men had done anything to furnish a pretext for a charge of desertion against them, or justify their discharge. I regard this declaration of the master to Leo, that he would not take the men back in the ship, as important only as showing an intent in the mind of the master to get rid of this crew. I would probably regard it as an actual discharge of the men from the service of the ship if it had been made to the men directly, or to one authorized to represent them; but, as the libelants all deny having commissioned Mr. Leo to go to the master as their agent or attorney, I cannot give it any greater effect than a remark or declaration made to any stranger.

It was mid-day, on a Saturday, when the men left the ship. On the next Monday morning, and before expiration of their leave of absence, they went as near as they could go to the ship, and attempted to hail her, to call a boat ashore, so they could go on board, and resume their duties; but Mr. Moore appeared and objected, on the ground that, if they went on board without him, he would not be able to collect their wages, and would lose what he had invested, as well as the profits he had hoped to realize, and the men suffered him to lead them away, and for a time desisted from their efforts to return to the ship. Later, and yet before the expiration of their 48 hours' leave of absence, they saw the captain come ashore, and endeavored to speak to him; and he saw them, and knew that they were endeavoring to get within speaking distance, but he evaded them by dodging into a private office, and re-

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maining there a long time, while he knew that they were respectfully waiting outside. The libelants did not return to the vessel, and have never made any other attempt to do so than what I have mentioned. Several days after their attempt to speak to the captain, they sent a man to him to request permission to remove their clothing and effects from the vessel, which request was readily and unconditionally granted; and they then voluntarily went on board and brought away all their belongings. This was done while the vessel was lying moored to the dock, and while the master was on deck, but no remarks were passed between him and the men. The master, in his testimony, attempts to account for his peculiar conduct in eluding the libelants when they tried to speak to him on Monday morning, when their purpose was merely to ask to have the ship's boat to take them on board again, and also for his failure to speak to them when they came on board to remove their effects, by pretending that he was in fear of being ill-treated by these men. I was astounded to read in the deposition of the master of an English ship such a declaration as is contained in that of Capt. Hamilton, on file in this case, in which he says, "I was a bit scared," especially so as there is absolutely nothing in the evidence to afford the slightest ground for him at that time to have regarded these men, or either of them, as being dangerous. The reasons he states for his timidity are that he had heard of threats being made by the men, and that they had used violence towards a man whom he had employed as a watchman on the ship; but it is clear, from the evidence, that the threats, if any, were not made, and the difficulty with the watchman did not occur, until after the time of the captain's strange conduct. I entirely discredit this part of the captain's evidence. I do not believe that he was ever afraid of this crew. He has been master of vessels for fourteen years. This is sufficient to prove that he could not have been frightened so easily as he pretends to have been; for, without personal courage, he would not wish to devote his life to a profession exposing him to almost constant danger, and, if he would, he could not maintain the position of a commander. I believe that his motive for the actions I have commented on was not fear, but rather a wish to avoid meeting the men, and thus escape the necessity of either assisting them to return to the ship, or consenting to have them quit the service, and that it was his desire that they should desert, so that their wages might be forfeited. The master did not prevent the libelants from returning to the vessel, nor use any force whatever to prevent them from fulfilling their contract; and I am satisfied that if they had returned to the vessel, and offered to resume their stations as seamen, he would have placed no obstacles in their way. The libelants claim, however that, because they had no money to hire a boat, they were not able to return to the vessel, but the evidence shows that they have managed to live in Tacoma very well to the present time without doing any work; and I am satisfied that they are shrewd enough, and determined enough, to have found a way of returning to the vessel, if they wished to do so.

From consideration of all the facts and circumstances in the case, and especially the voluntary removal of their effects from the vessel by the

libelants, and the master's consent thereto, so freely given, it is plain that the contract of service on the part of the libelants was, by the mutual consent of the libelants and the master, terminated from the time the libelants left the vessel, on the 25th day of January, 1890. The parties had a right thus to terminate the contract by mutual consent; and, although such consent was not actually expressed in words, it may be implied from the conduct and actions of the parties above narrated. The contract having been partly performed, and then abrogated as to the part not performed by mutual consent, I hold that the libelants are not entitled to recover any sum whatever as damages or as extra wages, as they would be if the master had discharged them before the termination of the period or voyage for which they had shipped, but are entitled to receive their wages, at the rate specified in the shipping articles, for the time during which they actually served, after deducting the sums advanced, and for which they were chargeable for articles furnished from the ship's slop-chest. The master having voluntarily consented to their leaving the vessel, he cannot rightfully be allowed to charge them as deserters, nor claim a forfeiture of their wages earned by actual service. I make an exception as to Lawrence Silva, Antonio Pedro, and Antonio Fortes, as to the rate of wages to be allowed them, on the ground that they shipped at Montevideo as able seamen, but were incapable of performing the duties of able seamen. Therefore, instead of allowing them wages at the rate specified in their contract of shipping, they will only be allowed wages at the rate of \$15 per month, which sum seems to me to be in proportion to the value of their services. A decree will be entered in favor of the libelants for the amount of wages during the time of their service as alleged in the libel, less the amounts which in the libel they admit as credits proper to be allowed the ship.

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THE LILLIE.<sup>1</sup>

CROSBY *v.* THE LILLIE *et al.*

*Circuit Court, S. D. Alabama. April 21, 1890.*

**ADMIRALTY—APPEAL—COSTS—PROCTOR'S DOCKET FEE.**

As an appeal in admiralty suspends the original decree, and there is no final hearing until that in the appellate court, the proctor's docket fee of \$20, allowed (Rev. St. § 824) on final hearing in admiralty, accrues in case of appeal only in the circuit court, and should be charged but once.

In Admiralty. On motion to retax costs.

*W. E. Richardson*, for the motion.

*W. D. McKinstry*, *contra*.

<sup>1</sup>Reported by Peter J. Hamilton, of the Mobile, Ala., bar

**TOULMIN, J.** The libellant obtained a decree in the district court, which was appealed from by the claimants. On appeal the circuit court also rendered a decree in favor of libellant, and the appellants were taxed with all costs. The clerk taxed against appellants three proctor's fees, aggregating \$45. Among them were two docket fees of \$20 each, one of which was taxed as part of the costs in each of said courts, and the fee of \$5 was taxed under section 824, Rev. St., for services rendered in the case in removing the same by appeal from the district court to this court. Appellants now move the court to retax the costs to the extent of the docket fee of \$20, taxed as part of the costs in the district court, on the ground that it is illegal and unauthorized. Section 824, Rev. St., provides that there shall be taxed and allowed to proctors, on a final hearing in admiralty, a docket fee of \$20, and the question now presented for decision is, were there two final hearings in this case, or what is the final hearing? An appeal in admiralty suspends and vacates the decree appealed from, and the decree is not final until the case is heard and decided in the appellate court, and there is no final hearing until there is a final decree. *Ben. Adm.* § 590; *2 Conk. Adm.* 385, 394; *Hen. Adm.* § 138; *U. S. v. Preston*, 3 Pet. 57; *The Lucille*, 19 Wall. 73. The statute provides that the proctor shall be allowed a docket fee "on final hearing," and it is held that final hearing is the last hearing, in admiralty cases, when the case is finally heard as to costs. *Goodyear v. Sawyer*, 17 Fed. Rep. 7, 8. The court says that the docket fee is general, and it is taxable on the final hearing in favor of the proctor of the prevailing party as a lump sum for all the services in a case. There has been but one "final hearing" in this case. There is but one final decree, and that is the decree rendered on appeal in this court, the decree in the district court being superseded and vacated by the appeal. My opinion, therefore, is that there can be but one docket fee of \$20 allowed,—the docket fee taxed as part of the costs in this court. The motion to retax the costs is granted.

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### THE TOLCHESTER.

(*District Court, D. Maryland.* February 5, 1890.)

#### 1. SHIPPING—LIMITING LIABILITY—SUIT BEGUN IN STATE COURT—JURISDICTION.

In a case of application for limitation of liability of the owners of a steam-boat who had been sued in the state courts in actions given by the statute of Maryland for loss of life arising out of a collision in the harbor of Baltimore, *held*, that after the steamer had been appraised, and stipulation given in the district court for the payment into court of the amount of the appraisement when ordered, the reduction of the amounts sued for in the state courts so as to reduce the aggregate of the amounts claimed in those suits below the amount of the appraisement and stipulation could not take away the jurisdiction of the district court, even conceding that the claims so reduced were all that the owners of the steam-boat could be made liable for.

#### 2. SAME—TORTS COMMITTED ON NAVIGABLE WATERS—HIGHWAYS—JURISDICTION OF FEDERAL COURT.

*Held, further*, that, as the liability of the owners of the steam-boat arose out of a maritime tort committed on water which was a navigable highway of commerce,



the district court had jurisdiction of it in admiralty, and that the rule of limitation of the liability of the owners of the steam-boat with respect to such a tort was a rule of admiralty procedure prescribed by congress, the power to enact which was not necessarily referable to the commercial clause of the constitution, and therefore the fact that the vessel was customarily employed solely in Maryland waters, and not in foreign or interstate commerce, was immaterial.

3. SAME—ALLOWANCE OF SUITS IN STATE COURT.

*Held, further*, that after the stipulation was given the court had in its possession a fund to which, under the rule of procedure enacted by congress, all claims were transferred, and proceedings against the owners were forbidden; that therefore the court had no discretion to allow the suits in the state courts to go on for the purpose of ascertaining the amount of damages, even though the plaintiffs in those suits might have reason to anticipate difficulty in asserting in the district court the right of action given by the state statute for the loss and injury sustained by them by reason of the death of the persons drowned in the collision.

4. SAME—INJUNCTION.

*Held, further*, that the district court, having in its control the only fund to which claimants have a right to resort for payment of their claims, and being the only court competent to administer the admiralty rule for the limitation of the liability of the owners of the vessel, it has the authority and jurisdiction, in order to prevent that administration and its decree from being nugatory, to issue an order restraining the further prosecution of the suits in the state courts.

(Syllabus by the Court.)

In Admiralty.

*John H. Thomas and H. V. D. Johns*, for libellant.

*Albert Rûchie*, for respondents.

MORRIS, J. This proceeding was begun by the Tolchester Excursion Company, of Baltimore city, a Maryland corporation, which filed its libel for a limitation of liability on the 30th December, 1889, alleging that it was the owner of the steamer Tolchester on the night of 28th July, 1889, when a collision occurred between that steamer and a small sail-boat in the harbor of Baltimore. The libel further alleges that suits have been instituted in the state courts of Baltimore city against said company by persons claiming to have suffered loss and damage by said collision, for an amount in the aggregate exceeding the value of the steamer and her pending freight. The company, in its libel, denied its liability for any damage resulting from the collision, desiring to contest its liability therefor, and also, if liable, prayed to have the benefit of a limitation of its liability, setting out the facts and circumstances on which it relies, and praying for an order for the appraisalment of the steamer and freight, and to be allowed to give a stipulation with sureties for the payment thereof into court when ordered, and for a monition warning all persons having claims arising out of the collision to present the same, and for an order restraining the further prosecution of all suits against the company in respect of all such claims. On January 3, 1890, the court ordered the appraisalment to be made; and on January 7th stipulation for \$23,150, the amount of the appraised value of the vessel and freight, was given and filed in court. On the 13th of January, it was ordered that notice should be served on the parties who had instituted suits, to show cause why the monition and injunction prayed for in the libel should not be granted, and why they should not be restrained from prosecuting their suits in the state courts.

The parties upon whom this notice was served are now opposing the granting of the prayer of libelant's petition, and for cause they show: (1) That the collision occurred in the harbor of Baltimore, within the limits of the city, and, as respondents contend, was caused by the wrongful act and neglect of libelant and its officers and agents; that the persons who were in the small sail-boat at the time of the collision were Mary Kolb, John Pietz, Annie Kolb, Louis A. Deering, and Mary Weiner, and that the owner of the boat was Frederick Isaacson; that the suits instituted are for the damage to the sail-boat, and for the personal injuries received by Annie Kolb and Louis A. Deering, and also suits under the statute of Maryland for the death of Mary Kolb and John Pietz, who were drowned, and a suit by the father of Annie Kolb for loss of her services, and that Mary Weiner, who was drowned, left no one living who, under the Maryland statute, would be entitled to bring suit for her death. And the respondents allege that these suits embrace every claim which could possibly arise from the collision against the steamer or her owners. They allege that while it was true, when the libel was filed, that the amounts claimed as damages in the suits in the state courts exceeded the amount for which the steamer and her freight has been appraised, since the appraisement and the stipulation therefor was filed in this court the amounts claimed in the suits in the state courts was on January 16th reduced, so that now the aggregate amount claimed is only \$22,000, which is less than the appraised value of the interest of libelant in the steamer and freight, and that therefore the libelant is not entitled to proceed to limit its liability. (2) They further show that the steamer was employed exclusively as an excursion steamer, in the internal commerce of Maryland, and therefore the libelant is not entitled to a limitation of its liability. (3) They further show that, in view of the doubt whether claims for damages arising from death by negligence given by the state statute can be made the basis of a suit in the admiralty, this court should refrain from interference until it shall appear that the libelant cannot be protected by pleading the defense of limited liability in the state court.

1. The first objection to the jurisdiction of this court is that the aggregate of the claims for which suit can be brought, conceding that it is a fact that there is no one living who is entitled, under the state statute, to sue for the death of Mary Weiner, does not, as now reduced, exceed the value of the steamer and freight. In our opinion, this question is to be determined by the jurisdictional facts as they existed at the time when the court assumed jurisdiction. It may, perhaps, be conceded that the libelants' proceeding, in its inception, was *ex parte*, and that up to the time of filing the stipulation the court had nothing upon which it could act, and that the libelant might, as of course, have dismissed its libel; but, after the stipulation was filed, there was placed under the court's control a fund for distribution in which all parties interested are entitled to share. That fund could not be withdrawn without the consent of all interested; and whether or not the court is entitled to retain that fund, and to exercise the jurisdiction invoked, must be determined by the facts existing at the time it was placed in the court's control. If

at that time the court's jurisdiction was properly invoked, and it was then the duty of the court to keep it, and adjudicate all the questions as to its distribution, it does not seem possible that the jurisdiction could be divested by the subsequent reduction of the damages claimed in the suits in the state courts. The libellant had acquired a right to have this court proceed with the case, and this court cannot now refuse to do so. *Cooke v. U. S.*, 2 Wall. 218; *Mollan v. Torrance*, 9 Wheat. 537.

2. The jurisdiction of this court and the applicability of the act of congress is disputed upon the contention that the only power of congress to pass the limited liability act is derived from the commercial clause of the constitution, which is limited to commerce with foreign nations and among the several states. The Tolchester is a large steamer, enrolled and licensed under the laws of the United States for the coasting trade, and licensed to carry 1,200 passengers, and when the collision happened was starting on a voyage on the Patapsco river and Chesapeake bay, within Maryland waters. She was usually employed by her owners on the Patapsco river, the Chesapeake bay, and Susquehanna river. She was, before the collision, under a contract to make a trip to Fortress Monroe, in Virginia, which she performed after the collision. She was held by her owners for any employment she could get on the Chesapeake bay or any of its tributaries. While on her usual voyages, and on the voyage she had started on when the alleged tort was committed, she was navigating among vessels of all nations. The matters in dispute do not arise upon a contract relating to the purely internal commerce of a state. The claims arise out of an alleged tort committed upon a highway of commerce navigable from the ocean. *The Belfast*, 7 Wall. 624. As to torts committed upon the Patapsco river, there can be no question that this court has admiralty jurisdiction. It has frequently been held that, by the legislation with regard to the limitation of the liability of ship-owners for such torts, congress has simply declared that the rule prevailing in the admiralty courts of other countries shall prevail in ours, and has merely authorized the admiralty courts to adopt appropriate methods for securing the benefits of that maritime rule to ship-owners of the United States, and of other nations as well. In *Norwich Co. v. Wright*, 13 Wall. 127, the supreme court said:

"We do not hesitate to express our decided conviction that the rule of the maritime law on this subject, so far as it relates to torts, was intended to be adopted by the act of 1851."

In *The Scotland*, 105 U. S. 31, the rule was applied to the owners of a foreign vessel, and it was said:

"The rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of congress, we have announced that we propose to administer justice in maritime cases."

In *Providence & N. Y. S. S. Co. v. Hill Manuf'g Co.*, 109 U. S. 593, 3 Sup. Ct. Rep. 379, 617, it was said:

"The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule administered in courts of admiralty, in all countries

except England, from time immemorial; and, if this were not so, the subject-matter itself is one that belongs to the department of maritime law." See also *Butler v. Steam-Ship Co.*, 180 U. S. 556, 9 Sup. Ct. Rep. 612.

It would appear, therefore, that the alleged liability with regard to which limitation is invoked has arisen from a marine tort on navigable waters, and that the jurisdiction of this court, and its power to adjudicate every question with regard to that liability, is dependent on locality, and not on the nature of the employment or commerce in which the vessel was engaged.

3. The third ground of contention goes to the exercise of jurisdiction, even if the court has it, because of the alleged difficulties attending the assertion by the respondents in this court of the right of action given by the state statute. As to this, it does not appear to me that the court has any discretion. The giving of a stipulation for the value of the vessel and freight is declared by the supreme court to be the equivalent of the surrender of vessel and freight provided for by section 4285, Rev. St., and that section declares that, upon such surrender, "all claims and proceedings against the owner shall cease." That is to say, such claims are thereby transferred from the owners to the fund thus created. The supreme court, by rule 54, in order to give effect to the immunity of the owners from suit after such surrender, directs that "the said court shall also, on the application of the said owner or owners, make an order to restrain further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims." It would appear, therefore, that this court has no discretion to allow suits in other courts to go on even for the purpose of merely ascertaining the amount of damage. The express provision of the law and of the rule of the supreme court is that such suits shall not go on, but shall cease, and that all litigation shall proceed in the district court as against the property surrendered or its proceeds, or the sum stipulated to be paid into court in lieu of such surrender.

4. The only remaining question is as to the power of the court to issue an injunction as prayed. In *Providence & N. Y. S. S. Co. v. Hill Manuf'g Co.*, it would appear that the supreme court has intimated the proper solution of this question. On page 594, 109 U. S., 3 Sup. Ct. Rep. 389, it is said:

"It is hardly possible to read them [the supreme court rules] in connection with the act of 1851 without perceiving that, after proceedings have been commenced in the proper district court in pursuance thereof, the prosecution *pari passu* of distinct suits in different courts, or even in the same court, by separate claimants against the ship-owners, is, and must necessarily be, utterly repugnant to such proceedings, and subversive of their object and purpose."

On page 600, 109 U. S., 3 Sup. Ct. Rep. 394, the court said that it was "unnecessary to determine the question as to the legality of the writ of injunction issued by the district court. Although we have little doubt of its legality, the question can only be properly raised on an application for an attachment for disobeying it." In *Norwich Co. v. Wright*, 13 Wall. 125, the supreme court had already said:

"If an action should be brought in a state court, the ship-owner should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the state court, or procure an order from the district court to restrain the further prosecution of the suit."

The right of the district court, after it has in its possession the fund to be distributed, to issue an injunction, can, I think, also be supported upon the principle recognized in *Dietzsch v. Huidekoper*, 103 U. S. 494. The district court has possession of the only fund to which the claimants have a right to resort for the payment of their claim. It is the only court competent to settle, by a decree binding upon all parties interested, the question of the right of the ship-owner to have his liability limited. The injunction would, therefore, appear to be, as in the case of *Dietzsch v. Huidekoper*, ancillary to its administration of that fund, and necessary to prevent its judgment and its proceeding from being nugatory. The issuing of such an injunction was, after careful consideration, sanctioned in the *Providence & N. Y. S. S. Co. Case*, 6 Ben. 124; and in the *Long Island Transp. Co. Case*, 5 Fed. Rep. 599, which was followed in *The Amsterdam*, 23 Fed. Rep. 112. This proceeding is not a case of admiralty and maritime jurisdiction in which the right of a common-law remedy is expressly saved to suitors where the common law is competent to give it, because, as has been decided in the cases above cited, the common law is not competent to administer this maritime rule of limited liability where the vessel, or the fund representing it, is surrendered into the admiralty court by the owner.

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### THE INTREPID.<sup>1</sup>

#### WRIGHT *et al.* v. THE INTREPID.

(District Court, E. D. New York. March 26, 1890.)

#### 1. COLLISION—PRACTICE—EXCEPTIONS TO ANSWER—SPECIFICATIONS.

When exceptions to a pleading are drawn with several specifications, the failure to sustain any specification is fatal to the exception.

#### 2. SAME—EXCEPTIONS—WHEN ALLOWED.

Exceptions to pleadings in collision cases are permitted only when made in good faith, for the sole purpose of obtaining the full statement of facts which the law requires.

In Admiralty. On exceptions to answer.

The libel in this case set forth a case of collision by night in the East river, New York, between the steam-boat *Morrisania*, belonging to the libelants, bound up stream from Fulton street, New York, to Astoria, Long island, and a car-float in tow of the steam-tug *Intrepid*, bound down the river. The answer of the owner of the *Intrepid* consisted of 11

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

articles. The first 8 articles admitted or traversed or denied any knowledge as to the allegations of the libel. Article 10 set forth the faults charged by the Intrepid on the Morrisania. Article 9 was as follows:

"*Ninth.* The claimant is a corporation created under the laws of the state of Connecticut, engaged in the transportation of cargo and cars between New York and Wilson's Point, Conn., and is the sole owner of the steam-tug Intrepid, which is a new, large, and staunch steam-tug, 110 feet long on the keel, 22 feet beam, supplied and furnished with powerful engines for the transportation of car-floats. On Thursday, December 19, 1889, the said steam-tug Intrepid left Wilson's Point, Conn., with the car-float No. 1, with freight-cars thereon, securely lashed on the starboard side of said tug, the whole tow bound for New York. After reaching the East river, the wind was light from the north-west, the weather was clear starlight, and the tide was then, and at the time of the collision hereinafter mentioned, running strong flood. An experienced pilot and tug-boat captain was in charge in the pilot-house of the Intrepid, standing on the starboard side of the wheel; another pilot was on the port side, assisting in the steering. The regulation two white towing lights were carried at the tug's flag-staff, aft, one above the other, and one white light forward, with the red and green side lights on the top of the pilot-house, properly screened. Two white lights were also on the car-float on her flag-staff, with the red and green lights upon the pilot-house of the car-float, properly screened, together with a white light on the forward end of the float. The master of the car-float was in command, and in the pilot house of the float attending to her steering, and a licensed pilot was forward on the car-float, where he was devoting his undivided attention to his duties as lookout. When the tug and car-float had passed along the north side of Man O'War rock, they headed down in the middle of the river, steering a course rather towards the Brooklyn shore. When heading on that course, and proceeding slowly about two or three miles an hour, two steam-boats, the Cape Charles and the Maine, were sighted down the river, below Tenth street, and showing all their lights, which bore on the Intrepid's starboard bow. The Intrepid blew two blasts of her whistle to signify that she would pass between the boats and the Brooklyn shore. The Cape Charles, which was ahead, answered with two blasts, and the ferry-boat Maine also blew two blasts in assent, and appeared to stop her engines. The Intrepid came on, and, when about abreast of the Tenth-Street buoy, was passing both of said boats in safety, when just as the Cape Charles was a little past abeam, and the bows of the Maine had been reached, a steam-boat astern (which turned out to be the Morrisania) sheered out from behind the Maine, directly in front of the Intrepid's course, showing her red light and white light, and at that moment blew one blast of her whistle. The Intrepid at once replied with several short alarm blasts, and backed full speed astern, but the Morrisania kept on making a rank sheer right in front of the Intrepid, rendering a collision inevitable; bringing the port side of the Morrisania across the front of the car-float, and doing herself serious damage. Said collision occurred about a length below the Tenth-Street buoy, and nearly abreast of North Fourth street, Brooklyn."

To the answer the libelants filed the following exceptions:

"The libelants except to the answer of the claimants herein, on the ground of the indefiniteness and uncertainty thereof, and—*First.* In that it fails to state: (1) The length of the float; (2) to what part of it the tug was made fast, whether with the tug's stern projecting aft of the float, or her stem forward of the float, or whether the stern of the float projected aft of the tug, or her stem forward of said tug, and how much. *Second.* In that it fails to state:

(1) Whether the colored and white lights of the tug, or either or both of them, were so fixed as to be visible over the tops of the cars on the said float. *Third.* In that it fails to state: (1) How many cars there were on the said float; (2) what part of her length they covered. *Fourth.* In that it fails to state: (1) What were the white towing lights which are described as regulation lights, which were carried on the tug's flag-staff aft, and through how many points of the compass they were visible; (2) what was the character of the two white lights which were on the float, and through how many points of the compass they were visible; (3) how far above the water and the deck the white towing lights of the tug were carried, and the distance of one above the other; (4) how far above the tops of the cars on the float said lights were; (5) whether the towing lights of the tug were aft of the smoke-stack of said tug or forward thereof; (6) how high above the water and the deck the two white lights on the flag-staff of the float were, and how far apart they were; (7) whether they were carried one above the other or horizontally; (8) whether they were towing lights or otherwise; (9) what was the character of the white lights carried forward on the tug, and on the forward end of the float; (10) how high above the water and the deck said lights were carried; (11) through how many points of the compass the same were visible. *Fifth.* In that it fails to state: (1) At what point or opposite what place the said tug was when the steam-boats Cape Charles and Maine were sighted; (2) how far apart they were; (3) how far either of them was from the Brooklyn shore or the Tenth-Street buoy; (4) in what part of the river they were; (5) how much they bore on the Intrepid's starboard bow; (6) how far off the Intrepid was when she blew the two blasts of her whistle; (7) how far off the Cape Charles was when she answered with two blasts of her whistle; (8) how far off the Maine was when she answered with two blasts of her whistle; (9) how far off she was when she appeared to stop her engine. *Sixth.* In that it fails to state: (1) On what course, and heading for what point, the Intrepid was when steering her course towards the Brooklyn shore; (2) how much the Intrepid changed her course after blowing the two whistles, if at all; (3) how much the steam-boats Cape Charles and Maine changed their courses; (4) how the Intrepid was heading at the time the Cape Charles was a little past the beam, and the bows of the Maine had been nearly reached. *Seventh.* In that it fails to state: (1) How far off the Morrisania was when her red and white lights were first seen; (2) where the Morrisania appeared to be when she was first seen,—opposite what point she was in the river; (3) how far distant she was from the Intrepid; (4) how far distant she was from the Maine; (5) who it was on the Intrepid or the float that first saw the Morrisania, and what report, if any, was made on the said tug or float, as to seeing the Morrisania. *Eighth.* In that it fails to state: (1) What the speed of the Intrepid was at the time the Morrisania was first seen; (2) what the speed of the flood-tide was, which is stated to run there with great speed; (3) in what direction the flood-tide was running; (4) what justification the Intrepid had for being on that side of the East river."

*George A. Black*, for libellant.

*Wing, Shoudy & Putnam*, for claimant.

BENEDICT, J. When exceptions to an answer are drawn in the manner adopted in this case, it seems proper to hold the failure to sustain any specification to be fatal to the exception to which such specification is attached. As it is plain that to each of the exceptions a specification has been attached that cannot be upheld, the result follows that all the exceptions must be overruled. Furthermore, if, as contended by the

claimant, the exceptions number 38 instead of 8, the fact that 38 exceptions are taken to an answer in a simple collision case, which seems to have been drawn with fullness and care, taken in connection with the character of most of the exceptions, gives to the proceeding the character of a cross-examination. Exceptions to pleadings in collision cases are permitted only when made in good faith, for the sole purpose of obtaining the full statement of facts which the law requires. Exceptions overruled.

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### THE WAVERLY AND THE ANGLIA.<sup>1</sup>

(District Court, E. D. New York. April 14, 1890.)

#### **COLLISION—PRACTICE—JOINT-DEFENDANTS—CROSS-LIBEL—COSTS.**

The owners of the steam-ship A. libeled the steam-ship W. for damages by collision. The W., by petition under the fifty-ninth rule, made certain tugs co-defendants with herself in this suit, and also brought a cross-suit against the A. and the tugs, jointly. The A. was represented by one proctor; the tugs all appeared by another proctor. On the trial the W. was declared solely in fault for the collision. *Held*, that the tugs, and also the A., were entitled to tax against the W. a single bill of costs in each action.

In Admiralty. On appeal from taxation of costs.

*Wheeler, Cortis & Godkin*, for the Waverly.

*Wing, Shoudy & Putnam*, for the Anglia.

*R. D. Benedict*, for the A. C. Cheney and the Goodwin.

BENEDICT, J. These cases come before the court on a question of costs. The facts are these: The first libel was filed by the owners of the steam-ship Anglia against the steam-ship Waverly to recover for the injury to the Anglia in a collision with the Waverly. Into this suit, upon a petition filed by the Waverly under the fifty-ninth admiralty rule, two tugs that were towing the Anglia at the time of the collision were brought as parties defendant. They were owned by different claimants, and interposed separate defenses. A libel was also filed in behalf of the owner of the steam-ship Waverly against the steam-ship Anglia, and the two tugs that had her in tow, to recover damages sustained by the Waverly in the same collision. The causes were heard together. The result was that the Waverly was found solely in fault for the collision. The libel of the Anglia against the Waverly was therefore sustained, and the petition of the Waverly against the tugs, brought into this action, was dismissed. In the second action, the libel of the Waverly against the Anglia and the two tugs, in which each vessel had interposed a separate defense, was dismissed. The two tugs were represented by a single proctor, who now seeks to recover a single bill of costs against the Waverly in the first action, and also a single bill of

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.



costs against the Waverly in the second action. The Anglia also seeks to tax a bill of costs in each action against the Waverly.

As to the first action I am unable to see any ground upon which to refuse costs to the tugs. Having defended successfully a proceeding taken against them, they are entitled to recover their costs against somebody. Certainly they cannot recover costs of the Anglia, for she at no time asked a decree against them, and took no proceeding against them. Their costs must therefore necessarily be paid by the Waverly, upon whose petition it was that they were brought into the case and compelled to defend. In the action brought by the Waverly the proceeding was directly against the Anglia and the two tugs. Each of the vessels proceeded against interposed a separate defense, the owners of the respective vessels not being the same. The tugs, being successful in their defense, are, of course, entitled to recover their costs against the Waverly, as is also the Anglia. The case of *The American Eagle*, (not reported,) to which reference was made, upon examination, is found to differ from the present case. In this case no ground is seen upon which costs can be refused to the tugs as well as to the Anglia, and, that being so, such costs must be paid by the unsuccessful party, namely, the Waverly.

### THE MOHAWK.<sup>1</sup>

HARRIS *et al.* v. THE MOHAWK.

(District Court, E. D. New York. April 9, 1890.)

1. COLLISION—FOG—PERILOUS NAVIGATION—EAST RIVER.

Tugs which navigate the East river in dense fogs do so at their peril.

2. SAME—DERANGED COMPASSES.

The tug M. was held in fault for entering a dense fog in the East river, knowing, as she did so, that her compasses were out of order.

In Admiralty.

*Hyland & Zabriskie*, for libelants.

*Goodrich, Deady & Goodrich*, for claimants.

BENEDICT, J. This is an action for damages received by the tug Howard Carroll while lying at the end of a dock, pier 7, in a dense fog, by being run into by the tug Mohawk. At the time of the collision the Mohawk was moving at a speed of about three miles an hour, directly upon the New York piers. The collision is to be attributed to the fault of the Mohawk in this, that she was navigating the East river in a dense

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

fog without a compass on board. At the time of the collision she was utterly ignorant of her position, supposing herself to be in the middle of the river, when in fact she was steaming some three miles an hour, head on, to the New York piers, and close to them. Her testimony shows that she discovered her compass to be out of order before she went into the fog. Upon such a discovery it became her duty to keep out of the fog, as she might have done, for there was then no fog above the bridge where she then was. Aside from the failure to have a compass it was, in my opinion, a fault on the part of the Mohawk to go into the fog. She struck the fog at the Brooklyn bridge. She could have tied up at some pier in that neighborhood, instead of which she attempted to pass down across the mouth of the ferry slips, and so lost her bearings, and came in contact with the Howard Carroll. Tugs navigating the East river in such a fog as this was do it at their peril. The libelants must have a decree, with a reference to ascertain their damages.

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### THE SEA GULL AND THE TRANSFER NO. 5.<sup>1</sup>

REED *et al.* v. THE TRANSFER NO. 5.

LONG ISLAND R. CO. v. THE SEA GULL AND THE TRANSFER NO. 5.

(District Court, E. D. New York. April 14, 1890.)

#### COLLISION—STEAM-VESSELS MEETING—CHANGE OF COURSE—SIGNALS.

The steam-boat Sea Gull was proceeding by night up the East river, just below Blackwell's island. The steam-tug Transfer No. 5, with a car-float on her starboard side, came down the channel on the east side of Blackwell's island, made the lights of the Sea Gull on her starboard bow, and blew her two whistles. The Sea Gull ported to cross the course of the Transfer No. 5, but came in collision with the car-float and was sunk. Her justification for her course was that the tug blew her one whistle. The court found that the Transfer's whistle was a signal of two blasts. *Held*, that the Sea Gull was in fault for the collision.

In Admiralty. Actions for damages by collision.

The suit of Reed and others was to recover for the loss of the Sea Gull. The collision broke the float loose from the Transfer No. 5, and it drifted against a Long Island Railway Company float, lying at a wharf. To recover for the damages thereby occasioned, the second suit was brought.

*Hinsdale & Sprague*, for Long Island Railroad Company.

*Wilcox, Adams & Macklin*, for the Sea Gull.

*Page & Taft* and *R. D. Benedict*, for the Transfer No. 5.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York Bar.

BENEDICT, J. The pleadings in these cases, and the testimony of the master of the Sea Gull, make it entirely clear that the Sea Gull was proceeding up the channel outside of Transfer No. 5, which was moving down the channel. The vessels were not on parallel courses, and the natural navigation under the circumstances would have been for the Sea Gull to pass up in the tide outside of Transfer No. 5, and for Transfer No. 5 to keep near the shore coming down. Instead of passing outside the Transfer No. 5, the Sea Gull ran across the course of the Transfer No. 5, intending to pass up inside of her, and so caused the collision. Her only justification for this course is that she received a signal of one whistle from the Transfer No. 5. The case turns, in my opinion, upon the question whether the Transfer No. 5's signal, being the first signal given between these two vessels, was a signal of two whistles or of one. Upon this question of fact the weight of the evidence is against the Sea Gull, and in favor of the averment on the part of the Transfer No. 5 that her first signal was two whistles. This finding is conclusive of the case. The libel of Reed against Transfer No. 5 must accordingly be dismissed, and the Long Island Railroad Company must recover in their action against the propeller Sea Gull, and her libel as against the Transfer No. 5 must be dismissed.

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THE RARITAN.<sup>1</sup>

THE L. P. DAYTON.

MARSELLUS v. THE RARITAN AND THE L. P. DAYTON.

MERCHANTS' TRANSP. CO. v. THE L. P. DAYTON.

(*District Court, E. D. New York. April 16, 1890.*)

**COLLISION—BETWEEN STEAMERS—CROSSING COURSES.**

The steam-tug L. P. D. was lying in the Hudson river, near the New York piers, headed for the Jersey shore, and with a car-float along-side. The steam-barge R., coming up stream, undertook to pass between the L. P. D. and the shore, but collided with the float, and was sheered against a canal-boat, in tow of another tug, on her starboard side. The R. claimed that the L. P. D. backed the car-float into her. The court found that the L. P. D. did not back, but that the R. wrongfully supposed that she would move ahead in time to leave room for the R. to pass, and therefore held that the R. was in fault for the collision.

In Admiralty. Action for damage by collision.

A. B. Stewart, for William Marsellus.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

*R. D. Benedict*, for the Merchants' Transportation Company and the Raritan.

*Carpenter & Mosher*, for the L. P. Dayton.

BENEDICT, J. These actions arose out of a collision that occurred in the East River in the daylight. The case turns upon the question of fact whether the L. P. Dayton, after she had moved out her float into the stream, backed her float so as to close up the passage through which the Raritan was passing, whereby the Raritan was brought in contact with the stern of the float. Upon this question of fact the evidence fails to show to my satisfaction that the Dayton backed as is claimed. I incline to the opinion that the cause of the collision was that the Raritan, in taking her course through the gap between the Dayton and the Willie, assumed that the Dayton would move ahead by the time the Raritan would reach her. When this assumption failed, the Raritan necessarily brought up against the stern of the float, and so the damage arose.

In the case of Marsellus against the Raritan and Dayton, the libelant must have a decree against the barge Raritan, and the libel against the L. P. Dayton must be dismissed.

In the case of the transportation company against the L. P. Dayton, the libel must be dismissed.

FIRST NAT. BANK OF WELLSTON *v.* ARMSTRONG.

(Circuit Court, S. D. Ohio, W. D. April 12, 1890.)

## 1. BANKS AND BANKING—RECEIVER—TRUST FUND.

Checks and drafts sent from one bank to another were indorsed "for collection," and credited "subject to payment," according to the dealings between the banks. Part of them were paid to the receiver of the latter bank after its failure, and the balance were credited to it by the payors. *Held*, that the amount paid the receiver should be accounted for as a trust fund, but the balance as a general debt.

## 2. SAME—NATIONAL BANKS—ORGANIZATION.

Under Rev. St. U. S. § 5196, providing that no banking association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller to commence the business of banking, correspondence between one bank and the person who became the president of a bank afterwards formed cannot constitute an agreement controlling the business between the banks, but may be referred to, in connection with other evidence, to show what was their understanding.

In Equity.

*John T. Moore and David Davis*, for plaintiff.

*Kittredge & Wilby and John W. Herron*, for defendant.

Before JACKSON and SAGE, JJ.

SAGE, J. This cause was submitted to the court upon an agreed statement of facts, from which it appears that on the 17th day of June, 1887, the complainant mailed at Wellston, Jackson county, Ohio, to the Fidelity National Bank at Cincinnati, checks and sight-drafts on various banks other than the Fidelity to the amount of \$2,229.01. Each of said checks and drafts was indorsed as follows:

"Pay Fidelity National Bank of Cincinnati, Ohio, or order, for collection for First National Bank of Wellston, Ohio.

"J. H. SELLERS, Jr., Cashier."

At the same time the complainant so charged the Fidelity Bank with the remittance, which was received by the Fidelity Bank on the 18th of June, and acknowledged by postal, mailed on the evening of that day, as follows:

"THE FIDELITY NATIONAL BANK.

"CINCINNATI, June 18, 1887.

"In reply to yours of the seventeenth, we credit, subject to payment, \$2,229.01.

AMMI BALDWIN, Cashier."

On the same day credit was given accordingly by the Fidelity Bank to complainant. On the 18th day of June, 1887, the complainant mailed to the Fidelity National Bank the further sum of \$3,284.54 in checks and sight-drafts on various banks other than the Fidelity, all of which were received by the Fidelity on the 20th of June, and receipt thereof acknowledged by postal of that date, signed by the cashier, and stating a credit, "subject to payment," of \$3,284.54. It further appears that such credit was on that day given by the Fidelity Bank to the complainant. Each of the checks and drafts composing said remittance of \$3,284.54 was indorsed by the complainant in the same form as the in-

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dorsements upon the checks and drafts remitted as first above. All the indorsements of both remittances were made by means of a stamp furnished by the Fidelity Bank to the complainant about the 1st of May, 1887, to be used by the complainant in indorsing commercial paper to the Fidelity for collection. The checks and drafts composing the last remittance were charged by the complainant to the Fidelity in the same manner as those composing the first remittance. It further appears from the agreed statement that Baldwin and Sellers were at the dates aforesaid cashiers of the Fidelity and of the Wellston Banks, respectively; also, that on the 17th of June the Fidelity Bank was insolvent, and so continued, and on the 20th of June, 1887, at the close of business hours, a national bank inspector or examiner, under orders of the comptroller of the currency, and by authority of the statutes of the United States, took possession of the Fidelity Bank, and afterwards the defendant Armstrong was appointed, and now is, the receiver thereof. The total amount of commercial paper remitted by the complainant to defendant was \$5,513.55. Of this there was paid to the receiver, after the failure of the Fidelity Bank, the sum of \$3,336.40. The residue of said remittances—that is to say, the sum of \$2,177.15—was credited by various payors to the Fidelity Bank, and the Fidelity Bank had full benefit thereof in its accounts with the payors; but the money did not come into the hands of the receiver, and advice of the credits did not reach the Fidelity Bank until after the government had taken possession. Attached to the answer of the defendant are copies of two letters which it is admitted were written and received. The first is dated at Cincinnati, September 16, 1886, and addressed to H. S. Willard, Wellston, Ohio. Mr. Willard was afterwards president of the complainant bank. This letter was written and signed by E. L. Harper as vice-president of the Fidelity Bank. It refers to a letter received from Willard, which is not in evidence, nor set forth in the agreed statement of facts. Harper writes as follows:

“We are in receipt of your esteemed favor, and, replying, have to say that we will credit sight items on any point in the United States where there are banks at par, and make collections on same points, which, when paid, will credit at par, allowing you two and a half per cent. on daily balances, calculated when monthly statements are rendered, and will remit for your credit to New York, against your balances, at any time you may desire, without charge, or will ship you currency; express charges at your cost.”

On the 25th of September, 1886, Willard, upon a letter-head of the Milton Furnace & Coal Company of Wellston, of which he was president, addressed a letter to Harper as vice-president, signing it “H. S. WILLARD, Pt.,” accepting the offer contained in Harper’s letter of the 24th, above quoted. These letters were written, mailed, and received several days before the complainant bank received its certificate of authorization, which was issued and bears date October 6, 1886. The complainant and the Fidelity Bank did business with each other in the usual way, each remitting to the other checks and drafts for collection, all of which were charged and credited, respectively, as above stated.

From and after about May 1, 1887, the balance was always in favor of the complainant, against which the complainant drew as occasion required, and sometimes ordered remittances made in exchange on New York. The complainant was allowed and received interest on the daily balances so in its favor at the rate of  $2\frac{1}{2}$  per cent.; settlement of such interest being made monthly. No part of the several sums above mentioned has been paid to the complainant, either by the receiver or by any other person. The prayer of the bill is that the court find that the complainant's claim for \$3,336.40, with interest from June 17, 1887, is a preferred claim against the estate in the hands of the receiver, and for a decree for its payment in full, and for general relief.

The claim of the defendant that the various checks and drafts referred to and set forth in the bill, were sent to the Fidelity Bank, and received by it, under and by virtue of the written agreement evidenced by the letters above quoted, is overcome by the fact that the last clause of section 5136, Rev. St. U. S., which relates to the corporate powers of banking associations, provides that "no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence the business of banking." See *Armstrong v. Bank*, 38 Fed. Rep. 883. That correspondence was, however, admitted in evidence, and may properly be referred to in connection with the evidence relating to the transaction of business between complainant and the Fidelity Bank, as a circumstance to aid in determining what was the actual understanding between them. It does not appear, however, that the complainants ever did draw against its remittances before the proceeds of collections were received by the Fidelity Bank, even if it be assumed that the understanding was in accordance with the terms stated in the correspondence. It is clear that the remittances were not sight items, within the true construction of that correspondence, nor within the understanding of the parties. Sight items on any point in the United States where there are banks, were, according to the correspondence, to be credited at par. Collections on same points were to be credited at par when paid. Every item in the remittance made by the complainant to the Fidelity Bank was indorsed as a collection, the indorsement being made by means of a stamp furnished by the Fidelity for that purpose. That the indorsement was restrictive, and that it did not pass title to the Fidelity Bank, is clear beyond doubt. That it was not at the time regarded by the Fidelity Bank as passing the title is also clear, both from the language of the postal acknowledgments of receipt of the remittances, and from the fact that the credit in every case was, in terms, "subject to payment." It was to the advantage of the Fidelity Bank that remittances should be for collection, and not as sight items, because the arrangement for interest to be paid by the Fidelity Bank, if it be assumed that it was as stated in the correspondence, was such that it would begin to run at once upon sight items, but would be postponed upon collections until receipt by the Fidelity of the proceeds. It may fairly be assumed that for this reason the Fidelity Bank furnished the stamp to

be used by its correspondent in indorsing paper to be transmitted for collection.

The case of *First Nat. Bank of Elkhart v. Armstrong*, 39 Fed. Rep. 231, which was cited by counsel for the government, is clearly distinguishable from this case. In that case the drafts were remitted to the Fidelity Bank "for collection" for the First National Bank of Elkhart, Ind., but each draft was, upon its receipt by the Fidelity Bank, credited to the First National Bank of Elkhart, Ind., as cash; and that, as had been agreed between said banks, gave to the Elkhart bank the right to draw upon the same as cash. Such had been the uniform custom and understanding of both banks. It was held by the court that, although it was also their uniform custom and understanding that, when any draft should be returned to the Fidelity Bank unpaid, it should be charged back to the Elkhart bank and returned to it, the title to the draft passed to the Fidelity Bank upon its being received and credited as cash, as above stated; or, in other words, that the indorsement for collection, under the special circumstances of that case, did not reserve to the Elkhart bank any title to the proceeds of the drafts. But here, even if we take the correspondence as the best evidence of what the arrangement really was, (and this is adopting the view most strongly in favor of the receiver,) we find that the remittances were for collection, that the credits were subject to receipt of proceeds, and that the contract was that they were to be credited at par when paid. The case of *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46, is in point, and sustains the view which we take of this case. There the draft remitted was indorsed for collection for the claimant. It appears from the syllabus that it was the practice of the Fidelity Bank, in its dealings with the claimant, to credit the latter on the date of the receipt of all drafts, checks, etc., sent for collection that were payable at sight or on demand, and the balance thus created was subject to be drawn on; but, if the paper was not paid, it was charged back to the claimant. On receipt of the draft in question in that case, the Fidelity Bank notified the claimant that it had been credited "subject to payment;" but the credit was not drawn against, nor were advances made on the faith of it. It was held that, the indorsement being restrictive, the Fidelity Bank acquired no title to the draft, and that, upon the insolvency of the Fidelity Bank before the receipt of the proceeds of the draft, the claimant was entitled to the proceeds against the receiver. In that case the credit was, as in this case, conditional, and not, as it was in the *Elkhart Case*, unconditional; and there was wanting the agreement which was found to exist in the *Elkhart Bank Case*, that the credit should be as cash, and that the Elkhart bank should have the right to draw upon the same as cash. In the case of *Commercial Nat. Bank v. Armstrong*, 39 Fed. Rep. 684, the Fidelity Bank addressed to the Commercial Bank a letter offering any one of four propositions: *First*, to collect all items at sight, and allow 2½ per cent. interest on daily balances, calculated monthly; and, *second*, to collect at par all points west of Pennsylvania, and remit the 1st, 11th, and 21st of each month. The other two propositions need not be stated. The Com-



mercial Bank accepted the second proposition. The court said that the first proposition perhaps contemplated a creditor and debtor relation, but the second, third, and fourth, upon their face, did not. But it is to be observed that even upon the first proposition the interest, by fair construction, was to be calculated from the date of the receipt of the proceeds, rather than from the date of the receipt of the draft or other paper. It is clear, therefore, that the ruling in the *Commercial Bank Case* is not in conflict with the conclusion in this case,—that the relation of debtor and creditor did not arise upon receipt of the paper, but, in the true construction of the arrangement as it existed, was postponed until the receipt of the proceeds of collection. The case of *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 558, 20 N. E. Rep. 193, which was cited for the complainant, states very clearly the distinction upon which the conclusion in this case rests. In that case, checks and drafts were mailed to the Fidelity Bank, indorsed by stamp as follows: "Pay Fidelity National Bank of Cincinnati, Ohio, or order, for collection for Manufacturers' National Bank of Boston, Mass." The Fidelity Bank received the checks and drafts on June 20, 1887, and on that day mailed to the plaintiff a postal-card, signed by its cashier, stating in reply: "We credit, subject to payment, \$3,501.48." On the same day the Fidelity Bank credited the plaintiff the same amount, and mailed to the defendant, a national banking association located at St. Louis, the check in question, for \$1,900.66, on the German American Bank of St. Louis, the same being one of those received, and indorsed upon it, by stamp: "For collection for account of the Fidelity National Bank, June 20, 1887, Cincinnati, Ohio. AMMI BALDWIN, Cashier." The failure of the Fidelity Bank became known to the complainant on the morning of June 21, 1887, and to the defendant after the receipt of the check in question, but before it had credited it. The court held that in the transaction the plaintiff and the Fidelity Bank stood in the relation of principal and agent, and that their contract contained in their letter showed, first, an offer to the plaintiff, by the Fidelity Bank, of its "services for making collections in the west," and then a proposition to credit sight items at par, subject to payment, and to make collections, remitting weekly in New York exchange, without charge. The court say:

"This proposition was accepted by the plaintiff, and the Fidelity National Bank thereby became the plaintiff's agent to collect for it commercial paper. Under this arrangement the credit given for a check was merely provisional until the check was paid. It did not create a debt from the Fidelity National Bank to the plaintiff, and it did not change the ownership of the check. *Levi v. Bank*, 5 Dill. 104; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675. In that respect, their relations to each other were very different from those between a banker and a depositor when checks are received on deposit as cash, and an absolute right to draw against them is given. *White v. Bank*, 102 U. S. 658; *Scott v. Bank*, 23 N. Y. 289; *Dickerson v. Wason*, 47 N. Y. 439; *Bank v. Loyd*, 90 N. Y. 530; *Ayres v. Bank*, 79 Mo. 421."

The liability of an indorser of commercial paper for the default of the payor, excepting in cases where the indorsement is "without recourse," not being affected by the fact that the transferee is also a purchaser for

value, it was rightly held in *Elkhart Bank v. Armstrong*, cited above, that, where it appears from the evidence that the remittance was by agreement received as cash, credited as cash, and subject to check or to draft, the fact that the paper remitted was indorsed "for collection," and the further fact that it was the understanding that, if not paid, the amount should be charged back to the sender, did not change the character of the transaction, although it did provide a short mode of adjustment between the parties. But here there was no agreement such as was shown in that case. On the other hand, not only was the indorsement "for collection," but the credit by the Fidelity Bank was, in terms, "subject to payment." This was clearly a provisional credit only. The title did not pass; and the proceeds of the collections which were received, not by the Fidelity Bank, but, after its failure, by the receiver, must be treated as trust funds in his hands, subject to the claim of the complainant, to whom they belong.

The decree will be in favor of the complainant, for the payment by the receiver of the sum of \$3,336.40, the proceeds of collections upon remittances made by the complainant to the Fidelity Bank, which were not received by the bank, but came into the receiver's hands after the failure of the bank. As to the residue, to-wit, the sum of \$2,177.15, the decree will find that the complainant is a general creditor of the Fidelity Bank, and as such entitled to dividends. The costs will be taxed to the defendant.

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### METROPOLITAN EXHIBITION CO. v. EWING.

(Circuit Court, S. D. New York. March 23, 1890.)

#### CONTRACT—INTERPRETATION—INJUNCTION.

The contract with defendant for his services as a base-ball player gave plaintiff, a base-ball association, the "right to reserve" him for the next season on condition that he should not be reserved at a salary less than for the current season without his consent, and that he should be one of not more than 14 reserved. *Held*, (1) the term "right to reserve" is ambiguous, and does not imply a contract by the player to devote his services exclusively to the association during the ensuing season, without the aid of extrinsic evidence to show that it has a recognized meaning in the nomenclature of the business to which the contract relates; (2) that, in order to ascertain the meaning of such a term, it is competent to do so by reference to other parts of the contract, and to other contracts made by the parties in respect to the same subject-matter on previous occasions; (3) that interpreting the contract by resorting to the proper sources of explanation the term is meant to give a prior and exclusive right in favor of one base-ball association as against other base-ball associations to contract with a player for his services for another season, and the contract is merely an exclusive right to make a contract upon terms to be agreed upon by the parties; (4) that although courts of equity will prevent by injunction the breach of contracts for professional services in some cases in which they will not decree specific performance, they will not undertake to make contracts for parties, or to enforce in any way those as to the terms of which the parties have not arrived at a definite understanding; (5) although preliminary relief will not be granted in a case in which it is doubtful whether the plaintiff will be finally successful, yet, where the questions are such that they can be as fully considered and as safely decided upon a motion for a preliminary injunction as at the final hearing, it is the duty of the court to decide them upon such a motion when such an injunction is essential to the protection of the plaintiff.

In Equity. On bill for injunction.

*Joseph F. Choate and George F. Duysters, for plaintiff.*

*Henry Bacon, for defendant.*

WALLACE, J. This action is brought to restrain a threatened breach of contract for the performance of personal services which require special aptitude, skill, and experience. It is a case in which an action at law would not afford the plaintiff an adequate remedy for the breach, and in which the power of the court should be exercised by preventive interposition, if it is found that the contract is such as the plaintiff claims it to be. The circumstances are such that, unless a preliminary injunction is granted, the plaintiff will obtain no effectual remedy, because, before the cause can be brought to final hearing, the time will have passed within which the relief sought would be practically useful, and, if it be then adjudged that the plaintiff is entitled to a permanent injunction, the judgment will be declaratory merely. Although preliminary relief is not to be granted in a case in which it is doubtful whether the plaintiff will be finally successful, yet, where the questions are such that they can be fully considered and as safely decided upon a motion for a preliminary injunction as at final hearing, it is the duty of the court to consider and determine them, and not defer the party invoking its assistance to a time when a decree, if awarded, would be too late.

The contract upon which the plaintiff founds its claim for relief is in form between the New York Base-Ball Club as party of the first part, and the defendant as party of the second part; but there is no reason to doubt that the New York Base-Ball Club was the agent of the plaintiff in entering into the contract, that the plaintiff is the real principal, that the contract was intended to inure for the benefit of the plaintiff, and that the plaintiff is entitled to enforce it against the defendant to the extent that the New York Base-Ball Club could do so. The doctrine is now generally recognized that, while a court of equity will not ordinarily attempt to enforce contracts which cannot be carried out by the machinery of a court, like that involved in the present case, it may nevertheless practically accomplish the same end by enjoining the breach of a negative promise, and this power will be exercised whenever the contract is one of which the court would direct specific performance, if it could practically compel its observance by the party refusing to perform through a decree for specific performance. It is indispensable, where the contract does not relate to realty, that it be one for the breach of which damages would not afford an adequate compensation to the plaintiff. It must be one in which the plaintiff comes into court with clean hands, and which is not so oppressive as to render it unjust to the defendant to enforce it. It must be one in which there are mutual promises, or which is founded on a sufficient consideration. It must be one the terms of which are certain, and in respect to which the minds of the parties have distinctly met, so that there can be no misunderstanding of their rights and obligations.

The contract is executed as of the date of April 29, 1889. It is a

formal document, consisting of 20 articles, by which the New York Base-Ball Club employs the defendant, and the defendant undertakes to perform professional services as a base-ball player for the club for the season (specified in article 2) beginning April 1, 1889, and ending October 31, 1889. Article 20 provides that the salary to be paid the defendant shall be \$2,000, payable semi-monthly. Among other things, the contract provides by different articles that the club may at any time terminate the contract on 10 days' notice to the defendant, whereupon the obligations of both parties are to cease; that the club shall provide the defendant while "abroad" with proper board and lodging, and pay all necessary traveling expenses; that if the defendant, during the term of his employment, be guilty of any excessive indulgence in liquor, or of gambling, or of insubordination, he shall be liable to certain specified penalties; and that, if the club ceases to be a member of the National League of Professional Base-Ball Clubs, either compulsorily or voluntarily, the "defendant shall, if the right of reservation be transferred" by the club to any other club, receive from that club at least the same amount in salary that he receives by the present contract. It contains, also, the following provision:

"Article 18. It is further understood and agreed that the party of the first part shall have the right to 'reserve' the said party of the second part for the season next ensuing the term mentioned in paragraph 2, herein provided, and that said right and privilege is hereby accorded to said party of the first part upon the following conditions, which are to be taken and construed as conditions precedent to the exercise of such extraordinary rights or privileges, viz.: (1) That the said party of the second part shall not be reserved at a salary less than that mentioned in the 20th paragraph herein, except by the consent of the party of the second part; (2) that the said party of the second part, if he be reserved by the said party of the first part for the next ensuing season, shall not be one of more than 14 players then under contract,—that is, that the right of reservation shall be limited to that number of players, and no more."

The plaintiff alleges that the defendant was one of 14 players, and no more, so reserved under said contract; that on the 22d day of October, 1889, plaintiff exercised its option to reserve the defendant for the season of 1890 by giving the defendant due and timely notice, in writing, of its intention to do so; and that, notwithstanding the exercise of this option, the defendant has engaged his services for the season of 1890 to another organization, to act for it as a base-ball player during that season. The plaintiff insists that, by the terms of the contract, it is entitled to the services of the defendant as a base-ball player for the season of 1890 upon the terms and conditions of the contract for the season of 1889, except the condition giving a right to reserve him for a subsequent season.

The case turns upon the meaning and effect of the clause and contract which gives the club the right to reserve the defendant for the season next ensuing. It is plain enough that the option is a right of reservation for the next ensuing season only,—the season ensuing the term mentioned in article 2,—and does not extend beyond the term from April 1,

1890, to October 31, 1890. It is equally plain that the salary for the ensuing season is to be the same as that for the season of 1889, unless the parties mutually consent to a change. But what is the character of the option which the plaintiff is permitted to exercise? What is the right to "reserve" the defendant? If it is the right to retain and have his services as a base-ball player for the season of 1890, when is the right of election to be manifested, and upon what terms are these services to be rendered? Can the club wait until April 1, 1890, before it manifests its intention to exercise the option? Is the club to pay the defendant's board and lodging while he is "abroad," serving the club, during the season of 1890? Can the club discharge him at any time during that season on 10 days' notice? Are the penalties for intoxication, gambling, or insubordination enforceable during the season of 1890? In short, does the contract embody the definite understanding of the parties to it in respect to their reciprocal rights and obligations after the season of 1889 shall have ended? If the term, "the right to reserve," has no defined meaning, and there were no extrinsic sources by which to ascertain the sense in which it is used by the parties, it would be an ambiguous phrase. As applied to a contract for personal services, the right to reserve would convey a very unintelligible conception of the conditions and incidents of the service to be rendered or enjoyed. A contract by which one party agrees, for an equivalent, to reserve himself for another for a stated period, or to reserve himself as a lawyer or doctor or artist or laborer for a specified term, would very inadequately express a promise to devote his professional or manual services exclusively to the other during that period; and the promise of a base-ball player to reserve himself for a particular club for a given season would hardly, without more, convey any definite meaning of the understanding of the parties. It certainly would not bind him to submit to any special rules or regulations respecting the performance of his services not expressly consented to, or not to be necessarily implied from the nature of the employment and the situation of the contracting parties. If it had been the meaning of the contract to allow the club to renew the engagement of the defendant for a second season upon the same conditions as those for the first season, that intention could have been easily and unequivocally expressed. As it is, it is left wholly to implication, unless the "right to reserve" is a term having a defined and specific signification. This ambiguity suggests such grave doubt as to the meaning of the clause that in two adjudged cases, in which it has been considered by the courts, the judges have thought it too indefinite to be enforceable. In *Exhibition Co. v. Ward*, 9 N. Y. Supp. 779, (in the supreme court of this state,) Mr. Justice O'BRIEN was of the opinion that the failure to provide for the terms and conditions of the contract for the second season rendered the clause so indefinite and uncertain that it could not be the basis of equitable relief, or that it meant that every player is bound for the ensuing season upon the same terms and conditions as those of the first season, including the signing of a new contract containing the option to reserve. In *Philadelphia Ball Club v. Hallman*, in the court of common pleas of Philadelphia, Judge THAYER

was of the opinion that the failure to designate the terms and conditions of the new engagement under which the player is to be reserved rendered the contract of reservation wholly uncertain, and therefore incapable of enforcement.

Where the terms employed to express some particular condition of a contract are ambiguous, and cannot be satisfactorily explained by reference to other parts of the contract, and the parties have made other contracts in respect to the same subject-matter, and apparently in pursuance of the same general purpose, it is always permissible to examine all of them together in aid of the interpretation of the particular condition; and, if it is found that the ambiguous term has a plain meaning by a comparison of the several contracts and an examination of their provisions, that meaning should be attributed to it in the particular condition. So, also, if it appears that the term used has an established meaning among those engaged in the business to which the contract has reference, and, unless it is given that meaning, is indefinite and equivocal, it should be treated, in interpreting the contract, as used according to that understanding; and in construing a contract the court is always at liberty to look at the surrounding and antecedent circumstances, and avail itself of the light of any extrinsic facts which will enable it to view the contract from the stand-point of the parties at the time when it was made. In the present case, it will satisfactorily appear, by resort to these sources of interpretation, that the term "right to reserve" is used in the contract in the sense that obtains in base-ball nomenclature, and that it is intended to signify an option, the character of which was well understood by base-ball clubs and professional players when the present contract was made. Obviously, the right to reserve given by the eighteenth clause of the contract is the same thing as the right of reservation mentioned in that part of the contract which provides that the present club may disband, and transfer its right of reservation to some other club. The agreement is in a form common to all contracts between base-ball clubs organized under what is known as the "national agreement" and professional players, a form which is prescribed by the national agreement. The national agreement is a compact between the various base-ball associations constituting the National League Base-Ball Clubs and the American Association of Base-Ball Clubs, made with a view to regulate the rights and obligations of the members as respects one another. One of its paramount features consists of provisions regulating the privilege of clubs to reserve a stated number of players. The provisions are framed to prevent any club of the National League or the American Association from engaging a player already reserved by another, and to render the player so reserved ineligible for employment by any other club. They require each club, on the 10th day of October in each year, to transmit to all the other clubs a reserved list of players, not exceeding 14 in number, then under contract, and of such players reserved in any prior list who have refused to contract for another year, and declare such players ineligible to contract with any other club. Inasmuch as the parties to the national agreement comprise all, or substantially all, the clubs in the country

which employ professional players, this national agreement, by indirection, but practically, affects every professional player, and subordinates his privilege of engaging as he chooses to the option of the club by which he is under reservation. As is stated in a recent publication edited by a prominent professional player:

"The most important feature of the national agreement, unquestionably, is the provision according to the club members the privilege of reserving a stated number of players. No other club of any association under the agreement dare engage any player so reserved. To this rule, more than any other thing, does base-ball, as a business, owe its present substantial standing. By preserving intact the strength of the team from year to year, it places the business of base-ball on a permanent basis, and thus offers security to the investment of capital. The reserve rule itself is a usurpation of the player's rights; but it is, perhaps, made necessary by the peculiar nature of the ball business, and the player is indirectly compensated by the improved standing of the game. The reserve rule takes a manager by the throat, and compels him to keep his hands off his neighbor's enterprise."

In the contracts between clubs and players as framed prior to November, 1887, there was no provision by which the player consented to the option for reserve on the part of the club. But the contracts did contain a condition that the player should conform to, and be governed by, the constitution and provisions of the national agreement; and the player thereby assented to become ineligible for engagement by any other club of the league during the season of his engagement by a particular club, or while the option of re-engaging him for an ensuing year on the part of that club remained in force. Changes were made from time to time in various features of the national agreement. The players were obliged to inform themselves of the latest changes, in order to understand the precise terms of their contract with the clubs. They became unwilling to consent to a form of contract by which they were to be subjected to conditions not mentioned in the contract itself. In November, 1887, a committee representing the professional players met a committee representing the parties to the national agreement for the purpose of agreeing upon certain changes to be made in the form of the contract. The committees finally agreed that the obnoxious clause in the contract should be omitted, and the clause now found in the eighteenth article should be inserted. This was the origin of the clause giving to the club, by the contract itself, the option of reserve. The clause was manifestly inserted in order to give, by an express condition, the right of reservation to the clubs which theretofore the players had only given by agreeing to be bound by the terms of the national agreement. By ascertaining what that right of reservation was, it can be plainly seen what the parties had in mind in using the term in the present contract. If, when the contract was made, the term had a well-understood definition, there was no necessity to particularize in the contract the conditions or characteristics of the option.

Reference has already been made to the provision of the national agreement requiring each club, on the 10th day of October in each year, to transmit to all the other clubs a reserved list of players, and declaring

such players ineligible to contract with any other club. This provision is to be read in connection with another provision of the national agreement, which prescribes that no contract shall be made "for the services of any player by any club for a longer period than seven months, beginning April 1st and terminating October 31st, and no such contract for services to be rendered after the expiration of the current year shall be made prior to the 20th day of October of such year." The two provisions, read together, allow a period of 10 days to intervene between the time when a club can exercise the privilege of placing a player upon its reserved list and the time when it can make a contract with him for services to be rendered in an ensuing year, thus emphasizing a distinction between the right to treat the player as reserved and the contract which is to fix the terms upon which the reservation is to be complete. The effect of these provisions is that, when the club has exercised its privilege of reservation, no other club is permitted to negotiate with the player; but the club which has placed him upon the reserved list, and no other, is then at liberty to enter into a contract with him for services for an ensuing year. Consequently the right of reservation is nothing more or less than a prior and exclusive right, as against the other clubs, to enter into a contract securing the player's services for another season. Until the contract is made which fixes the compensation of the player and the other conditions of his service, there is no definite or complete obligation upon his part to engage with the club. He agrees that he will not negotiate with any other club, but enjoys the privilege of engaging with the reserving club or not, as he sees fit. Read with this understanding, the clause in question by which the privilege of reserving the defendant is given to the club expresses definitely the terms of the option. If the club exercises the right of reservation, it agrees in advance that the player shall receive at least as large a salary as he has received during the current year, and leaves it open to him to contract on that basis for the next season, or to insist on a larger salary. All the other terms of the engagement are matters of negotiation between the club and the player. The law implies that the option of reservation is to be exercised within a reasonable time; but when this has been done the right to reserve the player becomes the privilege, and the exclusive privilege, as between the reserving club and the other clubs, to obtain his services for another year if the parties can agree upon the terms. As a coercive condition which places the player practically, or at least measurably, in a situation where he must contract with the club that has reserved him, or face the probability of losing any engagement for the ensuing season, it is operative and valuable to the club. But, as the basis for an action for damages if the player fails to contract, or for an action to enforce specific performance, it is wholly nugatory. In a legal sense, it is merely a contract to make a contract if the parties can agree. It may be that heretofore the clubs have generally insisted upon treating the option to reserve as a contract by which they were entitled to have the services of the player for the next season upon the terms and conditions of the first season, and even requiring him to enter into a new con-



tract containing the option for reservation; and it may be that the players have generally acquiesced in the claims of the clubs. However this may be, the players were not in a position to act independently; and, if they had refused to consent to the terms proposed by the clubs, they would have done so at the peril of losing any engagement. The facts, therefore, are not such as to permit any weight to be given to the acts of the parties as evincing their own construction of the contract.

It follows that the act of the defendant in refusing to negotiate with the club for an engagement for the season of 1890, while a breach of contract, is not the breach of one which the plaintiff can enforce. The motion for an injunction is denied.

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EDISON v. GILLILAND *et al.*

(Circuit Court, S. D. New York. April 9, 1890.)

PRINCIPAL AND AGENT—FRAUD—PLEADING.

A bill which alleges that defendant, as plaintiff's agent for the sale of stock, found a purchaser willing to pay \$750,000 for the stock and for a claim held by defendant against the corporation issuing it; that defendant's claim was worth only \$75,000, but that defendant so arranged the sale that \$500,000 represented the price of the stock, and \$250,000 the value of defendant's claim; and that plaintiff, relying on defendant's representation that the purchaser had agreed to pay \$500,000 for the stock, and \$75,000 for defendant's claim, and ignorant that the price was \$750,000 for both, entered into an executory agreement for the sale of his stock for \$500,000, and that defendant had been paid \$250,000 for his claim,—is fatally defective because it does not disclose that plaintiff ever parted with his stock, or had otherwise been a loser in consequence of defendant's alleged misconduct.

In Equity. On demurrer to bill.

*Eugene H. Lewis*, for plaintiff.

*Frederick R. Coudert* and *W. Bourke Cockran*, for defendants.

WALLACE, J. Briefly stated, the cause of action set forth in the bill of complaint is that the plaintiff, being the owner of certain shares of stock in a corporation, authorized the defendant Gilliland to find a purchaser, and negotiate a sale of the stock; that Gilliland got the defendant Tomlinson to assist him in negotiating the sale for a share of the profits; that Gilliland had a claim of his own against the corporation, growing out of an agency contract, of the value of about \$75,000; that Gilliland and Tomlinson found a purchaser in the person of one Lippincott, who was willing to buy the plaintiff's stock; that they represented to the plaintiff that Lippincott was willing to pay \$500,000 for the stock and \$75,000 for Gilliland's claim against the corporation; that thereupon plaintiff entered into an executory written contract with Lippincott for the sale of the stock at the price of \$500,000, to be paid, at a future day, upon the delivery by plaintiff of the shares to Lippincott; that, in fact, Gilliland and Tomlinson had negotiated with Lippincott for a purchase by which he was to give \$750,000 for the stock and Gilli-

land's claim, they both knowing that the claim was only of the value of \$75,000, and he being indifferent as to how the \$750,000 should be apportioned between the price of the stock and the claim of Gilliland; that the defendants and Lippincott thereupon fixed the terms of the purchase so that \$500,000 should represent the price of the stock, and \$250,000 should represent the value of Gilliland's claim; that the plaintiff, relying upon the representations of the defendants that Lippincott was to pay \$500,000 for the stock and \$75,000 for Gilliland's claim, and ignorant that Lippincott was to pay \$750,000 for both, entered into the executory contract mentioned for the sale of his stock to Lippincott; and that thereafter Lippincott paid to the defendants, and they received from him for themselves, the \$250,000. The theory of the bill of complaint is that by their fraudulent conduct the defendants "merged the actual value of Gilliland's claim in the value of the plaintiff's stock, and thereby forfeited all claim to receive or have allowed to them in any way" its actual value, and are therefore liable to account for the whole sum of \$250,000.

Although there is nothing alleged in the bill directly, or from which it can be inferred, to show that Lippincott did not regard the Gilliland claim as of the value of \$250,000, or that he would have been willing to give \$500,000, or any less sum, for the plaintiff's stock without also acquiring Gilliland's claim, it would not follow that the plaintiff could not recover if he really lost anything by the alleged misconduct of his agents. If, availing themselves of their opportunity as fiduciaries, they sold property of their own, or belonging to Gilliland, for more than three times its value, because they were able to control the sale of the plaintiff's property, without informing plaintiff of the facts, they were guilty of disloyalty to him; and, upon the discovery of their misconduct, he could, as to them, repudiate their authority to sell his property, or, at his election, compel them to account for the profits illicitly acquired by the transaction.

The bill is, however, fatally defective because the facts set forth do not disclose that the plaintiff has parted with his stock, or otherwise been a loser, in consequence of the alleged misconduct of the defendants. He has entered into an agreement to sell and deliver his stock, at a future day, upon receiving the purchase money; but that day had long expired before the bill was filed, and it does not appear that the contract was ever consummated. For all that appears, he has the stock now, is still its owner, and nothing ever came from the contract. Whether Lippincott repudiated it, or whether the plaintiff did, or whether it was carried out, is left wholly to conjecture. It must be assumed, upon demurrer, that the pleader has stated his case as favorably as the facts will permit. It must be inferred, therefore, that the contract, for some unexplained reason, has fallen through, and that the plaintiff is in the same position he was before it was made. The case as stated by the bill is, at best, one in which a principal has employed agents to sell property for him, and they have taken advantage of their agency to sell their own property at a price largely in excess of its real value. The case is not

one where the principal has lost the sale of his own property by the misconduct of his agents. But the theory of the bill is that the property was actually sold, while the facts show that the sale has never been completed, and, consequently, that the plaintiff has lost nothing by the transaction. The demurrer is sustained.

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TORREY v. UNITED STATES.

(Circuit Court, E. D. Missouri, E. D. April 22, 1890.)

1. ACCORD AND SATISFACTION—CONSIDERATION.

In an action to recover a balance on a contract to deliver beef, defendant pleaded that the agreement, as understood by both parties, was \$3.50 per hundred for steers, with 20 per cent. deduction for all cows delivered, which latter clause was accidentally omitted from the contract, and that plaintiff had accepted a settlement on that basis in full satisfaction of all claims thereunder. On plaintiff's motion to strike out, *held*, treating the plea as one of accord and satisfaction, the allegation of mistake was necessary, as showing a consideration for the settlement, and it constituted a legal defense.

2. CODE PLEADING—EQUITABLE DEFENSE.

Treating the plea as an equitable defense to an action at law, it was permissible, under the Practice Act of Missouri, (Rev. St. 1879, § 3461,) providing that there shall be but one form of civil action. *Smith v. Canning Co.*, 14 Mo. App. 523, followed.

3. CLAIMS AGAINST UNITED STATES—JURISDICTION.

The action being brought under Act Cong. March 3, 1887, c. 359, § 2, providing that the circuit courts shall have concurrent jurisdiction with the court of claims in certain cases against the United States, and that the judge shall be the trier of the facts in such cases, the question of the right of parties to a trial by jury is not involved.

At Law. On motion to strike out special plea.

Plaintiff's petition contains two counts, the first laying the damages at \$525 and the second at \$3,000, for other violations of the contract. Act Cong. March 3, 1887, c. 359, § 2, provides that the circuit courts shall have concurrent jurisdiction with the court of claims in all actions against the United States where the amount involved exceeds \$1,000, and does not exceed \$10,000.

*Jay L. Torrey* and *E. W. Pattison*, for plaintiff in error.

*Geo. D. Reynolds*, U. S. Atty.

THAYER, J. In this case the plaintiff sues in the first count to recover a balance alleged to be due on a contract with the government to deliver 475,000 pounds of beef cattle (either steers or cows) at the Shoshone Indian agency. It is alleged in the petition that the price agreed to be paid was \$3.50 per hundred on the hoof, but that the government only allowed and paid \$2.80 per hundred for such cows as were delivered, and that, in consequence of its failure to pay for the cows at the price stipulated in the contract, there is a balance still due in the sum of \$525. The government answers the complaint, first, by a general denial of all the allegations, as it is permitted to do under the code of

procedure in this state. It then pleads specially the following facts, in substance: That the contract in question on which plaintiff sues was for 475,000 pounds of beef, at the price of \$3.50 per hundred on the hoof,—a deduction of 20 per cent., however, to be made from such price, in paying for all cows delivered; that plaintiff and the defendant alike understood such to be the contract; that the cattle delivered under the contract were accepted and paid for in pursuance of such understanding; that plaintiff accepted the payment so made, in full satisfaction and discharge of all claims under said contract; but that in drafting the agreement the clause with reference to deducting 20 per cent. of the stipulated price in paying for cows was accidentally omitted, and that the omission was not discovered till long after the contract was made. There is a motion to strike out the special plea, on the ground that it is an equitable defense not permissible in a suit at law. I am satisfied that the motion ought not to prevail.

1. The matter pleaded, in my judgment, is not exclusively an equitable defense. It is averred in the plea that plaintiff has accepted a certain sum, in full satisfaction and discharge of all claims under the contract sued on. This is a legal defense, and, even in this aspect, it was probably thought necessary to allege and prove that there was a mistake in drafting the contract from which a controversy might arise, as otherwise it might not appear that there was any consideration for accepting, by way of satisfaction and discharge of all claims under the contract, a less sum than appeared to be due according to its provisions, as the same had been erroneously written. Treating the plea as one of accord and satisfaction, and hence as a legal defense, it appears to the court that the allegation as to the mistake made in drafting the contract is a proper and necessary allegation.

2. But I am unwilling to admit that such a defense may not be made to a suit at law on the contract, even conceding it to be of an equitable nature. The government pleads that a mistake was made in drafting the contract, not as the basis of any affirmative relief sought, but purely by way of defense, and in negation of the right asserted by the plaintiff. In this state an equitable defense, made under such circumstances, is allowable in a suit at law. *Smith v. Canning Co.*, 14 Mo. App. 522, and cases cited. Nothing is to be gained, it would seem, by forcing the defendant to file a bill for the reformation of the contract, and for an injunction to stay the action at law until the suit for reformation is concluded. The question as to whether either party will be subjected to a different form of trial than they are entitled to, is not even involved in this case, as, in any event, the suit being under the act of March 3, 1887, the issue of fact must be tried by the court. I am satisfied that the motion is not well taken, and it is accordingly overruled, with leave to file a reply.

FOX *et al.* *v.* CADWALADER.

(Ottewill Court, E. D. Pennsylvania. October 10, 1899.)

**1. CUSTOMS DUTIES—CONSTRUCTION OF ACTS—COMMERCIAL TERMS—PHILOSOPHICAL INSTRUMENTS.**

Where descriptive words used in the tariff acts are commercial terms, they are to be construed in the sense in which they are used in commerce; and if at the time of the passage of the act of 1893 there was a class of articles defined and well known in the branch of commerce to which they belonged as philosophical instruments, all articles within that class are dutiable under the trade name, as used in said act.

**2. SAME.**

If the designation "philosophical apparatus and instruments" is not a trade term, then it is to be construed according to the meaning ordinarily given to the words in common speech, and in that sense it includes not merely such instruments as are used in purely scientific investigation or instruction, but all instruments designed to illustrate or utilize certain laws of natural philosophy, and which require for their design or their manufacture or their use some special knowledge of those laws.

**3. SAME—CLASSIFICATION—SPECTACLE LENSES.**

Disks of glass known as "spectacle lenses," which have been ground or polished for use in spectacles, and which only require to be cut and fitted to the frame, are not exempt from duty as "plates or disks of glass unwrought, for use in the manufacture of optical instruments," but are dutiable as "articles of glass cut, engraved," etc.

**4. SAME—MICROSCOPE SLIDES.**

Small rectangular pieces of common window glass, used for microscope slides, are dutiable as "common window glass, not exceeding ten by fifteen inches square," and not as "articles of glass cut," etc.

**At Law.**

This was an action brought by an importer to recover an alleged excess of duty imposed by the collector. The plaintiffs imported the following articles, which they claimed to be dutiable as "philosophical apparatus and instruments," and which the government claimed to be dutiable as manufactures composed wholly or in part of iron, steel, copper, etc., viz., (1) dynamos, dynamometers, ammeters, volt-meters, milliamperes, and amperemeters; (2) surveying aneroids; (3) clinical thermometers; (4) spy glasses, marine glasses, binoculars, and opera glasses; (5) achromatic lenses, rectilinear lenses, projection lenses, railroad lenses, photographic lenses, and loupes richaud. Plaintiffs also imported glass disks known as "spectacle lenses." These disks had been ground or polished for use in spectacles, but required to be cut and fitted to the frame before forming part of the finished spectacle. Plaintiffs claimed that these were exempt from duty under the provision in the free list for "glass plates or disks unwrought, for use in the manufacture of optical instruments." The collector claimed that they were dutiable as "articles of glass cut," etc. Plaintiffs also imported small rectangular pieces of common window glass used as microscopic slides. The glass had not been subjected to any other process of manufacture than the cutting into sizes. Plaintiffs claim that the articles were dutiable as "common window glass, not exceeding ten by fifteen inches square." The collector contended that they were dutiable as "articles of glass cut," etc. As to the articles claimed to be philosophical instruments considerable evidence was given on both sides on the question whether the term was a

trade term, designating a class of articles dealt in under that commercial classification.

*Frank P. Prichard*, for plaintiffs.

*James M. Beck*, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for defendant.

BUTLER, J., (*charging jury orally.*) In view of what was said in your presence this morning, in disposing of questions of law raised by the facts and points, I need not address myself to the law or to the points at this time.

As respects the articles of merchandise here involved, called by the plaintiff philosophical apparatus and instruments, it is sufficient to say that these were taxed by the government under a provision of the tariff laws which was supposed by the customs officers to apply in the case, and that unless the plaintiff's contention here is right,—that they are to be denominated philosophical apparatus and instruments, and therefore fall within the provisions of the statute invoked by the plaintiff intended to cover the case of philosophical apparatus and instruments,—the assessment and collection of revenue, on the part of the government, was correct. Congress has subjected philosophical apparatus and instruments to a duty of 35 per cent. These articles of merchandise were, by the government, subjected to a duty of 45 per cent. What did congress mean by the terms philosophical apparatus and instruments? You will observe that these are terms of class denomination, every member of this class, of philosophical apparatus or instruments, has its individual name. Congress did not undertake in providing for the levy of a duty upon philosophical apparatus and instruments to designate the different members of the class by name, but used a class designation. If in that branch of commerce to which these articles belong, they have a trade designation, and that designation is such as congress has here employed,—philosophical apparatus or instruments,—then it makes no difference whether we think that designation is founded in reason, or is wise or is unwise, we are required to infer that congress intended to describe these articles when it used the terms. Congress is supposed, in the tariff laws, to use commercial terms in designating articles for assessment; to apply the names by which they are known, (not to the public at large or to lexicographers,) but to merchants who deal in them.

The first question, therefore, is: does the evidence show that these articles are known and classified in commerce, (that branch of trade to which they belong, by those who deal in them,) as philosophical instruments. I do not mean by those who buy a single article; because they know it probably by its individual particular designation, but those who deal in the class. Does the evidence show that they are known and classified by such persons as philosophical instruments? If it does there is an end of this case. I repeat, it is unimportant whether the classification is a wise or an unwise one, whether it is based on reason or not, if there is such a classification of the articles by the trade, such a designation of the class in the branch of commerce to which they be-

long, that governs. Congress meant to use the term in the sense in which those who deal in these articles understood it. Does the evidence satisfy you that these articles are so classified and known? The witnesses called by the plaintiff, and the government, were all very intelligent men, are all highly reputable, and there is nothing in their testimony to justify a suspicion that they do not testify truthfully, according to their understanding. All the witnesses called by the plaintiff to whom the question was put, testified, in the first instance, that the articles are so classified, so dealt in, so bought and sold by the trade. Of course when an individual calls at an establishment and asks for a microscope, he does not ask for a philosophical instrument. He then designates the article by its individual name, not by its class denomination. But the witnesses say that by all who deal in these articles as a class of merchandise, they are known as philosophical instruments, so classed, bought and sold. If that is true, it disposes of this question, without more. Is it true? These witnesses were cross-examined, and you will say how far their statements, on examination in chief, were shaken. It is for you to judge. One witness, Mr. Walmsley, was called on the other side, (also a very intelligent and apparently a very respectable man, no doubt worthy of credit,) who tells you that he did not so understand; that his understanding of the trade designation was not such as the plaintiff's witnesses state. What else is there bearing on the subject? The fact that these various items or articles, when called for individually, and specified, are not called philosophical instruments, is, as before stated, of no consequence. It tends to prove nothing. The catalogue of the plaintiff is before you, and is worthy of your consideration.

The plaintiff has divided up the various articles in his store into different classes; some of them, which may be said to be emphatically philosophical instruments, he puts in a department by themselves, and calls philosophical instruments. Others he puts in a class and calls them optical instruments, others mathematical instruments, etc. Does this show that he as a merchant, himself largely engaged in this trade, does not regard all these articles as philosophical apparatus or philosophical instruments? You must judge. Would it be possible for him to conduct his business without doing as he does in this respect? Not only does his convenience require it, but do or do not his necessities demand that he should do this. Would it be possible for him to find, in those who ordinarily accept services under another, one man who would be competent to take charge of all the business of that establishment? It is for you to say. One man may understand the instruments which more especially and distinctly, from their construction, are known as philosophical instruments. Another may be especially educated as respects optical instruments or mathematical instruments, but would it be reasonable to expect that a proprietor could find a man to go into such an establishment who would be sufficiently qualified by his training to take charge of the entire establishment? Could he point out to his customers without confusion what was wanted without some such

refinement upon the classification? It is for you to judge what value this testimony pointed to by the defendant should have. Mr. Fox tells you why this is done. He tells you it is a necessity in the transaction of his business. You will say from the evidence whether or not these articles claimed by the plaintiff to be philosophical apparatus, or philosophical instruments, have that trade designation. If they have you will decide this branch of the case for the plaintiff. I do not hesitate to say to you, although the question is for you, that in the judgment of the court the weight of the evidence is with the plaintiff as respects this branch. You, however, will consider it carefully and deliberately, and decide according to your judgment of the evidence. If you do not find the articles have such a trade designation as I have stated, then it will be necessary for you to take them up separately and say whether any of them, and if any, which of them, are philosophical instruments, according to the meaning of the term philosophical apparatus and philosophical instruments as employed in common speech, for it is a rule of law that where, in a tariff act, the terms used are not shown to be terms of commerce or trade, they must have the interpretation which is given them, or the meaning which is attributed to them, in common speech. In the absence of testimony governing the subject, it is the duty of the court to say to you what is the meaning of those words in common speech, supposing them not to be terms of trade. In that respect I adopt the view of the plaintiff.

I instruct you as asked to do in the plaintiff's third point, that if you find the name philosophical apparatus or instruments is not a trade term, (as I have explained,) then it is to be understood as used by congress in the ordinary signification of the word, and in that event, you will find the term to include such instruments as are designed to illustrate or utilize certain laws of natural philosophy, and which require for their manufacture or use special knowledge of those laws. Thus, you observe, if you do not find the articles to be denominated or classified by commerce as philosophical apparatus or philosophical instruments, then you must determine, according to the definition of them given you, whether any of them are, (and if so, which of them,) according to common speech, philosophical apparatus or philosophical instruments. That will be a difficult question, if you reach it. I need not dwell on the subject; I could not aid you by doing so; and I will therefore dismiss the first class of articles involved.

The second class consists of the plates or disks of glass for use in the manufacture of optical instruments. They were assessed by the government and tax collected upon them as articles of glass cut, engraved, etc.; and were properly so assessed unless they are, as the plaintiff claims, plates or disks for use in the manufacture of optical instruments unwrought. There is no controversy in the testimony respecting the character of these articles of glass. They are before us; they show for themselves. The testimony of the plaintiff and his witnesses and that of the defendant's witnesses is precisely the same. They were originally disks or glass plates; glass unwrought, but when imported to this country they



were not unwrought; work had been put upon them. Not only had they been wrought, but they had been wrought to such an extent as to change their character and proper denomination. They were no longer plates or disks of glass in the ordinary sense, but they were lenses. They had been manufactured until they were perfect lenses. They still required to be fitted to the case; only however for the purpose of being held and adjusted to the eye. They were lenses as perfect, so far as the use of a lense is concerned, as after being trimmed and fitted to the case. If held to the eye by the fingers they would answer all the purposes of a lense. The statute did not require that they should be so far wrought as to change their nature and designation, to subject them to duty. They are to be admitted duty free, when free of any material work; they should not be wrought to any extent, the object of the statute being to protect the laborers engaged in that branch of art in this country. I therefore feel no hesitation in saying to you, that as respects these articles, the plaintiff cannot recover. The assessment is right.

The third class consists of the glass slides for microscopes. These slides are window glass; nothing else; they have been taxed as cut glass. They are, in the judgment of the court, not cut glass. They have not been cut in any other sense than for diminishing the size. Window glass comes in at a certain rate. The plaintiff claims that this is window glass. All window glass that comes in is cut more or less. This before us may be cut into smaller pieces, but that is the only difference between it and the ordinary window glass. The plaintiff is right, in the judgment of the court, respecting this, and the government must be charged with the difference between the tax on window glass and the tax on glass cut or manufactured. Cut glass means glass cut into shape. That disposes, so far as the court is concerned, of all there is in controversy in this case.

There is a photographic glass here, stamped, painted or printed, (call it by any name you will,) which has been taxed as printed glass. In the judgment of the court, it is properly taxed. Indeed the plaintiff has abandoned his claim on this count. The globes have also ceased to be a matter of controversy. The plaintiff claimed that they were manufactures of paper, and liable to be taxed only to the extent that congress has taxed paper. The government taxed them as manufactures of brass, or partly of brass. The government now concedes that it was a mistake to so tax them; that they should have been taxed as *papier-mache*; and the plaintiff admits that he was wrong in his classification of them. They do bear a similarity to a map. They are intended, to some extent, for the purposes of a map, but they are not a map and they are not made of paper, but of *papier-mache*. They have also dropped out of the case. They should be taxed as manufactures of *papier-mache*, as the parties agree.

The district attorney has asked me to charge you:

"(1) The words philosophical apparatus in the tariff act comprise such goods, wares and merchandise as are principally and generally employed in institutions of learning in the demonstration of natural laws or by the student or scientist in experimental research."

I cannot do so.

"(2) The words 'philosophical apparatus' do not comprise however all apparatus which may be constructed or operated in accordance with natural laws and which may be termed scientific."

I cannot do so.

"(3) If the importations in question are not mainly and principally designed and used for the demonstration in institutions of learning of natural laws or by the student in experimental research, but are mainly and principally used for practical and industrial purposes, then they are not philosophical apparatus within the meaning of congress and dutiable as such."

I cannot do so.

"(4) The fact that any or all of these importations are or may be used in institutions of learning for the demonstration of natural laws or by the student in experimental research does not *per se* make them dutiable as philosophical apparatus, and they are not so dutiable if their predominant uses are practical and industrial."

I cannot do so.

"(5) If any or all of these importations are mainly and principally employed as the tools or implements of trade by men engaged in industrial pursuits or by men for practical purposes of every-day life then they are not dutiable as philosophical apparatus."

I cannot do so.

"(10) Unless the articles in question are glass, are glass-plate or disks unwrought, and commercially known as such, paragraph 708 of the act of March 31, 1883, has no application to these importations.

"(11) That the term 'cut' in section T. I. 135, does not mean the glass cut to size, but that certain work has been done on *surface* of same to produce the form or the property of the glass."

These points apply, I think, to the disks, and so understood, are affirmed.

"(25) If the jury believe that the importations in question are not commercially known as common window glass and bought, sold and used as such and adaptable for that purpose, but are manufactures of glass, they are dutiable at forty-five per cent. *ad valorem*."

I disaffirm this point.

The plaintiff has asked the court to say:

"(1) If there is a class of articles, which have become grouped together in trade under the general name of philosophical instruments, and are, as a class, known and dealt in under that name, then your verdict should be for the plaintiff for the excess of duty above thirty-five per cent. on all articles which you shall find were included in that class."

I have virtually said so, and I affirm the point.

"(2) The facts that the individual articles of this class are each known by a separate trade name, and that some of them are occasionally sold by dealers in other general classes of merchandise, do not necessarily take them out of the class of philosophical instruments."

I affirm this point, and I say further that it is of no consequence that the individual members of the class may be known by individual names. It is always so of classified articles. It is uniformly so.

"(3) If you should find that the name philosophical instruments is not a trade term, then it is to be understood as used by congress in the ordinary signification of the words, and would include such instruments as are designed to illustrate or utilize certain laws of natural philosophy, and which require for their design, manufacture or use some special knowledge of those laws."

I affirm this point.

"(4) The word 'wrought' in the tariff laws means that the articles have been manufactured into something else. The fact that the glass plates or disks, for use in the manufacture of optical instruments, have been ground and polished and advanced in the stages of manufacture does not change their classification so long as they remain glass plates or disks not completely finished as a part of any optical instrument."

This point has been disposed of.

"(5) Common window glass which has been subject to no other process of manufacture than cutting into sizes is dutiable under the provisions for common window glass under the tariff law, and the small pieces of window glass imported by plaintiffs to be made into microscope slides are, therefore, dutiable as common window glass."

This point has been disposed of.

Counsel on behalf of plaintiffs excepts to the refusal of the court to affirm the fourth and fifth points presented by him, relating to unwrought disks or plates of glass. The district attorney excepts to the answer of the court to the first, second, third, fourth, and fifth points presented by him.

The verdict was for plaintiffs for the amount claimed on the philosophical instruments, and the microscope slides.

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### COOPER v. ARMOUR *et al.*

(Circuit Court, N. D. New York. April 17, 1890.)

#### MALICIOUS PROSECUTION—WHAT AMOUNTS TO—FILING ACCUSATION.

An action for malicious prosecution will not lie for preferring an accusation before a magistrate charging plaintiff with a criminal offense, if he was not apprehended, and no process was issued for his arrest.

At Law.

*Ward & Cameron*, for plaintiff.

*Stedman, Thompson & Andrews*, for defendants.

WALLACE, J. The question in this case is whether an action for malicious prosecution will lie against defendants, who have preferred an accusation before a magistrate charging the plaintiff with a criminal offense, notwithstanding the plaintiff was not apprehended, and no process

for his arrest was issued by the magistrate. The gist of the action of malicious prosecution is the putting of legal process in force, regularly, for the mere purpose of vexation or injury; and the inconvenience or harm resulting naturally or directly from the suit or prosecution is the legal damage upon which it is founded. Some of the text-writers state that the action will lie whenever the defendant has made a charge of felony against the plaintiff with a view to induce a magistrate or tribunal to entertain it, whether any warrant or other process was issued or not. Steph. Mal. Pros. 8; Add. Torts, § 856. Actions have been maintained in the nature of a conspiracy for procuring a false indictment, and even for preferring a false charge of crime upon which the grand jury refused to indict. But the only decisions cited in support of the proposition that the action of malicious prosecution will lie although a criminal proceeding has not actually been instituted by the issuing of process, where the point actually arose, are in the *nisi prius* case of *Clarke v. Postan*, 6 Car. & P. 423, and in the case of *Dawson v. Vansandau*, 11 Wkly. Rep. 516, in which, although no process was issued, the plaintiff was taken into custody, and held for examination upon the charge. On the other hand, it was said by PATTESON, J., in *Gregory v. Derby*, 8 Car. & P. 749, where there was a charge of stealing, upon which a warrant was issued against the plaintiff, that, "if the party was never apprehended, no action at all would lie;" and in *O'Driscoll v. McBurney*, 2 Nott & McC. 54, 55, it was said: "There can be no prosecution without an arrest." The only injury sustained by the person accused, when he is not taken into custody, and no process has been issued against him, is to his reputation; and for such an injury the action of libel or slander is the appropriate remedy, and would seem to be the only remedy. This is the view adopted by Hare & Wallace in their notes to American Leading Cases, (volume 1, p. 173;) and the learned commentators state that slander or libel is the only appropriate remedy where a charge of felony has been made, and warrant was not thereupon issued, and that malicious prosecution, and not slander or libel, is the remedy whenever a warrant has been issued. The question was fully considered by the supreme court of South Carolina in *Heyward v. Culbert*, 4 McCord, 354,—whether an action for malicious prosecution would lie, founded on a criminal charge upon which no process was issued against the accused; and it was adjudged that it would not. In that case the charge was in the form of an information laid before the magistrate to procure a warrant for the arrest of the plaintiff. To the same effect is the case of *Kneeland v. Spitzka*, 42 N. Y. Super. Ct. 470, where the question was decided in an appellate court. In the early case of *Ram v. Lamley*, Hut, 113, it was held that an action of slander could not be maintained for an oral charge of felony made to a justice of the peace upon an application for a warrant against the plaintiff, for the reason that, if words so spoken were to be held actionable, "no other would come to a justice of the peace to inform him of a felony." A defamatory statement spoken or written in a legal proceeding, civil or criminal, which is pertinent and material, is so unqualifiedly privileged that its truth can-

not be drawn into question, or malice predicated of it, in an action for slander or libel. *Revis v. Smith*, 18 C. B. 126; *Lea v. White*, 4 Sneed, 111; *Garr v. Selden*, 4 N. Y. 91; *Hawk v. Evans*, 76 Iowa, 593, 41 N. W. Rep. 368. If, upon considerations of public policy, such an action cannot be maintained, upon the same considerations no other action should lie. Without doubt, libel or slander will lie for an accusation to a magistrate when made with no *bona fide* intention of prosecuting it. Unless such facts can be shown by the person accused, or unless he is subjected to the vexation and expense of process against him, upon principle, he ought not to be allowed to recover. The more generally approved doctrine is that, for the prosecution of a civil action, maliciously and without probable cause, to the injury of the plaintiff, he may maintain an action for damages, although there was no interference with his person or property. *Pangburn v. Bull*, 1 Wend. 345; *Whipple v. Fuller*, 11 Conn. 582; *Closson v. Staples*, 42 Vt. 209; *Eastin v. Bank*, 66 Cal. 123, 4 Pac. Rep. 1106; *Allen v. Codman*, 139 Mass. 136; *Marbourg v. Smith*, 11 Kan. 554; *Woods v. Fennell*, 13 Bush, 629; *Pope v. Pollock*, (Ohio,) 21 N. E. Rep. 356; *McCardle v. McGinley*, 86 Ind. 538; *McPherson v. Runyon*, (Minn.) 43 N. W. Rep. 392; *Smith v. Smith*, 20 Hun, 555. The cases, however, which sustain this view, do not countenance an action when the vexatious suit has not been actually instituted and prosecuted to such effect that the plaintiff has sustained pecuniary loss.

Inasmuch as the defamatory words which must be set forth in an action for slander or libel are not alleged in the present complaint, the case cannot be treated as an action for slander or libel. The motion for a new trial is denied.

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### In re CONVERSE.

(Circuit Court, E. D. Michigan. March 10, 1890.)

#### ATTORNEY AT LAW—EMBEZZLEMENT—CONSTRUCTION OF STATUTE BY STATE COURT— HABEAS CORPUS.

Petitioner was arraigned in the state court under a general statute punishing the crime of embezzlement. He pleaded that "as attorney at law" he was guilty of embezzling \$3,500, "that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money." There was another statute punishing the failure by attorneys at law to pay over moneys collected and received by them. Petitioner was sentenced upon his plea of guilty as for the crime of embezzlement, and, upon a writ of error to the supreme court, that court held that an attorney at law might be convicted of embezzlement under the general statute. *Held*, that this construction of the statute was binding upon the federal court, and that petitioner was not entitled to be discharged upon *habeas corpus*.

(Syllabus by the Court.)

#### *Habeas Corpus.*

This was a petition for a writ of *habeas corpus* based upon the following facts: Petitioner was arraigned upon an information in the circuit court for the county of Calhoun, charging him with embezzlement, he

"being then and there, agent to John E. Dunning and Daniel W. Hall, the executors of the last will and testament of Rice Hall, deceased." Upon such arraignment petitioner pleaded to the information in the following language: "As an attorney at law, I am guilty of embezzlement of \$3,500, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money." Thereupon the court, having made the usual private examination of the accused required by statute after a plea of guilty, sentenced him to five years' imprisonment, in pursuance of section 9151, How. St., which provides that "if any clerk, agent, or servant of any private person \* \* \* shall embezzle, \* \* \* without consent of his employer or master, any money or other property of another, which shall have come to his possession, or shall be under his charge, by virtue of such office or employment, he shall be deemed, by so doing, to have committed the crime of larceny." The next succeeding section (9152) provides that "if any attorney at law \* \* \* shall collect or receive in such capacity, any money belonging to another, and shall neglect or refuse to pay the same to the person entitled thereto, within a reasonable time after demand thereof, the person so neglecting or refusing shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail not more than one year." Petitioner claims that as the information was framed under section 9151, for the crime of embezzlement by an agent, and he had pleaded guilty to the offense of withholding money which he had collected as attorney at law, which was only a misdemeanor under section 9152, his sentence was illegal, and his imprisonment without due process of law.

*John C. Patterson*, for petitioner.

*Herbert E. Winsor*, Pros. Atty., for the People.

BROWN, J. Petitioner claims to be held in confinement in violation of the fourteenth amendment to the constitution of the United States, which declares that no state shall "deprive any person of life, liberty, or property without due process of law," and demands the interposition of this court under Rev. St. § 753, which extends the right of *habeas corpus* to every person held in custody "in violation of the constitution, or of a law, or a treaty of the United States." This jurisdiction, which requires of us to pass upon rulings made by state courts in cases not only within their cognizance, but within their exclusive jurisdiction, is one we would gladly disclaim, if it were within our power, and, so far as it is a matter of discretion, we have uniformly refused to exercise it, until the petitioner has exhausted his remedy in the state tribunals by an appeal to the supreme court. This discretion was declared by the supreme court to exist in *Ex parte Royall*, 117 U. S. 249, 6 Sup. Ct. Rep. 734. In this case, however, the petitioner has been refused relief by the supreme court of the state, and we do not feel at liberty to deny him the right to inquire of us whether his imprisonment was imposed by due process of law, or by the arbitrary and unauthorized act of the state court.

We suppose it will not be questioned that if a party should be sentenced without a trial, upon a plea of not guilty, the constitutional provision would be violated. So, if he were arraigned for one crime, and should plead guilty to another,—as, for instance, if he were charged with burglary, and should plead guilty to larceny,—it would be a plain abuse of power to sentence him either for the burglary to which he did not plead guilty, or for the larceny for which he had not been indicted. Upon the other hand, if he were indicted in general words, and he pleaded guilty to a particular crime, falling within those general words, it would not be illegal to sentence him under the indictment. As, for example, if he were indicted for embezzlement as “an officer of a bank,” and he pleaded guilty of embezzlement as “cashier” of such bank, in such case his description of himself would fall clearly within the general words of the indictment, and his plea would only render it more certain that he did commit the offense charged, and the sentence upon such plea would not be illegal; nor would it change the aspect of the case if it were shown that the offense of embezzlement by a cashier was provided for in a separate statute. In other words, it is no defense to an indictment under one statute that the prisoner might also be punished under another.

In this case the prisoner was charged with embezzlement as the “agent” of Dunning and Hall, executors of the last will and testament of Rice Hall, deceased, and pleaded guilty of “embezzlement of \$3,500 as an attorney at law, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money.” Another statute provided a different punishment for the receipt and retention of money collected by an attorney at law after demand is made for the same. The question, then, which confronted the court, was whether an attorney at law is an “agent,” within the meaning of the first statute, and can be punished as such for embezzlement in failing to pay over moneys collected and received by him in his capacity as attorney at law. This question was answered in the affirmative, Mr. Justice CAMPBELL dissenting. Mr. Justice SHERWOOD, in delivering the opinion of the court, observes:

“That the respondent collected the money as attorney is of no consequence. If the act of the respondent complained of contained all the elements of embezzlement, he was guilty of the crime, and was properly convicted. If an attorney collects money for his client, he, in so doing, acts as the agent of his client as well as his attorney; if in either case, after making the collection, he appropriates the money to his own use with the intention of depriving the owner of the same, he is guilty of the crime of embezzlement. If this were not so, no attorney could be convicted of the embezzlement of his client's money, and this was certainly never the intention of the legislature in passing the statute creating the crime.” *People v. Converse*, 42 N. W. Rep. 70.

In other words, the learned court construes the statute as covering an embezzlement by an attorney at law. Now, while this opinion may perhaps be against the weight of authority, which seems to hold that the word “agent” in this statute has no application to auctioneers, (*Com. v. Stearns*, 2 Metc. 344,) collectors of bills, (*Com. v. Libbey*, 11 Metc. 64,)

to solicitors intrusted by clients with money to invest upon mortgage, (*Queen v. Newman*, 8 Q. B. Div. 706; *Regina v. Cooper*, L. R. 2 Cr. Cas. 123,) or to attorneys at law, (*State v. McLane*, 43 Tex. 404,) still it is a construction placed by the supreme court of the state upon a statute of such state, and is as binding upon this court as if the opinion were pronounced in an ordinary civil suit. As the prisoner did, in fact, plead guilty to embezzlement as an attorney at law, and as the court has held that such offense did fall within the statute, there has been no violation of the constitutional provision, and the petition must be denied.

**HOLMES BURGLAR ALARM TEL. CO. *et al.* v. DOMESTIC TELEGRAPH & TELEPHONE CO. *et al.***

(*Circuit Court, D. New Jersey. April 12, 1890.*)

**1. PATENTS FOR INVENTIONS—LICENSE—ASSIGNMENT.**

Though a license granted by the owner of a patent was not transferable, the existence of a license to the assignee may be shown by proof that the owner recognized and dealt with him as a licensee.

**2. SAME—VERIFICATION.**

The absence of evidence that a certain claim of letters patent was covered by the oath of the inventor will not invalidate the claim.

**3. SAME—REISSUE.**

A patentee can claim on a reissue whatever clearly appears to have been a part of his original invention as described or shown in his original specifications, drawings, or models.

**4. SAME.**

A reissue is not invalid though no interference was had between the application therefor and a patent, no date of which is prior to the invention, claimed in the reissue, and described in the original patent.

**5. SAME—VARIANCE FROM ORIGINAL CLAIM.**

Reissued letters patent No. 4,297, granted to William B. Guernsey, March 14, 1871, for improvement in electro-magnetic burglar alarms, are not invalid for variance from the original patent on the ground that the latter does not cover a single circuit form of apparatus, since the drawings in such patent showing a single wire; if by mistake or accident, the use of the wire was not sufficiently described in the original specification, a reissue to supply the omission was properly granted.

**6. SAME—INFRINGEMENT.**

Said letters patent, combining in the same organization of circuits the characteristic signal instruments of both the open circuit and closed circuit systems, with a resistance or resistances in such a manner as to make each instrument guard against disabling the apparatus from causes such as would disable the other, are infringed by an apparatus of substantially the same construction and accomplishing the same results, the latter using, in place of an electro-magnet and armature, a galvanometer, to open and close a local circuit, and a "relay" corresponding to a closed circuit instrument; and it is immaterial that the galvanometer is made to perform an additional function.

**7. SAME—COMBINATION.**

Such patent contains a patentable combination though its parts are old, and act successively and not simultaneously.

**8. SAME—ANTICIPATION.**

Such letters patent were not anticipated by the English patent to Tyer, in 1865, for an apparatus for transmitting signals indicating the position of a train on a railway, nor by that to Varley in 1865, which was for a modification of the ordinary closed circuit system, nor by that to Mixon in 1866, which would require substantial alterations to make it accomplish the results of the Guernsey patent.



## 9. SAME—FOREIGN PATENT.

The existence of an English patent for which letters were subsequently granted by the United States dates from the time when the great seal was attached.

## In Equity.

Suit to restrain infringement of letters patent, brought by the Holmes Burglar Alarm Telegraph Company and the Municipal District Telegraph Company against the Domestic Telegraph & Telephone Company, George W. Hubbell, Enos Runyon, F. T. Fearey, and Jabez Fearey.

*S. A. Duncan* and *L. E. Curtis*, for complainants.

*G. G. Frelinghuysen*, for defendants.

WALES, J. This suit was brought to restrain the defendants from infringement of reissued letters patent No. 4,297, for improvements in electro-magnetic burglar alarms, granted March 14, 1871, to William B. Guernsey. One of the complainants is the owner of the patent, and the other is alleged to be a licensee under it.

The bill sets out the title of the Holmes Burglar Alarm Telegraph Company, and the granting of an exclusive license, for certain purposes, to the Municipal District Telegraph Company; but objection is made in the answer of the defendants that in fact no license was ever granted to the Municipal District Company, and, in consequence of the absence of joint interest and privity between the parties complainant, the bill should be dismissed on account of this misjoinder. Waiving a consideration of the question whether this objection should not have been taken by a plea in abatement, it is sufficient for the present purpose to say that the testimony of the witness, Holmes, and the written agreements in relation to the ownership and use of this patent, which are set out in the complainants' exhibits, afford satisfactory proof that a license was given to the Municipal District Company, as is alleged in the bill. The granting of a license may be proved by the acts and dealings of the parties who own, and permit others to use, the patent, without the necessity of resorting to written instruments; and it clearly appears from the proofs that prior and up to the time of bringing this suit the Municipal District Company had been treated and acknowledged as its licensee by the owner of the patent. This inference of fact is drawn from the transactions which were had between the Holmes Burglar Alarm Company and its immediate licensee, the Protective Company, which latter company transferred its license to the Municipal District Company. Admitting, as is claimed by the defendants' counsel, that the license to the Protective Company was personal only, and not transferable, and that it had not, prior to its assignment to the Municipal District Company, any right to assign its license, yet it is certain that the Holmes Burglar Alarm Company acquiesced in and ratified the assignment, and thereafter recognized the Municipal District Company as its licensee. There is no restrictive provision in any of the agreements which prevented the owner of the patent from conferring authority on the Protective Company to assign its license, and such authority may be proved without the aid of written articles. This conclusion dispenses with the necessity of dis-

cussing the regularity of the mode adopted by the defendants in presenting the objection of misjoinder, which, under the technical rule of pleading, and equity rule 39, should have been taken advantage of by a plea in abatement.

Another preliminary objection which is insisted on by the defendants' counsel is that claim 2 of the original Guernsey patent, which is made claim 4 of the reissue, is not covered by the oath of the inventor, and is therefore a nullity, and forms no part of the real patent. There is no evidence on this point, and there is equal ground for the presumption that the oath was taken as that it was not. But is the taking of the oath absolutely necessary? In *Whittemore v. Cutter*, 1 Gall. 433. Judge STORY said: "The taking of the oath was but a prerequisite to the granting of the patent, and in no degree essential to its validity." In *Crompton v. Belknap Mills*, 3 Fish. Pat. Cas. 536, the defendants, as in the present case, relied upon a certified copy of the file wrapper and contents to show that the oath had not been taken, but the court said:

"We are not satisfied the oath was not taken. The letters patent recite that it was. \* \* \* But suppose the oath was not taken. Would the patent be void on that account? It was held otherwise by Judge STORY in *Whittemore v. Cutter*, *supra*. The taking of the oath, though it be done prior to the granting of the patent, is not a condition precedent, failing which the patent must fail. It is the evidence required to be furnished to the patent-office, that the applicant verily believes he is the original and first inventor of the art, etc. If he take this oath, and it turns out that he was not the first inventor or discoverer, his patent must fail, and is void. So, if he do not take it, and still he is the first inventor or discoverer, the patent will be supported."

It has also been held that this is not a matter to be inquired into collaterally in an infringement suit. *Hoe v. Kahler*, 20 Blatchf. 430, 12 Fed. Rep. 111; *De Florez v. Raynolds*, 14 Blatchf. 505. And in *Railway Register Manuf'g Co. v. North Hudson R. Co.*, 24 Fed. Rep. 793, the court recognized the right of an applicant's attorney to insert in a pending application amended and enlarged claims, without having them verified by the oath and signature of the patentee, provided only they relate to matter substantially shown and described in the specification. As to the oath, it was decided in *Seymour v. Osborne*, 11 Wall. 516, that recitals in letters patent that the required oath was taken before the same was granted are, in the absence of fraud, conclusive evidence that it was so taken.

Original letters patent No. 108,257 were issued to Guernsey, October 11, 1870, and the reissue for the same invention, No. 4,297, were granted to him on March 14, 1871. The nature and objects of the invention are, in part, thus specified by the patentee in the reissue:

"The principal object of my invention is to provide an electrical apparatus which will give an alarm or an indication either in the event of the conducting circuit being broken, or in the event of a new or shorter circuit being formed. To this end I employ a continuous circuit, or a circuit capable of being made continuous at will, arranged with a resistance or resistances so that the current which is allowed to pass will not possess sufficient electro-motive force to effect the alarm, but having such arrangements at windows

and doors, and other places to be guarded, as will, on any tampering therewith, short-circuit the current past or around the said *resistance* or resistances to an extent sufficient to actuate the alarm. My invention thus combines the advantages, and avoids the disadvantages, of the two varieties of electro-magnetic alarms which are distinguished as the 'closed circuit' system and the 'open circuit' system. *I will proceed to describe a way of carrying out my invention by the use of two separate electro-magnets, each of which may constitute a resistance to prevent the sounding of an alarm until the circuit is either made around or past such resistance, or broken. More than one magnet or resistance is not essential in carrying out the invention, as will be understood from the following explanation:* Fig. 1 shows in perspective two electro-magnets, with separate conductors connected with a common battery, each conductor passing through an alarm, and through suitable connecting devices, which may be located in the frames of windows, or at any desired points, in such a manner that the opening of a door or window, or the performance of any act which it is desired to detect, will connect one conductor with the other, and avoid both electro-magnets. For this purpose the magnet of one conductor is located near the positive pole, and that of the other near the negative pole, of the battery. Fig. 2 illustrates a modification, in which one magnet *may be dispensed with*, and a simple resistance coil introduced *at the point to be protected* in such a manner that the act to be detected will close a short circuit, avoiding the resistance, and thus sounding the alarm. This more simple form of the apparatus is applicable to places where a single window, door, or other object is to be protected."

Then follows a general description of the drawing:

*"Two magnets and two conducting wires are shown and described, but only one magnet or other electro-motor, and one conducting wire, is necessary to accomplish the same effect, as will be manifest by an examination of the arrangement, and a knowledge of the principles involved. The location, with regard to each other, of the various members or elements of the alarm, is not an essential part of the invention, and can be varied as circumstances dictate."*

"Where but a single place is to be protected, as, for example, for the vault door of a bank, the apparatus may be simplified, dispensing with one of the resistance magnets, and employing a simple resistance, R, (Fig. 2,) *placed at the point to be protected*, and so arranged *with regard to the other members of the alarm* that the opening of the door or window, or the doing of any act which the alarm is to detect, will short-circuit the conductor, by forming a connection between the wires across, or independently of, the resistance."

"Various other modifications will readily suggest themselves for the accomplishment of the object without departing from the essential principles of the invention; the design being to obtain an alarm in which the signals shall be given by the closing or making of connection between two different conductors, or between two parts of the same conductor, *essentially* as is done in the open or interrupted circuit alarms, while at the same time there is or may be a continuous circuit in the said conductor or conductors, which by proper contrivances may be made to give notice to the person in charge of said alarm of any injury, accidental or malicious, which may have happened to his instrument or its belongings."

The third and fourth claims of the reissued patent are precisely identical with the first and second claims of the original patent, with the exception of the italicized words, which have been inserted in the reissue, and are as follows:

"(3) The combination in an electro-magnetic alarm of a continuous circuit or circuits with a sufficient resistance or resistances, and an alarm or alarms, when the said combination is so arranged that the severing or interrupting of the said circuits, or of either of them, shall cause the said alarm or alarms to sound, and also that the short-circuiting or diverting the course of the electrical current in said circuit or circuits around or past the said resistance or resistances shall sound an alarm, *or cause an alarm to be sounded*. This when the whole arrangement is properly combined with a sufficient battery, and with 'connections' or contrivances at points to be guarded which will, upon the doing of certain acts or the happening of certain things, short-circuit the said electrical current or currents past or around the said resistance or resistances, and so give the desired alarm.

"(4) In a burglar or fire alarm, the combination of an open and a closed circuit *to operate* substantially as set forth."

The third and fourth claims of the reissue have not been enlarged, and are identically the same with the first and second claims of the original, with the exception of the italicized words in the former, which do not materially change their effect. The drawings accompanying both patents are the same. The specifications in the reissue are the same as in the original, excepting the italicized portions, and describe the nature and objects of the invention more clearly and plainly than is done in the latter, in order to cover any element to which, by a fair construction of the original, the patentee would have been entitled; and for this purpose a reissue has always been allowed when the patentee has, by inadvertence or mistake, omitted to make such a description in the original. A patentee can claim on a reissue whatever clearly appears to have been a part of his original invention as described or shown in his original specifications, drawings, or models; and Guernsey has done no more. *Battin v. Taggart*, 17 How. 74; *Gallahue v. Butterfield*, 10 Blatchf. 232; *Wheeler v. Reaper Co.*, 6 Fish. Pat. Cas. 1; *Seymour v. Osborne*, 11 Wall. 544; *Calkins v. Bertraud*, 6 Biss. 494; *Russell v. Dodge*, 93 U. S. 460.

The two prior systems referred to by the patentee were well known at the date of the patent, and had been in extensive use; but each had certain serious and recognized defects which it was the object of Guernsey's invention to obviate. The advantages and disadvantages of the old systems are thus stated by Prof. Brackett, a witness for the complainants:

"The advantage of the open circuit system is that the apparatus cannot be disabled by connecting the two parts of the circuit together between the battery and the point protected, since such connection would sound the alarm in the same manner as opening the door or window. The disadvantage of this system is that the circuit may be cut or disconnected at any point without sounding the alarm, and this would completely disable the apparatus, since no alarm would be given upon a subsequent opening of the door or window. Such a system offers no difficulty to a burglar, except as the wires leading from the battery to the protected structure be effectually concealed, which might be difficult to do. The advantage of the closed circuit system is that the line is protected against cutting or interruption, since such an act would sound the alarm; and its disadvantage is that it may be completely disabled by forming a short circuit around the point protected, since this would not sound the alarm, nor would the alarm be sounded by any subsequent opening of the door or window."

It is thus apparent that each of these prior systems afforded sufficient protection as long as the wires or conductors remained intact, but both were fatally defective, in that they could readily be disabled by tampering with the wires; and it was the object of the Guernsey invention to protect the wires or conductors from being tampered with by any method applicable to either of these systems. Mr. Pope, another witness for the complainants, thus states the general nature of the invention:

"Guernsey was the first, so far as I am able to ascertain from the evidence in this case, or otherwise, to combine in one and the same organization of circuits the characteristic signal instruments of both the open circuit system and the closed circuit system with a resistance or resistances in such a manner as to make the open circuit instrument guard against disabling the apparatus by any method applicable to the ordinary closed circuit system, and, conversely, to make the closed circuit instrument guard against disabling by any method applicable to the ordinary open circuit system."

Both complainants and defendants are engaged in the business of central office protection, and, as is alleged, make use of almost identically the same form of apparatus. The defendants' apparatus consists of a battery, two principal instruments, and their accessories, conductors connecting the battery and instruments with an electrical casing inclosing a safe, a resistance, and contact springs connected with the door of the safe casing. Both instruments are included in the circuit, so that the current traverses their coils successively. One of them, designated as the "galvanometer" in the drawing, consists of a magnetized needle pivoted so as to swing freely in either direction in front of a coil through which a current passes. Its movement is limited by contact stops which form the terminals of a local circuit containing an alarm bell, B. The instrument is so constructed and adjusted that, when the resistance at the safe is included in the circuit, the needle stands between the two stops, but, when the current is strengthened by short-circuiting the current past or around the resistance, the needle is swung by the influence of the current in the coil against the stop at the right, and an alarm is sounded on the bell, B. It thus performs the function of the ordinary open circuit instrument. In addition to this, when the circuit is broken the needle swings against the stop at the left, and rings the same bell. The other principal instrument, designated as a "relay" in the diagram, corresponds in all respects, in construction and mode of operation, to the ordinary closed circuit instrument. By the intervention of two local circuits, it is made to release a drop or shutter and ring an alarm bell, C, when the current ceases to flow through its coils. There are two sets of contact springs at the safe, so arranged that upon the first movement of opening the door the circuit is broken at the springs, J, J,<sup>1</sup> at the top, and an alarm is sounded upon both the bells, B and C. Upon opening the door a little further, a short circuit is formed around the resistance coil, R, through the wire, G, G, and the galvanometer swings to the extreme right, and again rings its bell, B. If any attempt is made to tamper with the apparatus by cutting either of the wires leading to the safe, an alarm is sounded both upon the gal-

vanometer bell, B, and the relay bell, C; and if the wires are short-circuited an alarm is sounded on the galvanometer bell, B. It is contended on behalf of the complainants that the defendants' apparatus, the operation of which is thus described, contains the gist of the Guernsey invention, since it contains instruments having the characteristic mode of operation of the instrument of the two old systems referred to in the patent, and these are combined in the same circuit with a resistance so arranged as to render both instruments operative. The result of this combination is that the wires leading to the safe are effectually protected both from interruption and from short-circuiting. In other words, the same result is produced by substantially the same means in defendants' apparatus as in the apparatus of the patent. It is conceded that the use of a galvanometer needle, such as is used in the defendants' apparatus, to open and close a local circuit, including an electric bell, was well known in the art prior to the date of the patent, and that the galvanometer was recognized as an equivalent, for that purpose, of an electro-magnet and armature, such as is shown in the patent. It is urged by the defendants that the galvanometer is made to perform an additional function in their apparatus, but this fact will not relieve them from the charge of infringement so long as all the elements of the complainants' patent are embraced in their system. *Williams v. Barnard*, 41 Fed. Rep. 364. A careful examination of the testimony, which displays a special knowledge of the art, united with unusual intelligence and ability, on the part of the witnesses, leaves no doubt that the defendants are infringers of the third and fourth claims of the reissued patent. An elaborate review of the testimony, with references to the numerous models and diagrams contained in the exhibits, would extend this opinion to an unreasonable length, and, under the circumstances of the case, is not necessary.

The validity of the reissue was vigorously attacked on the ground of its alleged variances from the original patent, and chiefly because the latter does not contain even a suggestion of a single circuit form of apparatus; but a comparison of the specifications and drawings of the two patents does not sustain this objection. Fig. 2 in the drawing of each patent shows a single wire; and if by mistake or accident, the original specification did not describe with sufficient plainness the use and application of this wire, it was permissible to the patentee, under the provisions of the act of congress relating to reissues, to supply the omission as soon as it was discovered; and this he did within a few months after the date of the original. The single circuit was clearly indicated in the original, and by a fair construction the patentee would have been entitled to its use. As already shown, the claims in suit were not enlarged in the reissue. In fact the fourth claim is restricted by the words "to operate substantially as set forth."

It is further insisted on by the defendants that the patent in suit does not contain a patentable combination, in that it is only an aggregation of old parts or elements which act successively, and not simultaneously. The simultaneous co-operation of the parts is not essential to a patentable combination, if the parts are so arranged that the successive action of

each contributes to produce some one practical result, which result, when attained, is the product of the simultaneous or successive action of all the elementary parts, viewed as one entire whole. The term "co-operation" does not mean acting together or simultaneously, but unitedly to a common end. *Birdsall v. McDonald*, 1 Ban. & A. 165; *Forbush v. Cook*, 2 Fish. Pat. Cas. 668; *Hoffman v. Young*, 2 Fed. Rep. 77. So here the electrical protection of the conductors is the result produced by the combination, and the two instruments guard the same line at the same time. One instrument protects it from cutting, and the other from short-circuiting. Remove either instrument, and the result fails *pro tanto*. This result was useful, and never before known. The design of the combination was to protect the patented apparatus against the methods of disabling it by tampering with the conductors, as could be done with the prior systems. The instruments co-operate in making good each other's deficiencies, and the arrangement of the conductors is such that all their essential parts are brought under the protection of the instruments. To this end the resistance co-operates with the closed circuit instrument by forming a path for the current, when the apparatus is in its normal condition, so that a continuous current may flow through the conductors and through the instrument without giving an alarm. It co-operates with the open circuit instrument by enfeebling the current to such an extent that the open circuit instrument is not called into action until a short circuit is formed, and the current thereby increased. In view of the authorities, this constitutes a patentable combination, leading to a new result by new means.

But the defendants have introduced certain prior English patents which, they say, embrace substantially the same elements as are found in the patent in suit, and thus deprive Guernsey of the claim of originality. It is not asserted that the inventions contained in the English patents are identical with that of the Guernsey patent, but that, in the state of the art at the date of the Guernsey original patent, it required only simple modifications and substitutions in the English devices to make them produce the same results as are secured by the Guernsey combination. The English patents referred to are those of Tyer, (1865,) Varley, (1865,) and Moxon, (1866.) The device of Tyer is an apparatus for transmitting signals indicating the position of trains upon a railway, and his patent contains no suggestion that it could be adapted to perform the office of a burglar alarm. It can be easily disabled by cutting one of its wires, and is thus incapable of effecting the result secured by the Guernsey invention, which is the electrical protection of all parts of the conductors between the signal instruments and the points to be protected. The Varley apparatus is a modification of the ordinary closed circuit system, and does not contain any instrument corresponding to the signal instrument of the open circuit system, or any other means of giving an alarm which is operated by an abnormal strengthening of the current, nor does it contain a resistance separate and distinct from the instruments; and it can be entirely disabled, if used for central office protection, by inserting a battery in some part of the line leading from the circuit closer to the alarm instrument.

The Moxon patent would also require substantial alterations to make it accomplish the results which are obtained by the Guernsey combination. The proposed modifications and substitutions would be in the nature of inventions, and are not such as would readily occur to any one skilled in the art. They do not consist merely in the substitution of one known equivalent for another, without any change in the resulting mode of operation; but it is proposed to substitute for one or the other of the elements of the prior combination something having a different or additional function, which amounts to the same thing as adding to the combination a new and distinct instrument, and makes it a new combination having functions that it did not before possess. Defenses of this character have been frequently discountenanced by the courts. *Wooster v. Blake*, 8 Fed. Rep. 429; *Dudgeon v. Watson*, 29 Fed. Rep. 248; *Asmus v. Alden*, 27 Fed. Rep. 684. Here, as in *Dudgeon v. Watson*, the defendants had used practically the same combination as is covered by the Guernsey patent, and subsequently made the changes by which they sought to escape infringement; but in that case the court held that the defendants accomplished the same result by similar or equivalent means.

Among other objections to the Guernsey reissue, it was urged that no interference was had between the reissue application and the Holmes & Roome patent, of December 20, 1870; but there is no proof that Holmes & Roome were the prior inventors. On the contrary, the invention claimed in the Guernsey reissue was shown and described in the Guernsey original patent, which antedates any date of Holmes & Roome. The English patent to Holmes & Roome, although dated as of November 1, 1870, was not in fact issued until April 2, 1871, the date at which the great seal was attached; and therefore the provisions of section 4887 of the United States Revised Statutes do not attach to the corresponding patent issued by the United States. The English patent to Holmes & Roome, not being sealed, was not in existence until after the date of the Guernsey patent. *Gold & Stock Tel. Co. v. Commercial Tel. Co.*, 23 Fed. Rep. 340. The able and ingenious argument of defendants' counsel created at first some doubts of the validity of the Guernsey reissue; but, after a careful consideration of the various objections presented by him, both orally and in his printed briefs, the conclusion has been reached that Guernsey was the original inventor of the combination claimed by him, and that the reissued letters patent are valid. A decree will be entered for the complainants, excepting as against the individuals named as defendants, in relation to whom there is no proof that they were personally guilty of infringement.



STREET *et al.* v. THE PROGRESSO.<sup>1</sup>

(District Court, E. D. Pennsylvania. April 22, 1890.)

## CHARTER-PARTY—CANCELLATION—CONDITIONS—QUARANTINE REGULATIONS.

A charter-party provided that a vessel should proceed with all convenient speed to Charleston, S. C., or as near thereto as she safely could and discharge, should load there, and proceed to Liverpool. Should she not arrive at port of lading on or before October 1, 1888, the charterer to have the option of cancelling the charter, to be declared when the vessel was ready to load; the act of God, princes, or rulers of the people, etc., excepted. *Held*, that quarantine regulations of Charleston, preventing the entering of vessels into that port before November 1st, were within the exceptions of the charter-party. *Held, further*, that the vessel was bound to go to Charleston as soon as she reasonably could after November 1st, so that the charterers could exercise the option of canceling the contract then and there, and that she could not require the charterers to exercise that option at any other place; and that, having failed to proceed to Charleston, she must respond in damages.

Libel in Admiralty to Recover Damages for Breach of a Charter-Party.

*A. Sydney Biddle*, for libelants.

*Alfred Driver, J. Warren Coulston, and Robt. D. Benedict*, for respondent.

BUTLER, J. This case (being presented immediately before the April term of the circuit court) I must dispose of with little more than a statement of the facts, and my conclusion from them. On the 31st of August, 1888, the libelants and respondent entered into a charter-party, the material provisions of which are as follows: The respondent, reserving liberty to take outward cargo from Cuba to the United States, shall proceed with all convenient speed to Charleston, S. C., or as near thereto as she safely can; and, having discharged her cargo, shall load from charterer's agents, at such wharf or dock as they direct, a cargo of cotton or other merchandise, and proceed therewith to Liverpool or Bremen, as may be ordered, and on arriving there deliver the same on payment of the freight named. "Should she not arrive at the port of lading on or before October 1st, 1888, the charterer shall have the option of canceling the charter, to be declared when the vessel is ready to load." "The act of God, the queen's enemies, fire, epidemic, strike, or lock-out of stevedore's men, stoppage, or destruction of goods on railways, or at press, restraint of princes or rulers of people, collision, any act of neglect or default whatsoever of pilot, master, or crew in the management or navigation of the ship, and all other dangers or accidents of the seas, rivers, and steam navigation, throughout this whole charter-party being excepted." The respondent loaded sugar at Havanna, and came thence to the Delaware breakwater, *en route* to Philadelphia. Reaching the breakwater September 3d, she was detained part of a day at quarantine, and subsequently several days at the Lazaretto, below Philadelphia, reaching the latter place September 10th. She then received information of quarantine regulations at Charleston, which stood in the way of entering. On communicating with the libelants, she was in-

<sup>1</sup>Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

formed that entrance could not be made before November 1st, or, rather, that the quarantine regulations there would stop all vessels attempting to enter before that date; whereupon she went to New York for repairs. After further correspondence with libelants, and unsuccessful efforts to obtain cargo for a short intermediate voyage, she contracted to take a cargo of cotton from Norfolk, Va., to Bremen. Loading this cargo, she arrived at Bremen, November 6, 1888. Unloading there, she went to Hamburg, obtained a return cargo, and arrived at Boston, December 19, 1888. On this day she applied to the libelants to exercise their option under the charter, by declaring whether they would load her at Charleston; to which they replied that their charter rights were claimed, and would be insisted on. She then declined to go to Charleston.

The question presented by these facts is new and important. That it should not have arisen and been decided long ago, is remarkable. The terms of the charter are not unusual, and vessels have frequently been detained at quarantine, or driven off by the fear of such detention, under similar circumstances; yet the industry of counsel has not discovered a reported case, in this or any other country, in which the question has been presented. Numerous cases arising on contracts of insurance, and some others involving kindred subjects, have been found, which shed some light on the subject, though not much. These cases are cited in the briefs, and need not be further noticed. The question must be determined by the contract, its language and spirit, without the aid of direct authority. There is no controversy about material facts. The respondent would have been detained at quarantine had she proceeded on her voyage to Charleston before November 1st. How long she would have been detained is uncertain; possibly for a few days only. I assume, however, that it would have been until November 1st.

The libelants contend that she was bound to resume her voyage, and go there whenever she could, and that she certainly could at the date last named. On the other hand, she contends that she was not required to go at all, if "restrained by princes, rulers, or people," and that she was so restrained; and, further, she claims that, if this position is not sound, and the contract still bound her, she complied with it by the tender at Boston. What was her obligation? She bound herself to go to Charleston, with convenient speed, subject only to the exceptions stated. Among the several things which might relieve her from compliance were "restraint by princes, rulers, or people." I entertain no doubt that detention at quarantine, or being kept off by the certainty of detention if she proceeded, is covered by this language, nor that such detention excuses failure to arrive at the time specified. But did it justify an abandonment of the contract? I do not think so. To give it this effect, I must hold that such detention for one day or less, has the same result; or that "fire, strike, or lockout of stevedore's men, draymen," and all other causes of interference excepted from the contract, however slight, or of however short duration, would be attended with the same fatal consequences to the charter. The language must receive a reasonable construction,—such as tends to promote the objects of

the parties. It would be as unreasonable to hold that the respondent, so restrained for a brief period, was relieved from her obligation, as to hold that she was bound by it to resume her voyage whenever the restraint terminated, though years may have elapsed, and the circumstances of the parties so changed, that the reasons or objects which led to the contract no longer existed. Neither position is consistent with a just construction of the charter. So long as the circumstances remained substantially unchanged,—the delay, being no greater than might reasonably have been contemplated,—the contract remained in force. The month which elapsed made no material change. The respondent was still engaged in carrying merchandise, and able to keep her engagements; and the libelants still had merchandise to carry. She bound herself to go to Charleston and carry it, if she could get there within a reasonable time,—a time that answered the purpose for which she contracted to go. The exception was intended to protect her against the consequences of delay. It was not designed to work an abrogation of the contract, unless the restraint should be virtually permanent. It was not of this character. She was not prevented going, but simply delayed, and the delay was not such as to defeat the purpose of the parties. I have not time to pursue the subject further, nor would it be profitable to do so, if I had.

Did she discharge her obligation by the offer of performance at Boston, if libelants would then promise cargo? I do not think so. They were not required to exercise their option until she reached the port of lading, "and was ready to load." This was a right secured by the contract. How could they be deprived of it by the request? If the contract was still in force, as I have found, she was bound to proceed to Charleston, leaving the libelants to exercise their option when she "was ready to load." Her learned counsel think she had an equitable right to call for the exercise of it in advance. There is no principle of equity, however, which can be invoked in her favor. Her express contract was otherwise, and equity never relieves against the terms of a contract (sued upon) except for fraud, accident, or mistake. A party needs no relief from an obligation which he has voluntarily assumed.

As already stated, the restraint excused her from the consequences of delay prior to November 1st, when it was removed. Did it excuse the further delay which occurred prior to December 19th? This question may be unimportant. It relates only to the extent of damages recoverable. If the libelants' loss was enhanced by the additional delay, the question is important; otherwise it is not. It must nevertheless be settled now, as a guide to the commissioner who will pass upon the subject of damages. The respondent was not required to lie idle while the restraint lasted. She might employ her time, but she could not do so at the libelants' expense, or in disregard of their interests. It is quite as unreasonable that they should bear the loss of non-compliance after November 1st as that she should suffer the disadvantage of idleness. She bound herself to be at Charleston as early as she could get there, under the circumstances stated in the charter, using "convenient speed," and

for any failure after November 1st, she must be held responsible.—While the conclusions above stated are satisfactory to me, I appreciate and feel the force of the able argument presented by respondent's counsel. The case is not free from difficulty, and I am glad that my judgment is not final.

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THE GLENFINLAS.<sup>1</sup>

DAVIS v. A CARGO OF CHALK, Etc.

(District Court, S. D. New York. April 10, 1890.)

1. DEMURRAGE—UNLOADING BY LIGHTERS.

A large vessel, having four hatches, brought a cargo of chalk to the port of New York under a charter-party which contained the following provision: "Cargo to be shipped as fast as vessel can load, and to be discharged as fast as she can deliver." Her draft being considerable, she was first discharged into lighters out of one hatch only. The lighters were in no way improper, they were worked with diligence, and the chalk was received as fast as the ship could properly deliver out of the one hatch that was used. The vessel was not breasted off the wharf, and no demand or offer was made by the ship to breast her off, or to work another lighter on the other side. *Held* that the vessel could not recover demurrage for this period.

2. SAME—DISCHARGE FROM SINGLE HATCH—USAGE.

After the vessel was lightened she was sent to a chalk dock, where she could discharge from but one hatch a day. The master complained of this wharf from the first, and claimed that she should have been discharged from at least two hatches simultaneously. Claimant contended that the vessel had discharged 150 tons per day, which was all that the custom of the port required. *Held*, that the clause in the charter providing for the discharge of the vessel "as fast as she can deliver" was not controlled by the alleged custom, but was intended to secure to her a discharge according to her size and means of delivering a chalk cargo in this port, and therefore at a dock reasonably adapted to her means of delivery, if such docks for chalk were reasonably procurable, as in fact they were. The vessel was therefore allowed demurrage for one-half of the working days after commencing at this wharf, assuming that, in discharging at a proper wharf for such a ship from two hatches instead of one, the cargo would have been discharged in half the time.

In Admiralty. Action to recover demurrage.

*Butler, Stillman & Hubbard* and *Mr. Mynderse*, for libellant.

*Robert D. Benedict*, for claimant.

BROWN, J. The libellant claims demurrage for the detention of the ship *Glenfinlas* in the discharge of a cargo of 3,000 tons of chalk at this port in July, 1889. The cargo was brought under a charter which provided for "delivery along-side to be taken at the merchant's risk and expense;" for "discharge at two safe wharves, as ordered by the consignee;" "cargo to be shipped as fast as vessel can load, and to be discharged as fast as she can deliver;" and "ten days on demurrage over and above the said laying days at fourpence per registered ton per day." Her register was 2,148 tons. The vessel went first to Findley's stores at Atlantic docks, where she could only be discharged into lighters. There two days' delay arose, for which the consignees are liable. The cargo was

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

there partially discharged into several lighters, which were supplied one after another from the 11th to the 19th of July, when the ship was ordered by the consignees to another wharf, as they had a right to do under the charter. During this period the evidence does not show that the lighters sent were improper, or that they were not worked with diligence, or that the chalk was not received as fast as the ship could properly deliver from the one hatch that was used. The evidence indicates that, for the most part at least, additional hatches could not have been worked, because only one lighter at a time could be used on the same side of the ship; and the libellant's testimony states that, in order to work another lighter, it would have been necessary to breast out the ship from the wharf to admit another lighter on the other side of the ship. Her berth was taken by her master; she was not breasted off; there was no demand or offer by the ship to breast off, or to work another lighter on the other side. She therefore cannot recover demurrage for this period, except for the two days above referred to.

The second wharf to which she was ordered, and which was reached on the night of Saturday, the 20th of July, was Taintor's dock, Newtown creek, one of the principal docks in the city for the delivery of cargoes of chalk from smaller vessels. Discharge there was commenced on Monday morning, and finished on Friday, August 2d. During this time a day was lost through rain. During the other working days the discharge averaged about 160 tons a day. Only one hatch could be worked at that dock, and much evidence on the part of the claimant shows that, according to the usual practice in this port, as respects the delivery of ordinary cargoes of chalk, 150 tons per day is as much as is expected to be received or delivered. The claimants contend that this practice constitutes a usage, which is to be read into the terms of the charter, so as to relieve the consignee from any obligation to receive and provide for more than 150 tons per day. The ship, it is said, could not lawfully deliver more than the consignee was bound to receive; and the agreement "to discharge," it is said, is limited to the amount which the ship had a legal right to deliver under the local usage. I do not think that was the intention of this clause of the charter, or that it can reasonably bear that construction. Its meaning, I think, is to provide expressly for the rate of delivery at such places and during such days and times as she may be properly worked under the usage of the port. It is the office of usage to supply what is not expressed; not to override the language or the meaning of what is written. Usage in this case would properly determine the working days and hours, because the terms of the charter plainly do not intend to touch that subject. Equally plainly, as it seems to me, it does intend to determine the provision to be made for the ship's rapid discharge during working hours. It would be an obvious breach of the charter stipulation, as it seems to me, for the consignee to refuse to receive any more cargo after 12 o'clock on the ground of local usage, merely because 150 tons had been received during the forenoon; or to refuse to work two hatches instead of one, for the same reason. This vessel was a much larger one, and the cargo much larger, than were usual

in the ordinary transportation of chalk cargoes. She had four hatches. In the discharge of ordinary cargoes, at least two hatches would be used in a vessel of that size. A practice having reference to smaller vessels and smaller cargoes could not reasonably be applied to a much larger one, so as to limit the discharge to a single hatch. The master complained of Taintor's dock as an unsuitable one from the first. The clause in the charter providing for the discharge of the vessel "as fast as she can deliver" must be held intended to secure to her a discharge according to her size and means of delivering a chalk cargo in this port; and, therefore, at a dock reasonably adapted to her means of delivery, if such docks for chalk were reasonably procurable, as in fact they were. Taintor's dock, where a discharge could be made from only one hatch, was not, in my judgment, a proper dock for such a ship, under such a stipulation. The evidence leaves no doubt that other docks were procurable where the cargo could have been discharged from at least two hatches. Had there been any established usage that all chalk cargoes should be discharged at one particular dock, or at certain specified docks only, such a usage, I think, would have attached to this stipulation; and the duty of the consignee would have been only to discharge as fast as the ship could deliver at some one of those docks. But no such usage is shown. The usage claimed is of a kind wholly different, viz., to limit the amount to be received to a certain number of tons per day. Such usage, if proved, would be incompatible with the charter clause, and hence is superseded by it. The evidence, however, shows so much difference in the tons actually discharged per day in various cases, that I do not think any definite usage on that subject is proved to the extent claimed, or anything more than a considerably varying practice, having reference evidently to the general circumstances of the case.

Without attempting, upon the evidence, to determine just how many tons should be discharged per day, I shall, therefore, allow to the consignee only one-half of the working days after commencing at Taintor's dock; assuming that, by discharging at a proper dock for such a ship from two hatches instead of one, the remainder of the cargo would have been discharged in half the time. That would have completed the discharge by Friday night, July 26th. The libellant is therefore entitled to demurrage for the seven days remaining to August 2d, and for the two prior days above referred to, making nine days in all, with interest and costs.

SLOCUM *et al.* v. WESTERN ASSUR. CO.<sup>1</sup>

(District Court, S. D. New York. April 5, 1890.)

## 1. MARINE INSURANCE—POLICY—STIPULATION FOR JURISDICTION.

A stipulation, in a marine insurance policy issued in a foreign country, providing that suit on the policy shall only be prosecuted in a specified foreign court, is invalid.

## 2. SAME.

Where a policy of marine insurance was issued in a foreign country, but to American citizens, through brokers belonging here, on freight of a vessel of the United States, and in respect to a voyage between South American ports, *held*, that no equitable reasons existed for a court of admiralty of this country to decline jurisdiction of a suit on the policy, though the policy provided that such suit should be brought only in a certain court in the country where the policy was issued.

In Admiralty. On motion to dismiss the libel.

*Carpenter & Mosher*, for respondent.

*Wing, Shoudy & Putnam*, for libelants.

BROWN, J. The respondents are a corporation organized and doing fire and marine insurance business at Toronto, Canada, and having a branch office in New York for fire insurance only. In November, 1887, the company executed at Toronto a marine policy on freight, per bark Aquidneck, belonging to the libelant Slocum, a citizen of Massachusetts, upon the application of Gallaher, Currey & Whitney, insurance brokers of New York, in the sum of \$1,000, insuring Simpson & Shaw on account of whom it might concern, in case of loss, to be paid to their order. The company had conformed to the requirements of the statutes of the state of New York as respects the transaction of fire insurance business within this state, but not as respects marine insurance, and it had filed a certificate providing for the service of papers upon its agents within this state as required by statute. The present policy was issued at Toronto. A total loss having arisen, the above libel was filed by Simpson & Shaw, residents of this state, and by Slocum, a resident of Boston. The policy contains the following clause:

"And if the assured proceed at law or equity, by suit or action, to recover the whole or any part of the sum assured by this policy, such suit or action shall be brought and prosecuted in her majesty's court in the city of Toronto, and not elsewhere, within twelve months from the date of such loss or damage, under the penalty of forfeiture of all benefit of this insurance, and of the same becoming thereby wholly void."

Process was served upon the agent specified in the certificate. The respondents move to dismiss the libel upon the ground that this court, if not without jurisdiction of the cause, should, as a matter of discretion, decline to entertain it in the face of the above-quoted stipulation in the policy. The authorities, I think, sustain the general doctrine, that a stipulation inserted in a contract limiting the remedy for a breach of the contract to a particular forum is not a valid stipulation. Several cases have held that such a stipulation, distinguishing between the different courts of the

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

same country or state, will not be recognized or regarded as valid there. I do not see why any greater effect should be given to it abroad, or as between the courts of the country of the contract, and any appropriate foreign tribunal. *Steam-Shipping Co. v. Lehman*, 39 Fed. Rep. 704; *Scott v. Avery*, 5 H. L. Cas. 811; *Nute v. Insurance Co.*, 6 Gray, 174; *Amesbury v. Insurance Co.*, Id. 596; *Nevins v. Insurance Co.*, 25 N. H. 22; *Bartlett v. Insurance Co.*, 46 Me. 500; *Insurance Co. v. Routledge*, 7 Ind. 25; *Reichard v. Insurance Co.*, 31 Mo. 518. The clause in question furnishes, therefore, no legal defense to the action. A court of admiralty may, doubtless, in its discretion, decline to entertain jurisdiction in maritime causes arising abroad, where none of the parties are resident here. Suits for the wages of foreign seamen, involving detention of the ship, and brought here without justifiable reason, are declined. But, where the controversies are *communis juris*, special reasons should appear for declining jurisdiction. *The Belgenland*, 114 U. S. 355, 365, 5 Sup. Ct. Rep. 860; *Davis v. Leslie*, Abb. Adm. 123; *The Infanta*, Id. 263; *Thomassen v. Whitwell*, 9 Ben. 113; *The Carolina*, 14 Fed. Rep. 424; *The Noddleburn*, 30 Fed. Rep. 142.

The libelants are all citizens of this country; two of them reside in this state, and one in this district. No special circumstances are shown, as respects the particular matter in litigation or the convenience of witnesses, why the determination of the libelants' rights should be had in Toronto, rather than in New York. Though the policy was formally and technically issued at Toronto, the whole business was with citizens of the United States, through brokers belonging here, upon freight on a vessel of the United States, and in respect to a voyage between South American ports. These circumstances do not present, so far as I perceive, any equitable grounds for refusing, as a matter of discretion, to entertain a suit brought lawfully here to enforce an apparently lawful demand. On the contrary, this country, where the libelants reside, and where the business was in effect procured, and its profits realized, seems to me to be the more appropriate forum. No case is cited in which, under such circumstances, jurisdiction has been declined. In the recent case of *Ex parte Louisville Underwriters*, 134 U. S. —, 10 Sup. Ct. Rep. 587, Mr. Justice GRAY observed:

"In all nations, as observed by an early writer, such courts [admiralty] 'have been directed to proceed at such times, and in such manner, as might best consist with the opportunities of trade, and least hinder or detain men from their employments.' Zouch, Adm. 141. \* \* \* To compel suitors in admiralty \* \* \* to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons or his goods or credits attached, would not only often put them to great delay, inconvenience, and expense, but, would in many cases amount to a denial of justice."

I would not intimate that to remit the libelants to a suit in Toronto would in this case be a denial of justice; but an invalid stipulation is not sufficient reason for refusing jurisdiction of a cause which seems most appropriately to be brought here. Motion denied.



## THE LILLIE.

## CROSBY v. THE LILLIE.

(Circuit Court, S. D. Florida. March 26, 1890.)

## 1. ADMIRALTY—WAGES—LIEN.

The master of a steam-boat, who was also manager of the company owning it, brought suit for the engineer's wages, in his absence, knowingly claiming less than was due, and wrote the engineer that he could afterwards sue for the remainder. The latter never admitted that the claim was for the full amount, except by ratifying the suit. *Held* no waiver of his claim for the balance.

## 2. SAME—LACHES.

The fact that, as a libellant, he stood by at a sheriff's sale of the boat without giving notice of his additional claim, does not discharge his lien therefor, when it appears that some stockholders of the original company were interested as purchasers, and the master as their agent bought in the vessel.

## 3. SAME.

The engineer, having removed to a different port, libeled the vessel on her first appearance there. *Held* that, although a year had elapsed, he had not lost his lien where the delay caused no change for the worse to claimants.

In Admiralty. On appeal from district court. 40 Fed. Rep. 367.  
*W. D. McKinstry*, for libellant.  
*W. E. Richardson*, for claimant.

PARDEE, J. In March, 1887, the steam-boat Lillie, owned by the Montgomery & Prattville Daily Line, was navigating the waters of the Alabama and Coosa rivers. March 5th the libellant was employed on said steam-boat as engineer, and continued in such employment until December, 1887, when the boat was seized under an execution issued in favor of A. A. Janney & Co., on a judgment said firm had obtained against the Montgomery & Prattville Daily Line in the circuit court of Montgomery county, Ala. During his employment he was paid various sums on account, but at the time of said seizure there was a conceded balance due him as wages. On the 23d of November, 1887, a suit was instituted in favor of libellant against the Montgomery & Prattville Daily Line before a justice of the peace in the city of Montgomery, claiming balance of wages due to October 20th, \$95.85. Process issued in said suit, and on November 30th, on trial, a judgment was rendered for the plaintiff against the defendant for said sum and costs. December 8th a writ of *feri facias* was issued therein, which was returned December 19, 1887, with the following indorsement:

"Levied on steam-boat Lillie, her furniture and tackle, and same was sold on 21st December, 1887, for six hundred and twenty-five dollars, (\$625.00,) and the money applied to prior executions, and no property to satisfy this *fi. fa.*"

Early in January following a libel was prepared claiming wages due to libellant, and was filed in the district court for the middle district of Alabama; but, for some reason or other not apparent, no process issued thereon. The boat lay at Montgomery some time after the sale of it under execution, and continued in the waters of the middle district until January, 1889, when, on its arrival in Mobile, the libel in this case was

filed. In the district court the claimant made an elaborate answer, setting out a number of defenses, to which answer exceptions were sustained, and the claimant had leave to further answer. The further answer filed in the case sets forth several defenses; but, on exceptions filed thereto, all issues were eliminated but the question of equitable estoppel by reason of libellant's alleged presence at the sale of the boat under the execution aforesaid. In this court the whole case has been argued, and the defenses made are as follows: (1) That the amount claimed (\$241.05) is excessive, because to make that sum libellant has charged wages at \$50 a month up to October 1st, and thereafter at \$75 a month, when the agreement is alleged to have been that his wages were to be \$50 a month, with a further agreement that during certain time of sickness, and while the boat was aground, he was to charge nothing; and because the bill that he made out, upon which suit was brought in the justice's court in Montgomery, was for only \$95.85, claiming that sum only in suit being a waiver of any greater claim. (2) That the libellant was present at the sale by the sheriff, and made no objection to such sale, nor any claim of any lien on the boat for his wages; and afterwards entered into the employ of the purchasers, and rendered services to said boat, for which he was paid, at which time he made no claim for wages due him. (3) Laches on the part of the libellant in asserting his claim.

The evidence shows that the Montgomery & Prattville Daily Line was in financial difficulties in the month of November, at which time the general manager of the company and the master of the Lillie, (who, by the way, is now the master, and represents the claimants in this case,) knowing that wages were due the libellant for his services, himself prepared, in the absence of the libellant, the bill upon which the suit was brought in the justice's court, proved up the claim, and otherwise therein represented the libellant's interest. It appears by the evidence also that, at the time said master caused the bill to be made out, he knew it did not cover all the libellant's wages, and he informed libellant, by letter, that he could "get out a later one afterwards." There is no evidence in the case showing that libellant ever asserted or consented that the amount sued for before the justice was all that was due him for wages, except, of course, the fact that he ratified the action of the master in bringing the suit. Under these circumstances, the court cannot find that the libellant has waived any part of his claim.

While the libellant was present at the sale, the evidence does not establish that he said anything himself, or heard anything said, with regard to a good title being given by the sale, or in any way, except by silence, perhaps, participated in inducing any person whatever to buy the said boat as free and clear of liens. It does appear in the case that one of the owners of the Montgomery & Prattville Daily Line was one of the purchasers at the sheriff's sale, and has continuously held, and now holds, his interest in the said boat; that the master of the boat and agent of the owners, who was also a stockholder while she belonged to the Montgomery & Prattville Daily Line, retained some interest in said boat, though not as a stockholder, and, at the time of the seizure herein,

was the master and agent of the owners, who acquired at the sale on execution. The court has a right to infer, from this state of facts, that the purchasers at the sheriff's sale were charged with notice of the claim of libellant, and of his right to be paid by preference over the general creditors of the Montgomery & Prattville Daily Line. The claimants took the title of the vessel *cum onere*. The derivation of their title from the owners, through a sheriff's sale on execution, was a circumstance to put them on inquiry. The maxim, *caveat emptor*, fully applies to such purchases. All this is well settled in admiralty.

Practically, the position of the parties has not been changed from the day of the sheriff's sale until the bringing of this libel; no one of the claimants has changed his position for the worse, or in any wise been injured by libellant's delay in bringing his libel. Considering that the libellant lived in Mobile; was employed in Mobile for this service; after he had been discharged returned to Mobile, and then libeled the boat the first time that she returned to that port; and that, in fact, only 12 months elapsed before bringing the libel, and that no party has been injured by the delay,—the court is not disposed to convict the libellant of laches by holding his demand as stale. See *Coburn v. Insurance Co.*, 20 Fed. Rep. 644.

So far as concerns the dispute to as the amount of wages, it is only necessary to say that the district court yielded to the contention of the claimants, and allowed wages only at \$50 per month. As the libellant has not appealed, he does not complain of that allowance. It seems clear that the decree of the district court should be affirmed, and it is so ordered.

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### THE H. S. PICKANDS.

(District Court, E. D. Michigan. March 17, 1890.)

#### ADMIRALTY—JURISDICTION—MARITIME TORTS—PERSONAL INJURIES.

Libellant, who was engaged in repairing a vessel which lay at a wharf, attempted to descend a ladder connecting the wharf with the bulwark of the vessel. The ladder had been protected against slipping by a cleat at the bottom, but had been removed from the protection of the cleat by the negligent act of the master. In descending the ladder, it slipped, and libellant was thrown upon the wharf and injured. *Held*, that a court of admiralty has no jurisdiction.

(Syllabus by the Court.)

#### In Admiralty.

This was a libel *in rem* for personal injuries received under the following circumstances. In January, 1889, the steam-barge H. S. Pickands was lying in winter quarters at her wharf in Detroit, hemmed in by the ice. She was at the time undergoing repairs, and libellant was engaged in doing some work connected with her boiler. Access to the steamer was gained by a ladder, about 12 feet in length, leading from the wharf to the bulwarks of the vessel, which had been secured at the bottom by a cleat which prevented its slipping. A few minutes before the accident,

libelant himself had made use of it to board the vessel with a plank; and while there the master of the vessel, unknown to the libelant, had moved the ladder from the cleat, and left it unprotected. In attempting to go on shore to procure other material to use in his work, libelant mounted the ladder, which slipped at the bottom, owing to the icy condition of the wharf, throwing libelant down upon the wharf, fracturing two of his ribs, and otherwise injuring him severely. This libel was filed to recover for his pain and suffering, his medical attendance, and his loss of time.

*H. C. Wisner*, for libelant.

*Allen H. Frazer and Henry A. Mandell*, for claimant.

BROWN, J. I am clear in my opinion that a court of admiralty has no jurisdiction of this case. It has never been doubted since the case of *The Plymouth*, 3 Wall. 20, that, to enable us to take cognizance of a maritime tort, the injury must have been consummated, and the damage received, upon the water. The mere fact that the wrongful act was done upon a ship is insufficient. Subsequent adjudications have in no wise tended to limit or qualify this rule. *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. Rep. 25; *The Neil Cochran*, Brown, Adm. 162; *The Ottawa*, Id. 356; *The C. Accame*, 20 Fed. Rep. 643; *The Maud Webster*, 8 Ben. 547.

In this case, not only was the damage received upon the land, but the slipping of the ladder which occasioned the injury occurred there, although the removal of the ladder which produced the slipping was done by the master while on board the vessel. It is true that in the case of *The Daylesford*, 30 Fed. Rep. 635, the libelant was allowed to recover in a case similar to this; but the question of jurisdiction appears to have escaped the attention of counsel, and is not noticed in the opinion of the court. The same remark may be made with regard to *The Caroline*, 30 Fed. Rep. 199. But in the case of *The Mary Stewart*, 10 Fed. Rep. 137, it was held that an injury done to a man standing on the wharf by a bale of cotton which was being hoisted aboard a ship loading at the wharf, and which fell before it reached the ship's rail, and struck him, was not cognizable in the admiralty, although the rope which broke was furnished by the ship, one end of which was fastened to an engine which stood upon the wharf and furnished the hoisting power, and the other end of which passed through a pulley attached to one of the masts of the ship, and was fastened to the cotton which was being hoisted on board. This case is readily distinguishable from that of *Leathers v. Blessing*, 105 U. S. 626, in which the libelant was injured while on board the vessel by a bale of cotton falling upon him, and the jurisdiction was sustained upon the ground that the injury was received on board the vessel itself.

A decree will be entered dismissing the libel, but without costs, as the defense might have been made by way of exception to the libel.

NOTE. On appeal to the circuit court this case was affirmed by Mr. Justice BREWER.

COMMONWEALTH OF KENTUCKY v. LOUISVILLE BRIDGE Co. *et al.*

(Circuit Court, D. Kentucky. April 5, 1890.)

## 1. REMOVAL OF CAUSES—PLEADING.

Where defendant's petition for removal of a cause distinctly alleges that a federal question is raised, his answer, filed after a motion to remand, and setting out more in detail the nature of the defense, may properly be considered on that motion.

## 2. SAME—BOND—PENALTY.

Whether or not a removal bond should have no fixed penalty, a bond otherwise valid is properly accepted where the penalty is sufficient to cover the costs likely to accrue.

## 3. SAME—FEDERAL QUESTION.

A proceeding to exclude a bridge company from the use of a franchise to operate railroad tracks in a public street does not raise a federal question, though such tracks lead to its bridge, built under Acts Cong. July 14, 1863, and Feb. 17, 1865, authorizing the construction of a railroad bridge over the Ohio river, and declaring that it "shall be a lawful structure, and shall be recognized and known as a post-route," as those acts do not attempt to give the right to the use of the street as an approach.

## 4. SAME—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

A proceeding by a state to forfeit a franchise cannot be removed to the federal courts on the ground that it impairs the obligations of a contract; the prohibition of the constitution being that "no state shall pass any law" impairing the obligation of contracts.

In Equity. On motion to remand.

*P. W. Hardin and Muir, Heyman & Muir, for the Commonwealth.*

*Chas. H. Gibson and Barnett, Miller & Barnett, for defendants.*

BARR, J. The commonwealth of Kentucky brought this suit in the Jefferson court of common pleas; and it has been removed here, on the petition of the defendants, upon the alleged ground that the controversy is one arising under the constitution and laws of the United States. The plaintiff moves to remand the case to the state court, and insists that it does not raise any question under the constitution or laws of the United States; and it is also insisted that the bonds executed in the state court are not sufficient, and the execution of a proper bond is jurisdictional.

The suit is a statutory one under the Code of Practice of this state, which authorizes such a proceeding in lieu of a writ of *quo warranto*, or an information in the nature of a *quo warranto*, and is for the purpose of having the defendants excluded from the use of the franchise to operate a double-track steam railroad in and over Fourteenth street, in this city, from Main street to Maple street, and to recover damages for the wrongful use of said franchise heretofore. The plaintiff alleges in the petition that defendants, in co-operation with each other, have usurped the use of Fourteenth street from Main street to Maple street, a distance of about one mile, and have used the same, by operating a double-track railroad, with steam, for many years, and are still operating said road over and through said street, for the transportation of passengers and freight, and are now, and have been for more than 10 years, charging tolls and compensation therefor, illegally, and that they are exercising said franchise without warrant or right from the plaintiff, and without any lawful authority whatsoever. The petition for removal alleges that there is a fed-

eral question involved in the controversy, because (1) the plaintiff is violating the obligation of a contract which she has entered into with the Louisville Bridge Company; (2) that she is attempting to impair or destroy rights which the bridge company hold under acts of congress approved July 14, 1862, and February 17, 1865.

After the plaintiff entered this motion to remand the case to the state court, the defendants tendered an answer to the original petition of the plaintiff, and asks that it be filed and considered as part of the record on this motion. As the removal petition alleges distinctly that this suit raises a federal question, under the constitution and laws of the United States, I think it proper that the answer, which sets out more in detail the nature of the defense, should be considered and read on this motion.

The bonds which were executed by the defendants, and accepted by the state court, are each in the penalty of \$500, and are in conformity with the provisions of the statute in every respect, unless a penalty is improper. It is claimed that the third section of the act of March 3, 1875, as amended by the act of March 3, 1887, provides for a bond unlimited in extent, and one not to be limited by a fixed penalty, and therefore these bonds are fatally defective, and, as the execution of a proper bond is jurisdictional, this case should be remanded for that reason. Whether the execution of a valid and proper bond under this act, and the act of March 3, 1875, is jurisdictional, has been much discussed; and the circuit courts have differed in opinion. See *Burdick v. Hale*, 7 Biss. 96; *Torrey v. Locomotive Works*, 14 Blatchf. 269; *Deford v. Mehaffy*, 13 Fed. Rep. 481; *Harris v. Railroad Co.*, 18 Fed. Rep. 833. But that question does not arise in this case, as I think the bonds which were executed by defendants, and accepted by the state court, are valid bonds to the extent of the penalty, and the penalties are sufficient to cover the cost likely to accrue in this case. It may be that a bond without a penalty would be good under the statute; but the act does not prohibit a bond with a penalty, although it does prescribe the obligations under which the obligor must come. I therefore think the state court properly accepted these bonds with a penalty, as the obligations conformed to the provisions of the act. Both Field and Bump give forms of removal bonds with a penalty. See Field, Fed. Courts, 767; Bump, Fed. Proc. 909.

The facts which appear from the record, and that are material to the determination of the present motion, are these, viz.: The Louisville Bridge Company was incorporated by the commonwealth of Kentucky, and authorized to build a bridge across the Ohio river from some convenient point in the city of Louisville to a point opposite in the state of Indiana, and was authorized to acquire by purchase and condemnation the necessary land to build said bridge, and the necessary avenues thereto, and land for the purpose of any necessary building, etc. The company organized and built the present bridge under the charter granted by the commonwealth of Kentucky, and have accepted the provisions of the acts of congress approved July 14, 1862, and February 17, 1865, and built the bridge, in accordance with the provisions of said

acts, more than 15 years ago. Fourteenth street is a public street in the city of Louisville, 60 feet in width, and about 1 mile in length from Main street to Maple street, but extends beyond both of said streets. The bridge company, and those claiming under said company, have occupied and used said street for a double-track railroad, and have operated said railroad for the transportation of passengers and freight coming and going over said bridge, and for other freights, for more than 15 years, and have charged compensation for the passengers and freights thus transported. The general council of the city of Louisville, by an ordinance approved March 14, 1872, authorized said bridge company to thus use said street, so far as the city could lawfully authorize it. These tracks over and through Fourteenth street from Main street to Maple street are laid on the ordinary grade of the street. These tracks are not a part of the bridge structure, but are the connecting link between the tracks of the Louisville & Nashville Railroad Company and those of the bridge company at Main street. This track through Fourteenth street is the only existing railroad approach by which the Louisville & Nashville Railroad Company can reach the bridge from the south, and is indispensable to the present use of the Louisville bridge for the transportation of passengers and freight north and south. But other approaches can now, and could at the time of the construction of the bridge, have been made. At that time the Louisville & Nashville Railroad and the Jeffersonville, Madison & Indianapolis Railroad were the only railroads running to Louisville from the south and the north, respectively. The act of congress approved February 17, 1865, (13 St. at Large, 431,) amends the act of July 14, 1862, so as "to authorize the Louisville and Nashville Railroad Company and the Jeffersonville Railroad Company, stockholders in the Louisville Bridge Company, to construct a railroad bridge over the Ohio river at the head of the falls of the Ohio, subject to all the provisions of said act" of July 14, 1862, and provides for the kind of bridge to be constructed. The second section provides "that the bridge erected under the provisions of this act shall be a lawful structure, and shall be recognized and known as a post-route."

The fifth section of the act of 1862 is the only part material to the present inquiry, and that enacts—

"That any bridge or bridges erected under the provisions of this act shall be lawful structures, and shall be recognized and known as post-routes, upon which, also, no higher charge shall be made for the transmission over same of the mails, the troops, and munitions of war of the United States than the rate per mile which the company or companies erecting such bridge may from time to time receive on the balance of their line or lines for such services." 12 St. at Large, 570.

The act of 1865 did not authorize the Louisville Bridge Company to construct this bridge, but the authority to construct was given to the two railroad companies. This is not material, since the act did not grant either corporate franchises or property rights on either shore of the Ohio river. It may be assumed that, if the bridge was constructed according to the requirements of the act, whether by the two railroad companies

as stockholders of the bridge company, or by the Louisville Bridge Company in its corporate capacity, the bridge was to become a lawful structure and a post-route. But congress did not confer upon these railroad companies or upon the Louisville bridge corporate franchises, or any right to or interest in the land on either shore of the river. The right to be a corporation, and the rights and franchises incident to a corporation, and such as were necessary to construct and use such a bridge as required by the act, was not given, or intended to be given; neither was the act intended to give those building the bridge the right to condemn property, or purchase the property, necessary for the land approaches to this bridge, or for its piers. It, being declared a lawful structure, ceased to be, in law, an obstruction to the navigation of the Ohio river, whatever the fact might be. This gave authority to sink and build the necessary piers in the bed of the river, and on the shore of the river, if necessary, to have the bridge constructed the height required by the act. It may be assumed, for the purposes of this inquiry, that these acts not only authorized the construction of the necessary shore piers, and the construction of a part of the bridge upon them, but that it would authorize the construction of trestle-work for the same purpose. But such authority would give no right to or interest in the land upon which such piers and trestle-work were built. These, being property rights, remained as if congress had not acted at all. It may be argued, while this may be true as to property rights of individuals and corporations, that it is not true as to public highways, streets, etc., which are under the control of the state, or municipalities created by the state, and that as to these congress, under its authority to regulate commerce among the states, and establish post-roads, may exercise a control which is supreme, and could authorize their use without the consent of the state in which they lay. The conclusive answer to this suggestion is that, whatever may be the power of congress in and over public streets and highways in the states, in this instance it has not attempted to exercise any authority over Fourteenth street, or any other street in Louisville. The acts declare that the bridge shall be "a lawful structure and a post-route." It must be a structure, to be within the meaning of these acts. This is the ordinary meaning of "bridge," as given both by Webster and Worcester. If congress intended to give the authority to the bridge company to run railroad trains over and through Fourteenth street, or any other street in the city of Louisville, it should have been in unmistakable language; but, however this may be, it seems to me to be impossible to include Fourteenth street as part of the bridge which congress authorized. This street, to use the language of the charter of the bridge company, is only an "avenue" to the bridge, or approach to it by rail from the south. Indeed, I do not understand that the defendants have alleged this street to be a part of the bridge or structure, but only it is a necessary approach to the bridge. The language used in these acts is quite common in acts of congress, and has been construed by the supreme court several times, and in no instance have the words "lawful structure and a post-route," as applied to a bridge, been held to include, or have they



been claimed to have included, an existing street or public highway over land as part of the bridge because it led directly to the bridge. This language was used in the *Wheeling Bridge Case*, 13 How. 519, 18 How. 421, 460; in the *Clinton Bridge Case*, 10 Wall. 454; in the *Brooklyn Bridge Case*, (*Miller v. Mayor, etc.*,) 109 U. S. 385, 3 Sup. Ct. Rep. 228; *Missouri Bridge Case*, (*Hannibal & St. J. R. Co. v. Missouri River Packet Co.*,) 125 U. S. 260, 8 Sup. Ct. Rep. 874,—and in none of them is there an intimation that more than the bridge—the actual structure—was authorized and declared a lawful structure. Congress, in an act entitled “An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes,” enacted, among other enactments—

“That any telegraph company now organized, or which may hereafter be organized, under the laws of any state in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been, or may hereafter be, declared such by act of congress, and over, under, or across the navigable streams or waters of the United States.” 14 St. at Large, 221.

The supreme court, after declaring this was a constitutional exercise of power by congress under the commercial clause of the constitution, and after declaring an act of the Florida legislature, which gave an exclusive right to one of its own telegraph companies in two counties of the state, void and of no effect, uses this pertinent language, after quoting the language of the act:

“There is nothing to indicate an intention of limiting the effect of the words employed; and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads, and the navigable waters, of the United States. These are all within the dominion of the national government to the extent of the national powers, and are therefore subject to legitimate congressional regulation. No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted.” *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 12.

In same case in 2 Woods, 646, Judge Woods says:

“It is not supposed, nor is it claimed by defendant, that the act of congress gives a telegraph company the right to occupy the right of way owned by railroad companies without compensation.”

When this case arose, all railroads in the United States had been declared to have been post-roads by congress. I will not attempt to define or consider the extent of the power of congress under the commercial clause of the constitution, and that to establish post-roads. It is sufficient, and decisive of this branch of the case, if the fact be that congress has not given, or attempted to give, to the defendants, or either of them,

the use of Fourteenth street, from Main street to Maple street, as a railroad approach or avenue to the bridge. It may be that the defendants have a legal right to continue the use of said street as at present used; but, whether or not this be so,—and upon this I express no opinion,—this right cannot depend in any degree upon the construction of these acts of congress, as it has not legislated, or attempted to legislate, upon the subject. I do not understand that the fact that all railroads have been declared post-roads is urged as giving this court jurisdiction of the present controversy.

It is, however, contended that the commonwealth of Kentucky is seeking by this proceeding to abrogate a contract made with the Louisville Bridge Company, and it is thereby violating the federal constitution. Art. 1, § 10. This section prohibits a state from passing any law impairing the obligation of contracts. The supreme court say in a recent case that—

“In order to come within the provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.” *New Orleans Water-Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 30, 8 Sup. Ct. Rep. 741.

Here there has been no legislative action, and the uttermost that can be claimed is that the plaintiff is seeking through her courts to have the defendants deprived of a franchise which they claim to be theirs under a contract with plaintiff.

I have not overlooked the case of *Railroad Co. v. Mississippi*, 102 U. S. 135, which settles the right of defendants to a removal to this court, if this suit presented a real controversy or dispute as to the construction and effect of an act of congress and this notwithstanding the plaintiff is a state of this Union. In that case the real controversy was as to the obstruction of a navigable river (Pearl river) by a railroad bridge over it. The plaintiff relied upon an act of congress passed March 1, 1817, which declared “that the Mississippi river, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of said state as to other citizens of the United States.” The defendant also relied in its answer upon another act of congress, (March, 1868,) which, it claimed, authorized the construction of the bridge complained of by plaintiff as obstructing the free navigation of Pearl river. The suit necessarily involved the construction of the laws of the United States; and, indeed, the rights of defendant depended upon the act of congress. Besides, the subject-matter of the controversy was national, *i. e.*, the navigation of Pearl river, and its alleged obstruction. Here the subject-matter of the controversy is a franchise in and over a street in the city of Louisville, which does not depend upon any right given by congress, but upon the state laws.

In determining this motion to remand, I am necessarily compelled to determine whether the suit arises under the constitution or laws of the United States. This jurisdictional question should be determined now, although, if I had serious doubts upon the subject, it would perhaps be my duty to retain the case, and determine the question after all the evidence is in. But, as I have no doubts upon this question, it is my duty to remand the case to the state court from whence it came. It can be heard there, and in the supreme court of the state; and, if against the defendants, they still have the right to have the judgment of the supreme court of the United States as to whether the suit is one arising under the laws or constitution of the United States. The case should be remanded; and it is so ordered.

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RIKE *et al.* v. FLOYD *et al.*

(Circuit Court, S. D. Ohio, W. D. May 8, 1890.)

1. REMOVAL OF CAUSES—CITIZENSHIP OF PLAINTIFFS.

Act March 3, 1887, (St. U. S. 1885-87, c. 873, § 1,) provides that a suit in a state court, "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state," may, under certain circumstances, be removed on the ground of local prejudice to the United States circuit court, by any defendant who is a citizen of such other state. *Held* a petition for removal will be dismissed when it does not show that all the plaintiffs are citizens of the state in which the suit is brought.

2. SAME—LOCAL PREJUDICE—SUFFICIENCY OF AFFIDAVIT.

Under said act such defendant may remove the cause "when it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such state court, or in any other state court" to which he might under the state law remove the case. *Held* that, where the petitioners might remove the case to any one of seven counties adjoining that in which it was brought, an averment in general terms that, on account of local prejudice, they will not be able to obtain justice in such courts, is insufficient.

3. CORPORATIONS—INDIVIDUALS SUING AS TRUSTEES.

Under the laws of Ohio, where individuals sue by their own names, "as trustees of the Printing Establishment of the United Brethren in Christ," which is averred to be a corporation under the laws of Ohio, the individuals, and not the corporation, are the real plaintiffs.

Judge Lawrence, G. W. Houck, and Geo. R. Young, for petitioners.  
John A. McMahon and Gunkel & Rowe, for respondents.

SAGE, J., (*orally.*) Petition by Halleck Floyd and Charles S. Miller, defendants, for removal from the court of common pleas of Montgomery county, on the ground of local prejudice. The petitioners aver that they were at the time of the bringing of the suit, and still are, citizens of the state of Indiana; that the plaintiffs sue solely in the capacity of trustees of the Printing Establishment of the United Brethren in Christ, which is averred to be a corporation under the laws of the state of Ohio, located and doing business at the city of Dayton, and that, by virtue of the act of March, 1871, authorizing the incorporation of printing and publishing houses of religious denominations, the plaintiffs, as trustees, are a body corporate, and a citizen of the state of Ohio. The suit in the

state court was brought against the defendants, in their individual and personal capacities, for the purpose of quieting the plaintiffs' title and right of possession, as trustees of said printing establishment, to certain real estate and property located at Dayton, Ohio, occupied for the purposes of such establishments, and valued at over \$260,000. There is filed with the petition an affidavit containing the general averment that, from prejudice and local influence, petitioners will not be able to obtain justice in the state court in which the suit was brought, or in any other state court to which petitioners may, under the laws of the state of Ohio, have the right, on account of such prejudice and local influence, to remove said cause. It does not appear from the petition that the plaintiffs are all, as individuals, citizens of the state of Ohio. As a matter of fact, it was conceded upon the argument that some of them are not citizens of Ohio; but it is claimed that, suing as trustees of the printing establishment, they are acting in their corporate capacity, and therefore to be regarded, collectively, as a corporation and a citizen of the state. This claim is not well founded. The corporate name is "The Printing Establishment of the United Brethren in Christ;" and, while it is true that the plaintiffs sue as trustees, claiming right of possession and control, it is not true that this suit is by the corporation. The case of *Society v. Smithers*, 12 Ohio St., 250, is in point. In that case there was a contest, as in this, between two sets of men, each claiming to be trustees of the corporation, and entitled to the control of its property. The court held that the individuals suing as trustees of the corporation were the real and substantial plaintiffs in the action. So it is here. The law authorizing the incorporation of such establishments expressly provides for a corporate name to be specified in the certificate of incorporation, and this suit is not in that name, but in the name of the individuals claiming to be its trustees and managing agents, against the defendants, as individuals, who make the same claim. This being so, it is fatal to the petition that it does not show that the plaintiffs are all citizens of the state of Ohio. The case of *Thouren v. Railroad Co.*, 38 Fed. Rep. 673, is a controlling authority upon this point. The affidavit in support of the averments of local prejudice is not sufficient, in such a case as this, to warrant a removal. This is a chancery case, to be tried by the court. If there be any local prejudice in Montgomery county which would interfere with a fair and impartial hearing, (and upon this point the court would require a very strong and satisfactory showing,) the case could be removed to any one of seven adjoining counties; and the removal act requires a showing that the local prejudice complained of would prevent an impartial hearing, either in the county where the action is pending, or any other county to which, under the state laws, it could be removed. The proposition that there is such a condition of local prejudice as to affect the minds of the judges of all the courts of eight counties—indeed, of all the judges of the judicial circuits to which those eight counties belong—is so extraordinary that an affidavit asserting in general terms the existence of local prejudice authorizing removal would not be regarded by this court as sufficient. The application for removal is overruled.

HILTON *et al.* v. GUYOTT, Official Liquidator, *et al.*

(Circuit Court, S. D. New York. April 28, 1890.)

## 1. FOREIGN JUDGMENT—WHEN CONCLUSIVE.

A foreign judgment *in personam*, rendered in a court of a civilized country having jurisdiction of the subject-matter, in a cause involving the consideration of ordinary mercantile transactions between the parties, and in which the defendant, one of our citizens and not domiciled there, appeared and defended for the purpose of protecting his property from seizure, cannot be impeached when sued on here, though the defendant was at the trial of such cause denied the benefit of our rules of evidence and procedure, and though the judgment was based on false testimony, and was erroneous.

## 2. EQUITY PLEADINGS—PLEA.

Where one sued upon a foreign judgment brings a bill in aid of his defense, setting up the erroneous character of the foreign judgment, and praying discovery to enable him to establish the facts, the defense that the foreign judgment is conclusive, having been rendered in a court having jurisdiction both of the parties and of the subject-matter, may properly be presented by plea unsupported by an answer, when the jurisdictional facts do not appear in the bill, and when the facts which an answer would tend to prove may be treated as proved in impeachment of the plea, without destroying the defense pleaded.

In Equity. On plea.

James C. Carter and Horace Russell, for complainants.

W. D. Shipman and William G. Choate, for defendants.

WALLACE, J. The defendants have interposed a plea to a bill of discovery, and the plea has been set down for argument. The defendants are the representatives of Fortin & Co., and have brought a suit at law in this court against the complainants, who compose the firm of A. T. Stewart & Co., upon a judgment rendered in a court of France in favor of Fortin & Co. against Stewart & Co., for a money recovery in the sum of \$195,122, and Stewart & Co. have filed the present bill in aid of their defense in the action at law. It is alleged in the bill that the complainants are not indebted on account of the matters for which the judgment was obtained by Fortin & Co., and that Fortin & Co. are indebted to them in a considerable sum, for which they are entitled to a judgment in their favor. All the facts to sustain these averments are set forth, and the bill alleges that the complainants have set up these facts by way of defense and counter-claim to the suit at law; and the bill prays for a discovery, upon interrogatories annexed, to enable the complainants to establish the facts. The bill also contains averments by way of anticipation of the defense, and sets forth facts which are intended to show that the judgment of the French court is re-examinable, and that the complainants are at liberty to contest the merits of the original controversy. These averments are, in substance, that the suits which resulted in the judgment were brought by Fortin & Co. against Stewart & Co. before the tribunal of commerce of Paris, upon matters of contract and account arising from dealings between the two firms at Paris and New York; that when the suits were commenced the members of Fortin & Co. were citizens of France, and domiciled there, and the members of Stewart & Co. were citizens of New York, and were not within or resident within the

jurisdiction of the court; that Stewart & Co. had property in France liable to seizure by the process of the court, and were obliged to appear and defend the suits brought against them to protect it from seizure, and were obliged, in order to defend the suits, to bring cross-suits to establish counter-claims against Fortin & Co.; that the trial of these controversies was unfairly conducted, the witnesses not being sworn or affirmed, hearsay evidence being received, and the right of cross-examination of witnesses, and of compelling the production of books and papers, being denied, against the protests and to the prejudice of the complainants; that false testimony was given on the trial by Fortin & Co., and books and evidence fraudulently suppressed by them, and in consequence thereof the court was misled in regard to the merits of the controversy; and that the judgment was based upon false and fraudulent accounts and statements made by Fortin & Co., and is erroneous in fact and in law. The plea avers, and sets up the facts necessary to show, that the suits brought by Fortin & Co. were commenced and prosecuted in a court having jurisdiction of the subject-matter, and that Stewart & Co. duly appeared therein by attorneys and counsel, and brought several suits in the same court against Fortin & Co., claiming affirmative relief; that the several suits were consolidated, and a final judgment rendered in all; that both parties appealed to the court of appeals of Paris from the judgment of the tribunal of commerce of Paris, and the judgment now sued upon in the action at law is the final judgment rendered by that court upon such appeal. The plea avers that the suits in both tribunals were prosecuted and conducted in all respects in accordance with the course of practice and procedure prescribed for such tribunals by the laws of France, and that the final judgment of the court of appeals of Paris judicially decided and determined all the claims, matters, and controversies between the parties.

The defense interposed is properly brought forward by a plea, and, if the judgment concludes the parties, it is an efficient bar to the relief sought by the bill.

Although the bill sets forth the recovery of the judgment, it omits facts affecting the jurisdiction of the court, and the judicial character of the trial, which would preclude the defendants from having the benefit of their real case upon a demurrer, and the defendants could not properly and fairly protect themselves by asserting their judgment as a bar without supplying in their plea the facts which do not appear in the bill. It belongs to the class of anomalous pleas. It is not necessarily to be overruled, because it is not supported by an answer. A plea which contains in itself a full defense to the bill need not be supported by an answer, whether the bill does or does not aver facts for the purpose of avoiding the anticipated defense. It was formerly otherwise, in cases where the anticipatory averments of the bill were sufficient to overthrow the equity of the defense. An anomalous plea is only good against the original subject-matter which constitutes the equity of the bill, and is ineffectual against the supplemental matters averred to anticipate and avoid the defense; and therefore the matters in avoidance are not only

required to be denied in the plea, but by the former practice were required to be sustained by a full answer in respect to any discovery called for. Adams, Eq. 338. In modern practice, even though the bill contains such anticipatory averments, no answer in support of the plea is necessary, unless discovery upon interrogatories is called for. *Dawson v. Pilling*, 17 Law J. Ch. 394; *Webster v. Webster*, 1 Smale & G. 489. If interrogatories are annexed to the bill, respecting material anticipatory facts, as to which the answers might tend or be evidence to countervail the plea, then the plea must be supported by an answer. The rule is stated in Heard, Eq. Pl. 92, as follows:

"If the bill admits the existence of a legal bar, but alleges some inequitable circumstances to avoid its effect, and interrogates as to those circumstances, it is not enough for the defendant to plead the legal bar. He must accompany his plea with a distinct answer and discovery as to every circumstance as to which he is interrogated, the admission of which may tend to invalidate the plea."

This is necessary, because, upon the argument of a plea, every fact stated in the bill, and not sufficiently denied, must be taken to be true, (*Bogardus v. Trinity Church*, 4 Paige, 178,) and the denial of every material fact must be as full and complete as the bill requires. The complainant may read the answer to counterprove the plea, and is entitled to the facts he can elicit by his interrogatories, instead of the conclusions of the pleader; consequently when interrogatories are filed, and are not answered, the defendant loses the benefit of any denial in his plea of the matters as to which he is interrogated. The rule is that a defendant must answer as to facts which would be evidence to dispute the plea, but he is not required to answer to those things which may be well admitted consistently with the bar pleaded. If he does not answer interrogatories, upon the argument of the plea, every fact which they would tend to prove is treated as proved in impeachment of the plea. But if a plea sets up a defense which appears to be a good bar, notwithstanding all these facts are admitted to be true, it is not necessary to support it by an answer. The interrogatories annexed to the present bill mainly relate to the merits of the original controversy between Stewart & Co. and Fortin & Co., and call for a discovery of facts for the purpose of showing that Stewart & Co. were not indebted to Fortin & Co., and that the latter are indebted to the former. The other interrogations call for evidence of what took place on the trial of the suit in the French tribunal.

Tested by the rules which have been adverted to, the plea must be taken as admitting that when the suits were commenced against Stewart & Co., none of the members of that firm were or could have been personally served with process, but they were compelled to appear to protect their property in France from seizure; that they did not by their cross-suits invite the jurisdiction of the French court; that on the trial of the suit they were denied the benefit of the rules of evidence and procedure which obtain in the courts of this country; that Fortin & Co. fraudulently suppressed evidence and gave false testimony upon the trial, and the court was misled thereby, to the prejudice of Stewart & Co.; and

that the judgment is erroneous, and should have been in favor of Stewart & Co. for a large recovery. If the plea is good, it must be sustained upon the ground that the judgment of the French tribunal, notwithstanding these impeaching facts and circumstances, is not now re-examinable. The facts alleged in the bill are not inconsistent with the averment of the plea that the trial was conducted pursuant to the regular course of practice and procedure in the courts of France; and the interrogatories, if answered, would not tend to contradict that averment.

It is conceded by all the authorities that such a judgment may be impeached for fraud, because fraud avoids judgments as well as contracts of every nature. But the term "fraud" is indefinite, and when it is said that a judgment is vitiated and may be nullified by fraud it is not to be understood that the fraud which consists in false testimony, or the suppression of the truth, in respect to matters litigated upon the trial of the action which resulted in the judgment is sufficient to have this effect. It was said in *U. S. v. Throckmorton*, 98 U. S. 61, 68, "that the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." The court adjudged in that case that fraud of this description would not authorize the re-examination of a judgment, and the decision was placed upon the principle applicable to all domestic judgments, which is that the fraud which nullifies a judgment or decree cannot be predicated of false testimony, or forged documents, in respect to the disputed matter which has actually been presented to or considered by the appropriate tribunal. *Vance v. Burbank*, 101 U. S. 514; *Moffat v. U. S.*, 112 U. S. 32, 5 Sup. Ct. Rep. 10. The contrary was held in *Aboulloff v. Oppenheimer*, 10 Q. B. Div. 295, where the suit was upon a Russian judgment, and the defense was, in substance, that the judgment was obtained by false testimony of the plaintiff as to a fact in issue upon the trial which misled the court; and it was held that this was a good defense. The authorities cited in the opinions of the judges, however, do not sustain any such doctrine, being cases in which no such question was discussed, like *Ochsenbein v. Papier*, L. R. 8 Ch. 695, where the fraud was entirely extrinsic to the trial, and *Bank v. Nias*, 16 Adol. & E. (N. S.) 717, where the foreign judgment was held to be conclusive, and the particular question did not arise and was not alluded to. In Bigelow on Estoppel (5th Ed. p. 307) the proposition is stated thus:

"Indeed, there is no doubt that it may be shown, against a foreign judgment *in personam*, that it was obtained by some fraud not involved in the examination of the merits of the case, such as preventing the complaining party from presenting the merits of his case, or imposing upon the jurisdiction of the court, or corruption of the court, or collusion between counsel, or the like. But it would seem to be a sound view of the law that this should be the limit, as appears to be the case in regard to questions of fraud relating to domestic judgments."



If a foreign judgment cannot be impeached for fraud of this kind, committed by the party who obtained it, much less would there seem to be any reason, when the judgment is obtained in a court of a civilized country, for impeaching it because in matters of evidence or procedure, not relating to jurisdiction of parties or subject-matter, the trial was conducted by rules and usages differing from those of our courts. The methods of investigation in different countries are adjusted to the conceptions of expediency and propriety that prevail in each, and it would be mere bigotry to assert that, upon the whole, the truth of disputed facts is not as well ascertained in France or Holland or Germany as it is in England or the United States. Our law of evidence is largely a series of negations, sedulously framed, to exclude from consideration all *indicia* of the truth which do not fall within the class of those it regards as competent and safe, while in continental countries a larger latitude of investigation is indulged. In matters of evidence and procedure, to say nothing about the weightier matters of law, the wisdom of yesterday is the folly of to-day; and it is doubtful whether our present methods do not differ as greatly from those of the recent period, when parties were not permitted to testify, as they do from the methods of continental countries. Who can say with reason that our system of investigation is more infallible than that of France; or that a French citizen, sued here, could not as justly complain of our rules of evidence, or of a bill of discovery which compels him to exhibit his case in advance to his adversary, as one of our citizens sued in a French court could of the methods of procedure there?

The judgment is not deprived of the usual efficacy of foreign judgments because the complainants did not owe allegiance to France, and were not originally amenable to the jurisdiction of the tribunal of commerce of Paris. The complainants appeared in the suits, and submitted their rights to the investigation of that court and of the appellate court. They did this because they deemed it for their interest to do so; and surely so long as they were given an opportunity to contest the claims of Fortin & Co., and availed themselves of it, the circumstance that they were unwilling litigants cannot impair the jurisdictional sanctions of the judgment. *Rousillon v. Rousillon*, 14 Ch. Div. 370; *Voinet v. Barrett*, 55 Law J. Q. B. D. 39. They may not occupy the position of parties who have deliberately sought the jurisdiction of a foreign tribunal, compelled their adversary to litigate there, and, after litigating and being defeated, seek in the courts of another sovereignty to impeach the conclusiveness of the judgment; but they are in the category of those who have had a reasonable opportunity to be heard, and have been heard, upon the merits of their case. For these reasons, it seems that no exceptional grounds are found in the particular circumstances of the case for refusing to the present judgment the force and effect which foreign judgments ordinarily have in suits brought upon them in the courts of another country. The plea admits, however, that the adjudication was an erroneous one, and should have been in favor of the complainant for a large money recovery, instead of one against them. It is to be observed that the controversy

between the parties was wholly in respect to commercial transactions between them, growing out of the manufacture of gloves in France by Fortin & Co., and the sale of them in New York by Stewart & Co. as consignees for Fortin & Co., and involved merely questions of general commercial law and of fact, concerning which the testimony was principally in France. The case therefore presents the broad question how far a foreign judgment, not impeachable for fraud, and rendered by a court having complete jurisdiction of the parties and the subject-matter, is re-examinable upon the merits in a suit brought to enforce it here. The question has been much discussed by the courts in England, and by the commentators here, with great diversity of opinion, and the result is summed up by Prof. Greenleaf as follows:

"The general doctrine maintained in the American courts, in relation to foreign judgments *in personam*, certainly is that they are *prima facie* evidence, but that they are impeachable. But how far, and to what extent, this doctrine is to be carried, does not seem to be definitely settled. It has been declared that the jurisdiction of the court, and its power over the parties and the things in controversy, may be inquired into, and that the judgment may be impeached for fraud. Beyond this no definite lines have as yet been drawn." 1 Greenl. Ev. § 547.

The amount involved in this case is large, and the question is one of so much doubt and interest that the judgment of this court will doubtless be taken to the supreme court for review, whichever way the question may be decided; consequently it would seem to be quite useless to attempt in this opinion any extended discussion of the authorities or statement of the reasons for the conclusions reached. At the time of the adoption of the constitution of the United States, the rule established by the decided weight of judicial opinion in the English courts was that a foreign judgment should be regarded merely as *prima facie* evidence of the debt, and that the merits were always re-examinable. The earlier cases in the American courts followed the English authorities in recognizing the rule to be that foreign judgments were merely *prima facie* evidence of the liability established. In some of them, notwithstanding the provision of the constitution of the United States giving full faith and credit in every state of the judicial proceedings of every other state, domestic judgments of another state were treated as foreign judgments, and were held to be re-examinable upon the merits. *Hitchcock v. Aicken*, 1 Caines, 460; *Taylor v. Bryden*, 8 Johns. 133. In others, and in the later cases with one or two exceptions, the question was as to the conclusiveness of domestic judgments, and the expressions in the preceding cases were reiterated *obiter*; and the effect to be given to foreign judgments did not receive the careful discussion which it subsequently underwent in the courts of England, and which led the English courts to recede from their former doctrine, and declare in favor of the general conclusiveness of such judgments. Thus it may properly be said that, although the adjudications in this country are replete with *dicta* to the effect that foreign judgments are only *prima facie* evidence of indebtedness, the books contain very few cases in which the question

has been necessarily considered and authoritatively decided. It is sufficient to refer to *Bissell v. Briggs*, 9 Mass. 462; *Wood v. Gamble*, 11 Cush. 8; *Robinson v. Prescott*, 4 N. H. 451; *Taylor v. Barron*, 30 N. H. 95; *Williams v. Preston*, 3 J. J. Marsh. 600; *Aldrich v. Kinney*, 4 Conn. 382; *Graham v. Grigg*, 3 Har. (Del.) 408. In the late case of *Hanley v. Donoghue*, 116 U. S. 4, 6 Sup. Ct. Rep. 242, Mr. Justice GRAY says:

"Judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."

According to Mr. Bigelow, only two of the reported cases in the American courts (*Burnham v. Webster*, 1 Woodb. & M. 172, and *Runkin v. Goddard*, 54 Me. 28) are direct adjudications that such judgments are inconclusive. Bigelow, Estop. (5th Ed.) 264. Most of them, in which such judgments have been stated to be inconclusive, are cases in which domestic judgments were under consideration, or where the court rendering judgment did not acquire jurisdiction, or where the real question was whether a foreign judgment was not *prima facie* evidence of indebtedness. Besides the cases mentioned by Mr. Bigelow, two have been cited by counsel, those of *Anderson v. Haddon*, 33 Hun, 435, and *De Brimont v. Penniman*, 10 Blatchf. 436. *Anderson v. Haddon* seems to have been a case in which the judgment was obtained without any jurisdiction of the person of the defendant. In *De Brimont v. Penniman* the decree was a peculiar one, and Judge WOODRUFF assumed that it was not material whether the judgment was to be regarded as conclusive, or only as *prima facie* evidence of an indebtedness of the defendant; and he held that it was not *prima facie* evidence, because it only declared a conditional liability of the defendant, depending upon the continuance of a state of facts not alleged to be then existing, saying:

"There is no award of any sum certain, to be presently paid, and the declaration does not show that any sum whatever could even there (in France) be collected without a further application to the court."

Although the case of *Rankin v. Goddard* is treated by Mr. Bigelow as a direct adjudication that a foreign judgment is not conclusive, it seems only to decide the familiar propositions that the jurisdiction may be inquired into, or the judgment be impeached for fraud. See same case, 55 Me. 391. The case of *Burnham v. Webster* is a carefully considered judgment of the circuit court of the United States; but if the views adopted there were to be applied to the present case they would not necessarily lead to a re-examination of the merits of the original controversy. Mr. Justice WOODBURY declared in that case that he would allow the *prima facie* obligation of a foreign judgment to be rebutted by showing that the merits of the claim to the controversy were not in fact considered, owing to some accident, mistake, or agreement of the parties, or owing to any other sufficient excuse; that he would discriminate in favor of persons who had not willingly resorted to the courts of a foreign country, and against those persons who had voluntarily submitted themselves to such

courts; and that he would not allow the *prima facie* obligation to go far, if the judgment was that of a court of a barbarous or semi-barbarous government, acting on no established principles of civilized jurisprudence.

If there are few authoritative rulings in this country which decide that foreign judgments are not conclusive when not impeachable for fraud or want of jurisdiction, there are few which decide that such judgments conclude an inquiry into the merits. Two cases adjudge the point directly; and it was held in *Lazier v. Westcott*, 26 N. Y. 146, and in *Baker v. Palmer*, 83 Ill. 568, that a Canadian judgment was entitled to the same conclusiveness when sued on here as a domestic judgment would be. The case of *Railway Co. v. McHenry*, 21 Blatchf. 400, 17 Fed. Rep. 414, did not necessarily involve the point, as it does not appear in that case that the defendant offered any evidence to dispute the debt, and the only question necessarily under consideration was whether the foreign judgment was *prima facie* evidence of the debt. The doctrine of the general conclusiveness of such judgments is maintained by the American commentators, among them some of our most distinguished jurists, and also by the more modern English cases, and it is placed upon the principle that one court should not permit the re-examination of a cause upon its merits when the party seeking to impugn the judgment has been fully heard, and the cause decided against him by another court. Mr. Justice Story (Conf. Laws, § 607) refers to the difficulties which would arise if a different doctrine were maintainable to the full extent of opening all the evidence and merits anew in a suit upon a foreign judgment when some of the witnesses might be dead, some of the vouchers lost, and the merits of the cause as originally presented re-examined upon a partial presentation of the evidence. He says:

"Indeed, the rule that the judgment is to be *prima facie* evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for, under such circumstances, it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment, by showing that the court had not jurisdiction; or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular and bad by the local law,—*fori rei judicata*. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is, in legal effect, the right to retry the merits of the original cause at large, and to put the defendant upon proving those merits."

And in *Taylor v. Bryden*, *supra*, Chancellor KENT, treating a domestic judgment as a foreign judgment, observed that to try over again, as of course, every fact which had once been decided by a competent tribunal, would be carrying the doctrine of re-examination to an oppressive extent.

The later English cases undoubtedly assert that foreign judgments, whether against English subjects or foreigners, when obtained in suits of which the foreign court had jurisdiction, and in which the defendant appeared, are in all respects as conclusive as the judgments of

their own courts. They take the ground that the courts of one country should not sit to rehear causes which have been tried in another, and that a party against whom a foreign judgment has been obtained should not be permitted to allege error in the judgment, and try the controversy over again, but should resort to the mode of review or retrial in the foreign forum which is provided for by every system of jurisprudence in civilized countries. They decide that any matters constituting a defense to the judgment, which might have been tried in a foreign court, cannot be again brought forward for the purpose of impeaching the validity of the judgment. This is the emphatic result of the more recent adjudications, although much diversity of opinion among the judges is found upon the general subject. *Scott v. Pilkington*, 2 Best & S. 11; *Martin v. Nicolls*, 3 Sim. 460; *Bank v. Nias*, 16 Adol. & E. (N. S.) 717; *Henderson v. Henderson*, 3 Hare, 100; *Godard v. Gray*, L. R. 6 Q. B. 139; *Schibsy v. Westenholz*, Id. 165; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Voinet v. Barrett*, 55 Law J. Q. B. D. 39; *Trafford v. Blanc*, 36 Ch. Div. 600; *Nouviou v. Freeman*, 37 Ch. Div. 244. In *Godard v. Gray* it was held that the judgment of a French court was not re-examinable, although the judgment proceeded on a mistake of English law in the construction of an English contract, which was apparent on the face of the judgment; and the principle of the decision was that a question of foreign law is a question of fact, and the party could not complain who had neglected to produce sufficient evidence to enable the court to decide it correctly. In *Voinet v. Barrett* it was held that the judgment was conclusive, notwithstanding the defendant was not registered or domiciled, or under allegiance to the foreign country, and appeared in the foreign court merely to protect his property from seizure in case judgment should be given against him by default; and the judges cited with approval *De Cosse Brissac v. Rathbone*, 6 Hurl. & N. 301, where it was ruled that if a defendant voluntarily appears in a foreign court, and takes the chances of a judgment in his favor, he is bound by a judgment against him. These adjudications ignore any considerations of comity as a factor in influencing the effect of foreign judgments. They rest wholly on the practical and sensible doctrine, which is applied to domestic judgments, that a litigant who had had a fair opportunity to try his cause before a competent tribunal, and has availed himself of it, should acquiesce in the result, and, if he has reason to complain, should pursue those means for correcting error provided by the jurisprudence of the tribunal, instead of resorting to another court. This is a much safer and more reasonable doctrine than that of the earlier adjudications, and if it works injustice in occasional instances, works less hardship generally, and promotes justice upon the whole.

It is not necessary to consider whether a foreign judgment against one of our own citizens served with process while casually within the country of the judgment, and who did not appear to defend, is not re-examinable in a suit brought upon it here; nor whether such a judgment would be enforced here, although the defendant litigated his cause in the foreign court, when it adjudges a liability which our laws do not sanc-

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tion. It suffices to hold, and it is now held for the purpose of this case, that a foreign judgment *in personam*, rendered in a court of a civilized country having jurisdiction of the subject-matter, in a cause involving the consideration of ordinary mercantile transactions between the parties, and in which the defendant appeared and litigated, is, when sued on here, conclusive to the same extent that a domestic judgment is conclusive. Judgment is ordered for the defendants upon the plea.

**KESSLER *et al.* v. CONTINENTAL CONSTRUCTION & IMPROVEMENT Co.**

(Circuit Court, D. Connecticut. April 7, 1890.)

**1. CORPORATION—DISSOLUTION—STOCKHOLDER.**

Where a stockholder, proceeding under Gen. St. Conn. 1888, § 1942, files a bill in a federal court to have the affairs of the corporation wound up, and its effects distributed, on the ground that it has abandoned the business for which it was organized, leave will be granted plaintiff to file a supplemental bill setting up that since the institution of his suit defendant, acting under section 1943, has voted to discontinue its business, and to distribute its capital stock among the stockholders, and has obtained an order from a state court, limiting the time within which claims of creditors shall be presented, and praying an injunction to restrain it from acting thereunder.

**2. SAME—JURISDICTION—INJUNCTION.**

But a motion for temporary injunction to restrain defendant from proceeding under this order will not be granted, as it merely limits the time for presenting creditors' claims, and in no way conflicts with or impairs the jurisdiction of the case first acquired by the federal court.

In Equity. On motion for leave to file supplemental complaint and for an injunction.

*F. J. Stimson and Morris W. Seymour*, for plaintiffs.

*Adrian H. Joline*, for defendant.

SHIPMAN, J. A statute of the state of Connecticut authorizes the superior court of the state, as a court of equity, on the application of a stockholder of a corporation organized under its laws, to wind up the affairs of such corporation, and to dissolve it, if said court shall find that said corporation has voted to wind up its affairs, or has abandoned the business for which it was organized, and has thereafter neglected within a reasonable time to close its business and distribute its effects, and said court is authorized to appoint a receiver for that purpose. In May, 1888, the complainants, who are stockholders in the defendant corporation, which was organized under the laws of said state, brought their bill in equity, under said statute, alleging that the corporation had abandoned the business for which it was organized, and had neglected for an unreasonable time thereafter to wind up its affairs, and praying for the appointment of a receiver, who should close its business under the orders of this court. A motion for a temporary injunction, and for the appointment of a temporary receiver, was denied. The complainants have taken

some testimony, but have not closed their proofs. On December 31, 1889, the defendant, at a special meeting called for that purpose, voted to discontinue its business, and to distribute its capital stock. The assets of said company consist of common and preferred stock of the Fitchburg Railroad Company. The directors distributed 20,825 shares of said preferred stock among the stockholders, and reserved 7,948 shares to meet claims against the company. Section 1943 of the General Statutes of Connecticut provides as follows:

"When the stockholders of any corporation constituted under the laws of this state shall have voted to discontinue its business and distribute its capital stock among its stockholders, it may apply to the superior court in the county where it is located, or to any judge of said court in vacation, for an order limiting a time for the creditors of said corporation to present their claims against it to its directors, and said court or judge may make such order limiting not less than two months from its date, and shall prescribe the notice that shall be given thereof to said creditors; and all claims not presented in pursuance of said order shall be barred of a recovery. And any claim presented, which shall be rejected by the directors, shall be barred, unless the owner thereof shall commence an action to enforce the same within four months after he shall receive written notice of its rejection."

In pursuance of the votes passed at said meeting of December 31, 1889, the directors presented an *ex parte* application to the superior court for New Haven county, praying for an order under said section; and said court ordered on January 3, 1890, that three months from said day be limited for the presentation of claims against said corporation to its directors, and directed the manner in which notice to creditors should be given.

The complainants have now moved for leave to file a supplemental bill alleging the facts which occurred at and after said meeting, and praying for an injunction restraining the defendant from proceeding under said order of the superior court, or in any way interfering in the affairs of said corporation or winding up or distributing the same until the further order of this court. Said motion also asks for a temporary injunction restraining the defendant from further prosecuting said proceeding in said superior court, and from proceeding under said order or any other order of said court. The foundation upon which the supplemental bill is alleged to rest is that, pending a bill in equity, under the Connecticut statute, by a stockholder for the dissolution of a corporation, it has no right to take measures for its own dissolution, and thus practically deprive the court of control over the distribution of the assets. It has been justly held that, when a creditor of a corporation had commenced proceedings in the circuit court against such corporation to enforce his claim against it, the defendant could be enjoined "from taking proceedings for its own dissolution, or for the appointment of a receiver of its effects, or for the distribution thereof among its stockholders or any other persons, and from making any distribution or transfer of any of its effects." *Fisk v. Railroad Co.*, 10 Blatchf. 518. The defendant in this case is not insolvent, and the complainants are stockholders, and not creditors, so that the circumstances of the two cases are not alike;

but, upon a motion for leave to file a supplemental bill, the court is not called upon to definitely determine whether the legal position of the complainant is well taken. Leave to file the bill should be granted, and the questions under the bill will be determined when the issues have been formed.

The other question relates to the temporary injunction. The complainants insist that, inasmuch as the circuit court first obtained jurisdiction of the matters involved in the winding up of the defendant corporation by the bill which prayed both for such winding up and for the appointment of a receiver, this court must have exclusive jurisdiction, which cannot be interfered with by another court. The general principle is stated by Mr. Justice FIELD in *Sharon v. Terry*, 36 Fed. Rep. 337, as follows: "The jurisdiction of the federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction." This general rule is sustained by Justice FIELD by an ample citation of authorities, and, among others, by the opinion in *Taylor v. Taintor*, 16 Wall. 370, in which it is said: "Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted." The general rule being well established, the question is whether the action of the superior court was such as to arrest, injure, or impair the exclusive jurisdiction of the circuit court. Section 1943 simply empowers the superior court, upon an *ex parte* application of a corporation which proposes to wind up, to limit a time for the presentation of claims against it. The court takes no possession, and can have no control, of the assets, has no power of adjudication upon the claims, cannot either reject or approve them, and cannot order their payment. Its power is exhausted when it has directed creditors to present their claims. I do not perceive that the order of the superior court is in such conflict with the jurisdiction of this court, or tends to impair it, in such a manner as to justify the temporary injunction which is asked for, and which relates to the defendant's action under said order. I may remark, in addition, that it is not alleged in the supplemental bill, or in the affidavits, that the complainants anticipate a fraudulent or improper payment of claims, and that neither the affidavits upon this nor upon the preceding motion impressed upon me the belief that the complainants were in serious danger of injury. This is an additional reason for waiting until the final hearing, which, I think, will be promptly had, and may show that the allegations of the bill are true. The motion for leave to file a supplemental bill is granted, and the motion for a temporary injunction is denied.



## TEXAS &amp; P. RY. CO. v. INTERSTATE TRANSP. CO.

(Circuit Court, E. D. Louisiana. May 18, 1890.)

## NAVIGABLE WATERS—BRIDGE—INJUNCTION.

In a suit to restrain defendant from passing its tow-boats through the draw of plaintiff's bridge, at high water, with more than two barges in tow, it appeared that the bridge-seat at the eastern end consisted of wooden piles, and that there was no protection of any kind to prevent boats from colliding with the piles, or, in case of high water, with the bridge itself. The pier on which the draw turned was also unprotected. Complainant did not object to the use of the western draw, as the bridge-seat at that end was built on caissons, and was protected with iron pieces. Defendant introduced affidavits of 18 men experienced in the navigation of the river that the bridge could be completely protected by lines of piling outside the pier and bridge-seat. Complainant's manager and engineer made affidavit that this would cause too great a pressure of water on the bridge, injure the channel, etc. It also appeared that in all the years defendant had navigated the river its boats had caused but a single accident to the bridge, and then the damage was slight. *Held*, that complainant failed to show either that its bridge was properly constructed, or that defendant's navigation of the river was dangerous to the bridge, and that the injunction would be denied.

In Equity. On motion for injunction *pendente lite*.

Suit by the Texas & Pacific Railway Company to restrain the Interstate Transportation Company from taking a larger tow than two barges through the draw of complainant's bridge, at high water.

*Howe & Prentiss*, (W. W. Howe, of counsel,) for complainant.

*J. D. Hornor*, for defendant.

PARDEE, J. Assuming that the case made by the bill is one that is within the jurisdiction of this court sitting as a court of equity, and presents a case for equitable relief, still it appears on this hearing that two important facts, incumbent upon the complainant to establish, are left in doubt, if not actually disproved, to-wit: That the complainant's bridge is properly constructed and guarded so as to interfere as little as possible with the free and safe navigation of the Atchafalaya river; and that the actual navigation by the defendant of the said river, with its tow-boats and barges in each tow to the number of six, is dangerous to the safety of the bridge. It appears that the bridge-seat at the eastern end of the bridge is constructed of wooden piles driven in the river, and that there is no protection, by way of outer piling and guards, to prevent any steam-boat or tow from colliding directly with these wooden supports of the bridge, and, when the river is very high, with the bridge itself; and that the pier in the middle of the stream, on which the bridge turns, is also unprotected with sufficient piles and guards. Defendant produces 18 affidavits of experienced men in the steam-boat business, generally engaged in, and familiar with, the navigation of the Atchafalaya river, to the effect that the bridge is not a suitable bridge for the purpose for which it is intended, by reason of the fact that, to be properly constructed and protected, it should have a line of piling from the outside upper corner of the eastern bridge-seat running diagonally up the river to the shore, which should be planked; and that the same precaution should be taken with the pier on which the bridge turns

in the middle of the stream, which would then make a funnel through which boats and water-craft of all kinds could pass without injury to themselves or the said bridge; and that if such precautions were taken it would insure perfect protection to the bridge itself and make navigation absolutely safe. The complainant meets this point with an affidavit of John A. Grant, general manager of the complaining company, a civil engineer of well-established reputation, to the effect that the plan of protecting the bridge by the piling described is impracticable in the Atchafalaya river and similar streams; that it is not adopted at Morgan City bridge; that the effect of it would be to press the current against its curves, and destroy it, or push it over; that it would injure the channel, bank up the water, and create additional eddies; also cause the water to eat out and undermine the supports, not only of such works, but of the bridge itself. Of course, this is a matter upon which the court has no expert knowledge, and can only be governed by the showing made by the parties. The weight of evidence on this showing is against the complainant company. The affidavit of Vice-President and General Manager Grant, which is the main-support of the complainant's case, contains this statement:

"Deponent further states that while the tows of defendant might pass through the western side of the draw, which has iron pieces on both sides, with safety to the bridge, they insist on passing through the eastern side of the draw, where, on the eastern side thereof, the bridge-seat is of wood."

Counsel for complainant, on the hearing, stated to the court that there was no objection whatever to the use of the west side of the draw, as there was no danger to be apprehended from such use, no matter how many barges the defendant's tugs might undertake to tow through. An inspection of the drawings of the bridge presented by the defendant shows that the west bridge-seat is built upon caissons, which are apparently strongly made and well founded, and fully able to withstand collision with any tow of coal-barges. It would seem from these facts that the objection made by the defendant to the construction of the bridge as incomplete is well founded. If it is impracticable, for the reasons stated by General Manager Grant, for the complainant to put out the pilings and guards mentioned in defendant's affidavits as necessary for the protection of the eastern end of the bridge, it would seem that there is nothing to hinder, except, perhaps, expense, putting the eastern bridge-seat on as substantial a foundation as the western, to-wit, on caissons, with iron pieces on both sides; in other words, if the western bridge-seat, on caissons with iron pieces on both sides, is properly made and is strong enough, as is admitted, to resist collisions from tows with any number of boats, why should not the eastern bridge-seat, in the interest of navigation and with a view to obstruct the stream as little as possible, be constructed in the same way?

The affidavits presented by the defendants—all, as stated above, by experienced men in the steam-boat business, generally engaged in, and familiar with, the navigation of the Atchafalaya river—are to the further

effect that there is actually no danger to the complainant's bridge from the towing of defendant's barges in the usual manner through the said draw; that it has been continuously done since the construction of the bridge, and during the yearly high-water in the river, without accident of any kind to the bridge, with the single exception stated in complainant's bill, which exception did not inflict any material injury on the bridge, and generally without accident to the boats and barges towed through. The complainant's affidavits, on the same point, (two in number,) state apprehensions largely, and, outside of the fact that one barge did slightly collide with the bridge-seat, do not set forth specific facts. The claim made in the bill, and in General Manager Grant's affidavit, "that the danger of taking three barges through at the present extraordinary stage of high water is generally enhanced by the width of the tow combined with its length. The current of the Atchafalaya river at that point is of great velocity, much more than that of the Mississippi river. It is a torrent, and full of eddies. If a tow of three barges is diverted, as it is apt to be, from a direction parallel with the stream, the danger of striking the bridge is excessive, and at high water the impact would be on the upper portion of the bridge or bridge-seat, when the liability of the injury is excessive,"—is fully met by defendant's affidavits to the effect that such swinging of the entire tow in a direction across the opening of the bridge, tending to strike and break said bridge, is highly improbable and hardly possible, as the boats of the defendant company are in the habit of running a stern line to the shore, and there fastening it, which makes it impossible for the tow to swing. In fact the case is so left, on the showing made, that the court cannot say that it is actually dangerous to the safety of complainant's bridge that the defendant should tow through, at the present stage of high water, any number of barges in one tow up to the number of six. It also appears, by the affidavits presented by the defendant, that the insurance companies taking risks upon the boats and barges towed through the complainant's bridge approve of the number of barges towed by the defendant, provided they do not exceed three coal-boats or more than six coal barges at any one time; and this, notwithstanding the character of the bridge, with the extremely high water, and the rapidity of the current. On the whole case, I am of the opinion that the injunction *pendente lite* asked for should be refused, and the restraining order heretofore granted should be dissolved, and it is so ordered.

## CARPENTER v. UNITED STATES.

(Circuit Court, S. D. Ohio, W. D. April 8, 1890.)

## 1. CLAIMS AGAINST UNITED STATES—SOUNDING IN TORT—JURISDICTION.

In an action by a government officer against the United States for indemnity against his liability for damages for the seizure of a flat-boat, if it be viewed as sounding in tort, a demurrer to the petition will be sustained under Act Cong. March 8, 1887, c. 359, § 1, excluding actions of tort from the jurisdiction of the court.

## 2. SAME—EX CONTRACTU—LIMITATIONS.

If the action be considered as on implied *assumpsit*, the demurrer will still be sustained, under subdivision 2 of same section, limiting the bringing of such suits to six years after right accrued, where it appears that the seizure was made more than six years before suit brought, as the liability of the United States accrued then, and not when the owner of the boat recovered damages against plaintiff.

At Law. On demurrer.

*Bateman & Harper*, for plaintiff.

*John W. Herron*, for defendant.

SAGE, J. If this case is to be considered as sounding in tort, the demurrer to the petition must be sustained for the reason that the act of March 3, 1887, under which it is brought, excludes from the jurisdiction of the court cases sounding in tort. If it is to be considered as an action upon an implied *assumpsit*, the demurrer must be sustained for the reason that the right accrued in 1873, and this action was brought in 1889, whereas the act of March 3, 1887, makes it a condition precedent to the right to sue that the action shall be brought within six years after the right accrued for which the claim is made. It is true that the petition alleges the material facts of the action brought by the owner of the flat-boat against the plaintiff, and a notification to the United States attorney in the city of Pittsburgh, and the further fact that he assumed the defense of said suit. It is also alleged that Col. Merrill, the plaintiff's superior officer, was by him notified of said suit. The petition sets forth, also, that a judgment was recovered against the plaintiff, which he was compelled to and did pay on the 6th day of May, 1886, which was within six years of this suit. But, if we are to treat the suit as upon an implied *assumpsit*, the claim accrued against the United States when its officer took possession of and used the flat-boat, in 1873, and was not postponed until 1886, when the plaintiff was compelled to pay the claim made against him. The owner of the flat-boat looked, as he had a right to do, to the plaintiff. The plaintiff had the right either to treat the taking of the boat by the government officer as tortious, and sue him individually, or, waiving the tort, make his claim against the government for the use of the flat-boat. The right of the plaintiff to assert his claim for that use did not depend upon the recovery against him by the owner of the flat-boat.

The case is a hard one, but the plaintiff's only means of redress is through an appeal to congress. The demurrer is sustained, and the petition will be dismissed.

GRAVELEY *et al.* v. GRAVELEY *et al.*

(Circuit Court, W. D. Virginia. April 19, 1890.)

## TRADE-MARKS—INFRINGEMENT—JURISDICTION OF CIRCUIT COURT.

Under Act Cong. March 3, 1881, relating to registration of trade-marks used in foreign commerce, the circuit court has no jurisdiction of a bill for infringement where both parties reside in the state, and it does not appear that the trade-mark is used in foreign commerce.

## In Equity.

B. F. Graveley & Son filed their bill, November 24, 1888, against B. F. Graveley & Co., to recover damages of the defendants for using trade-marks on tobacco manufactured by them so similar to those used by the complainants on the celebrated "Graveley tobacco" as to constitute an infringement, and to enjoin the defendants from the further use of such trade-marks.

*Green & Miller*, for complainants.

*Pentross & Harris*, for defendants.

Before BOND and PAUL, JJ.

BOND, J. This is a bill filed to enjoin the defendants from using the trade-mark of the complainants, which had been duly registered under the act of March 3, 1881. The parties to these proceedings are all citizens and residents of Virginia, so that whatever jurisdiction the court may have to entertain the bill arises not from the citizenship of the parties, but from the fact that the complainants have a right guarantied to them by act of congress, which right is the exclusive use of their registered trade-marks against the claims of all other persons to use the same. If it be admitted that the complainants are entitled to the exclusive use of the trade-marks mentioned in the bill otherwise than by act of congress, a matter which, in our view of the case, it is not necessary to determine, and that the defendants have used them upon tobacco of their manufacture without the consent of the complainants, they do not derive that right of exclusive use from any statute of the United States. Their right under the laws of the United States is the right to use these registered trade-marks in foreign commerce. Act March 3, 1881, (21 U. S. St. at Large, 502.) The bill in this case nowhere asserts that the defendants have used these registered trade-marks in foreign commerce, nor does the proof show a single instance of such use on their part. Under these circumstances, since the parties to the suit are citizens of the same state, and since the only right guarantied to complainants by the laws of the United States is the right to use exclusively their registered trade-marks in foreign commerce, which right it is not alleged the defendants have infringed, it seems the court is without jurisdiction in the matter. The complainants may be entitled to the exclusive use of these registered trade-marks at common law, or under some state statute, and, if they were citizens of different states, might possibly file this bill here; but, under the state of facts above set forth, we think the bill must be dismissed for want of jurisdiction, and it is so ordered.

MUNRO v. SMITH *et al.*

(Circuit Court, S. D. New York. May 5, 1890.)

## COPYRIGHT—INFRINGEMENT—FRONTISPIECE.

The copyright of complainant's pamphlets and magazines containing pictures of "Old Sleuth" are not infringed by defendants' books having a picture of "Old Sleuth, the Detective," on the cover; the variations being sufficient to make the pictures very different.

In Equity. For infringement of copyright.

*Roger Foster*, for plaintiff.

*Archibald L. Sessions*, for defendants.

SHIPMAN, J. This is a bill in equity which is founded upon the alleged infringement of a copyright. The complainant is the publisher of a series of stories called the "Old Sleuth Library," and purporting to be written by "Old Sleuth." Each story is published separately in pamphlet form, and upon the cover is a picture of "Old Sleuth," a detective, in large, old-fashioned clothes, with full, bushy beard, spectacles, fob chain, and baggy umbrella. Each number of the series is copyrighted. The complainant has also published a magazine called "The Fireside Companion," each number of which is copyrighted. In the number issued January 7, 1884, he commenced the publication of a story called "Old Sleuth in Philadelphia," the first page of which contained a similar picture of the detective. Since the date of the plaintiff's copyright, the defendants have been the publishers of a series of stories called, upon the cover of each volume, "The Secret-Service Stories of Old Sleuth and Others," and two or more of them are also represented upon the cover to be written by "Old Sleuth." There is also a picture of "Old Sleuth, the Detective," upon the cover. All these stories, both of the plaintiff and defendants, are written by the same person, one of whose assumed names is "Old Sleuth." The complainant's bill is so drawn as to allege that he had a copyright in the pamphlet or magazine, and also in the print. It is manifest from the certificates of the librarian of congress that the several pamphlets and magazines containing the picture were copyrighted, but that there was no separate copyright in the engraving or print or cut. The picture was a part of the book, and the theory of the complainant is that this copyright was infringed by copying, publishing, and selling copies of this part of his book. I shall assume that this theory is correct, and that, when a defendant republishes an original picture or illustration owned by the complainant, and contained in a book or magazine upon which he has a valid copyright, such right is infringed. The only question in this case is in regard to infringement. The complainant brought a bill in equity against the defendants, before the supreme court for the state of New York, for an injunction against the use of the picture or the phrase "Old Sleuth, the Detective," or the word "Sleuth," upon the ground

that the several words and devices were the complainant's trade-mark. The supreme court held, at trial term, (1 N. Y. Supp. 313,) that the complainant was not entitled to the exclusive use of the name, but that the picture was his trade-mark. The court, at general term, (8 N. Y. Supp. 671,) reversed the judgment, and held that there was no trade-mark in the picture. It is thus obvious that the idea which first presented itself to the complainant's counsel, as it is also the first which would naturally present itself to any one, without a knowledge of the facts on both sides, was that the question was one relating to trade-marks, and it is necessary to dissociate from the case the ideas which belong to trade-mark cases. If the name "Old Sleuth" or "Old Sleuth Series," coupled with a picture of the detective called "Old Sleuth," was a trade-mark belonging to the complainant, the whole representation upon the cover of the defendants' books would be easily held to be an unlawful use of the trade-mark, and, in connection with the use of the words and names, a court might not improperly be led to enjoin against the use of a picture purporting to be a picture of "Old Sleuth." But there is no trade-mark feature in the case, and the question simply is whether the later picture, taken by itself, is a copy of or was borrowed from, or is an imitation more or less close of, the complainant's picture, or is a colorable variation therefrom, so as to be an infringement. That the defendants got the idea from the plaintiff of having a picture to represent the common hero of all the stories, an apparently old countryman, dressed in an old-fashioned garb and style, and having a shrewd face, is probably true. But the two pictures are dissimilar. The attitude, the general expression, and the general appearance of the two figures are unlike, and not only unlike, but very different. The variations are more than colorable. The defendants' picture is not an imitation, but their designer took the plaintiff's idea, and worked it out in a different way. I do not find an infringement, and the bill should be dismissed.

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GILMORE v. ANDERSON *et al.*

*Circuit Court, S. D. New York. May 5, 1890.*

**COPYRIGHT—INFRINGEMENT—ACCOUNTING FOR PROFITS.**

Defendant printed about 17,000 books infringing plaintiff's copyright, sold 1,000 at 23 cents each, gave away 1,000, and sold or exchanged the rest at 56¼ cents each. His account-books had been sold for paper stock before suit began, and many books received in exchange became comparatively worthless through no fault of his, but how many could not be told, nor how much he received from sales of those so received. His expense account showed that he must have received \$6,770, in order to make a profit. *Held*, that the evidence failed to show any profit.

In Equity. On exceptions to master's report, 38 Fed. Rep. 846.  
*Charles C. Burlingham*, for complainant.

*J. H. Parsons*, for defendants.

SHIPMAN, J. The interlocutory decree in this case directed the master to ascertain and report the profits which accrued to the defendants by reason of their infringement of the plaintiff's copyright. 38 Fed. Rep. 846. The master has reported in regard to the defendant Anderson, who was the publisher of the infringing book, that, while the expense side of the account can be ascertained, the proofs do not enable an ascertainment of how much Anderson received from the sales, and there is therefore a failure to prove that he realized any gains, profit, or advantage. The complainant has taken four exceptions to so much of the report as relates to Anderson, the object of each exception being to point out that the master was mistaken in his conclusion.

My study of the evidence has led me to surmise that Anderson made a pecuniary profit from the sales of the book. I have been, therefore, desirous to see if that suspicion or belief can be verified, and if any particular amount of profit can be found by trustworthy evidence, and have reached the conclusion that the master was right, and that the exceptions must be overruled. Anderson's books of account were sold for paper stock before the suit was brought. He printed between 16,000 and 17,000 copies of the Alger book, gave away 1,000 copies, sold 1,000 more at about 23 cents per copy, and sold or exchanged the rest at 56½ cents per copy. How many of these 14,000 or 15,000 copies he exchanged for school-books, which became comparatively worthless, he does not know, and he does not tell how much he received in money from the books which he received in exchange. He says that the sales for money were less than 10,000 copies, and he cannot swear that there were over 6,000 copies; that he exchanged a great many copies for school-books, and a large part of the books taken in exchange were sold at one cent per pound. His expense account can be ascertained with reasonable certainty, but the inability to know what he received for this uncertain number which was exchanged constitutes the defect in the proofs. In the ascertainment of actual profits, these exchanges for goods, which subsequently turned out, through no want of business skill or enterprise in the owner, to be worthless, stand upon the same footing as sales which became uncollectible. If there was any evidence that Anderson could have sold the school-books, if he had acted promptly and with business enterprise, or if the actual market value of the school-books, at the time of the exchange, was known, the case would present a different state of facts. Placing the expense account at the lowest figures which it can reasonably bear, he should have received \$6,770, in order to make a profit. If his cash receipts amounted to \$8,000, he clearly made a profit, for his estimate of the expenses is plainly too large; but there are no adequate means of determining in any reliable manner what sum he did receive. The exceptions are overruled.



## THE J. D. PETERS.

MAZEAS *et al.* v. THE J. D. PETERS *et al.*

(District Court, N. D. California. April 5, 1890.)

## COLLISION—BETWEEN STEAM AND SAIL—EVIDENCE.

A steamer and sloop were approaching nearly end on; the former going 10 miles an hour, the latter 6. The master and watchman of the steamer testified that the sloop was first seen 3 miles distant, and 1 point on their starboard bow, both lights being visible; that the steamer kept her course for 2 or 3 minutes, when, the sloop's red light disappearing, they altered their course one-half point to port, exposing their green light, and kept this course for a few minutes, when the sloop, being about 100 yards away, changed her course, and came up into the wind, exposing her red light; that the steamer stopped and backed, but was struck on her starboard bow by the sloop's port. The three persons on the sloop denied having changed their course. *Held*, that the steamer had not sustained the burden on her to show that the collision was not her fault.

In Admiralty.

Suit in admiralty by J. Mazeas and others against the steam-boat J. D. Peters and the California Navigation & Improvement Company.

*D. T. Sullivan*, for libelants.

*Pillsbury & Blanding*, for claimants.

HOFFMAN, J. On the morning of November 17, 1889, a collision occurred between the sloop Solferino, of the burden of 19.66 tons, and the steam-boat J. D. Peters. The course of the sloop was W. N. W.; that of the steamer, about E. S. E. The vessels were thus approaching each other nearly end on. Each vessel discovered the other at a distance of two and a half or three miles. The sloop was, as stated by the master of the steam-boat, one point on his starboard bow, three miles off. It is obvious that the collision was caused by gross negligence or mismanagement on the part of one or both of the vessels. In all cases of collision between steamers and sailing vessels, the former are presumptively in fault; for it is the right of the sailing vessel to keep her course, and the "duty of the steamer to adopt such precautions as will avoid her." *St. John v. Paine*, 10 How. 557; *The Oregon v. Rocca*, 18 How. 572. In *Leavitt v. Jewett*, 11 Blatchf. 421, Judge WOODRUFF, affirming the decision of BLATCHFORD, J., observes:

"It was the duty of the steamer to keep out of the way of the sailing vessel, which was seen by her, or ought to have been seen by her, at a sufficient distance, and where the room was abundant for any movement which the steamer desired to make for the purpose. She did not avoid the schooner. For the collision which ensued, she is presumptively responsible. The burden of excusing the collision rests upon her. She has attempted such excuse by imputing to the schooner a change of course defeating her own measures, claimed to have been properly taken. Such change of course is denied by the witnesses from the schooner. \* \* \* It is not enough that the steamer has created a doubt upon this sole ground of defense. \* \* \* I am constrained to hold that the defense is not satisfactorily established."

In the language of the cases cited from the supreme court, the defense must be almost conclusively established.

The account given by the master and the watchman of the steamer is substantially as follows: The sloop was first discerned by the steamer on one point on her starboard bow, and distant three miles. The speed of the steamer was about 10 miles per hour. That of the sloop, sailing free, with a strong flood-tide in her favor, was about six miles, probably more. The vessels were thus approaching each other at the rate of something more than a mile in four minutes, as they were sailing nearly end on. At first, when the vessels were about three miles apart, both lights of the sloop were visible. The steamer continued on her course some two or three minutes, when the sloop's red or port light disappeared, leaving only her green light in view. The vessels must then have diminished the distance between them one-half or three-fourths of a mile, leaving them more than two miles apart. Upon the disappearance of the red light, the steamer altered her course about one-half a point to port, exposing her green light to the sloop's green light. The steamer kept on this course, or edging more to port, "for a few minutes;" and "the first thing the captain knew" was that the sloop came right up into the wind, exposing her red light. The steamer instantly stopped and backed, but too late to avoid the collision. The sloop struck the steamer's starboard bow with her own port bow a few feet from her stern. When the sloop made this change of course, she was distant from the steamer, according to the watchman, 100 yards, and according to the captain, 250 or 300 feet. If the sloop had not changed her course, the vessels would, as these witnesses assert, have passed each other, starboard to starboard, at a distance, as the watchman says, of not less than 100 feet. With regard to this account of or excuse for the collision, which the court is asked to accept as satisfactory, it is to be observed: (1) That, by the captain's own showing, the vessels must have been at least a mile apart when the sloop showed her green light. The steamer promptly altered her course to port, thus exposing her own green light. The vessels were thus a mile or more distant from each other, sailing on divergent, or at least parallel, courses. If they continued on these courses "some minutes," I find it difficult to understand how, when the sloop came into the wind, she could have been within 100 yards or 250 or 300 feet of the steamer. Still less how, if she had not come into the wind, the vessels could have passed within 100 feet of each other. (2) To enable her to strike the steamer's starboard bow with her own port bow, as stated, she must, within 100 yards, have made a change in her course of, at the very least, eight points, which seems highly improbable, especially as she was running before the wind, with her main-sheet free, and would have lost the wind, and been obliged to cross the strong flood-tide before getting around far enough to present her port bow to the starboard bow of the steamer. (3) The maneuver attributed to the sloop was not an ordinary fault of seamanship. It betrays gross incompetency, or else bewilderment and total loss of presence of mind. There is no evidence to show that the persons in charge of the sloop were not reasonably competent to navigate their little craft. If they were panic-stricken, and lost their heads, it could only have been through fear of a

catastrophe they considered imminent. If so, the steamer had no right to expose her to such real or apparent danger; and it is almost inconceivable that they could have entertained such apprehensions if the vessels had for "some minutes," and for at least a mile, been sailing, star-board to starboard, on divergent or parallel courses. The nature and extent of the damage sustained by the sloop, and the fact that the steamer was uninjured, seem to show that the sloop was struck by the steamer, and not the steamer by the sloop, as asserted by the claimant's witnesses; and, further, the fact that far more injury was inflicted than could be caused by the impact of two vessels, one of which, by stopping and backing, had lost her headway, while the sails of the other were shivering in the wind, lends additional improbability to the account of the accident given by claimant's witnesses. With regard to the testimony on the part of the libelants, it is enough to say that all of the three persons on board the sloop positively deny having changed her course, or having seen the green light of the steamer until the moment of the collision.

The excuse set up for the steamer in this case is not unfamiliar to the supreme court. In *Haney v. Packet Co.*, 23 How. 291, Mr. Justice GRIER observes:

"But it [the answer] alleges as an excuse that, while the steam-boat and schooner were meeting on parallel lines, the schooner suddenly changed her course, and ran under the bows of the steamer. This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable, and generally false."

In the case at bar, it would not be difficult to suggest an explanation of the collision much more probable than that offered by the claimants. But it is unnecessary. It is enough that the claimants are presumptively liable for the accident, and that the burden of proof is on them to show to the satisfaction of the court that the steamer was not in fault. This they have failed to do. Decree for libelants.

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### THE BAY QUEEN.<sup>1</sup>

#### STANTON *et al.* v. THE BAY QUEEN.

(District Court, S. D. New York. April 9, 1890.)

#### **COLLISION—MUTUAL FAULT—STEAMER AND SAIL-BOAT BECALMED—LACK OF ROW-LOCKS.**

When a small sail-boat lay becalmed, her condition being visible to a steam-boat with a barge along-side, which approached her head on, between the Brothers and Riker's Island, in the East river, and collision ensued between the vessels, *held*, that the steam-boat was in fault for running down the sail-boat; but *also held*, that the latter was to blame for the lack of proper oars and row-locks in place, to aid in getting out of danger in such an emergency. The damages were therefore divided.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. Action for damage by collision.

*Robert L. Stanton*, for libelants.

*Wing, Shoudy & Putnam*, for claimants.

BROWN, J. In the case of *The Plymouth*, 26 Fed. Rep. 879, in the first circuit, it was assumed that the obligations of a tug-boat with a tow towards "a little sail-boat" were the same as towards a larger craft. In the case of *The Missisquoi*, 8 Ben. 6, the libel was dismissed, because the small boat had time to pull out of the way, and did not do so, her duty in that regard "being conceded in the libel." Article 24 of the rules of navigation declares that nothing in the rules shall excuse neglect of "any precaution required by the ordinary practice of seamen, or by the special circumstances of the case." It is certainly the common practice of seamen, and but a reasonable exercise of common sense, that small boats, whether with or without sails, should do something to keep out of the way of impending collision with large and cumbersome vessels, and be provided with the ordinary means of oars for doing so. The libelant's boat was a small craft, about 20 feet long, with a flat bottom, a center-board, two sails, and no jib. Being suddenly becalmed, after the passage of a thunder shower, she was run down, in the East river, between the Two Brothers and Riker's Island, about 5 P. M., by the steamer Bay Queen, which had a passenger barge in tow along-side. The boats were approaching about head and head. The small boat being becalmed, it was plainly the duty of the steamer to avoid her by turning either to the right or the left. Her sails were drooping, her sheets dragging in the water. This was visible at a sufficient distance. The Bay Queen might have avoided her by starboarding more promptly, or by reversing, which she did not do. Seeing that the boat was mainly helpless, the Bay Queen was in fault for running her down. The small boat must also be held to blame for the lack of any ready means of getting out of danger in such emergencies. Had her row-locks been in place, even with the small oars or paddles that she had, I have no doubt the libelants would have turned and rowed her out of danger after they saw that the Bay Queen was not likely to clear her. Even very much larger sailing vessels are in the habit of providing means, and keeping them in readiness, for use to avoid the dangers to which they are liable when becalmed. In the case of *The B. K. Washburn*, 19 Fed. Rep. 788, this court held a schooner becalmed jointly liable for not using such means to avoid collision. Decree for the libelants for half their damages and costs.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. UNITED ELECTRIC RY.  
Co. *et al.*

(Circuit Court, M. D. Tennessee. May 19, 1890.)

## TELEPHONE COMPANIES—ELECTRIC RAILWAYS—INJUNCTION.

In the present state of electrical science, a telephone company cannot maintain a bill for an injunction against the operation of an electric railway to prevent damages incidentally sustained by the escape of electricity from its rails.

(Syllabus by the Court.)

**In Equity.** On motion for an injunction.

This was a bill in equity to enjoin the use of electricity by the street railways of Nashville under any system which makes use of the earth for its return circuit. The complainant is a Kentucky corporation "empowered" by its charter "to construct and operate lines of telephone." It entered the state of Tennessee, claiming a right under section 1535 of the state Code, which provides that "any person or company may construct a *telegraph* line along the public highways and streets of this state, or across the rivers, or over any lands belonging to the state, free of charge, and over the lands of private individuals as hereinafter provided, and may erect the necessary fixtures therefor." The city of Nashville gave its consent to the use of its streets by an ordinance passed in 1879, and in that year complainant established a telephone plant, which it has continued to enlarge and improve to the present time. In 1885 an act was passed by the legislature of Tennessee authorizing both foreign and domestic corporations to "construct, operate, and maintain such telegraph, *telephone*, or other lines necessary for the speedy transmission of intelligence, along and over the public highways and streets of the cities and towns of this state: \* \* \* provided, that the ordinary use of such public highways and streets \* \* \* be not thereby obstructed," etc. In 1888 the city passed another ordinance, confirming complainant's rights to the streets and alleys, as then established, and granting the further right to extend its plant as public needs might require. Under these provisions, complainant built and operated its lines of telephone through the streets of Nashville, now having in use about 1,400 telephones, and 1,300 miles of wire.

Defendants are five street railways, all now operated by electricity, under the Sprague and Thompson-Houston systems, and using a single trolley or overhead wire. Three of these roads were originally incorporated by special acts authorizing them to operate street railways by horsepower. By an act approved March 21, 1887, amending the general incorporation laws, all street railways thereafter organized under the general laws of the state were authorized to propel their cars by electricity. Two of these railways were organized under the general incorporation laws. By another act, approved February 28, 1889, all street railway companies which before that time had operated cars by animal power were empowered to operate the same by electricity, provided the city

gave its assent. Acting under this supposed authority, one of the defendants, the McGavock & Mt. Vernon Company, proceeded to equip a portion of its road with electricity.

Thereupon, and on April 17, 1889, complainant filed its bill in the chancery court to enjoin it. Before the cause was heard, the parties entered into an agreement by which the telephone company agreed to dismiss its bill, to elevate all its wires which might interfere with the operation of the road, to use all means to prevent their wires from coming in contact with the trolley wires of the road, and not to interfere further with the operation of the road; the railroad company agreeing, upon its part, to construct at its own expense a return metallic circuit, for the use of the telephone company, whenever it is ascertained that its service is being injured by electricity generated by the railway company, and to use all necessary precautions to prevent the telephone wires from coming in contact with its own wires. In January, 1890, a similar agreement was made between the telephone company and the City Electric Railway, with a proviso that if, upon a fair trial, the return wire should not protect the telephone company from substantial injury, the parties should be remitted, without prejudice, to their legal rights and remedies as they existed before the agreement was made. The bill charged that the metallic current had not given the relief anticipated, and that complainant was not estopped by its agreement. The *gravamen* of the bill was that the electricity, which is supposed to return to the dynamos by means of the iron rails, scatters through the earth, and is thereby conducted to the wires of the telephone company through various agencies, known as "conduction" or leakage, and this current, being stronger, overcomes the weaker current of the telephone, producing loud, buzzing noises, and wholly preventing, or greatly interfering with, telephonic communication. Besides, the electricity thus conducted acts upon the bells of subscribers when there is no call from the central office, causing them to ring, and also causing a great number of the annunciators at the exchange to fall at one time, so that the operators cannot tell who, if any one, has called. That, if the currents used by the cars were constant and uniform, it would not interfere with the telephones. It further averred that the service was interfered with by *induction*, where a varying current of electricity, conveyed on a conducting wire, will produce in a parallel wire other currents of electricity. The varying current upon the trolley line induces a like current in the parallel telephone wires on the same street, and also, as in the case of conduction, produces the noises and sounds, and rings the bells of subscribers, and throws down the annunciators. The bill also charged that the single trolley was dangerous to life and property. If, by winds and storms, a telephone wire should break, and fall across the trolley, it might be fatal to man or beast to touch it, and dangerous to the lives of those in the telephone exchanges, sometimes causing fire in the houses of subscribers. The bill concluded that all these troubles and dangers would be avoided if defendants would use an entire metallic circuit, or double trolley, properly constructed, and that the same result would follow if complainant

would use a complete metallic circuit for every one of its subscribers; but the latter would nearly double the cost of the plant, and grave difficulties would be encountered at the central office, which it was not certain could be successfully overcome. On the contrary, the single trolley could be converted into a double trolley at a comparatively small expense. That, in consequence of these interferences, subscribers make constant complaints, many threaten to, and some actually do, refuse to pay for their telephones.

The answer did not make an essentially different case, but averred that in February, 1889, all the defendants were sold to the United Electric Railway; that each company had sold its mules, and changed its stabling to an electric car plant; that the entire system furnishes transportation to 15,000 persons per day. It denied that the metallic return wire has failed to protect the telephone, and averred that little or no trouble was experienced on the route so protected. It further alleged that, of the four methods of equipping electric railways, viz., storage batteries, the conduit system, double trolley overhead, and single trolley overhead, all have substantially proved to be failures, except the last. It denied that the complainant was entitled to a monopoly of the earth for its return circuit, and insisted that it should make use either of a complete metallic circuit, or of a device known as the "McCluer Device" for its return circuit.

*Vertrees & Thos. H. Malone*, for complainant.

*East & Fogg, J. C. Bradford, John S. Wise, and John Ruhm*, for defendants.

BROWN, J. We do not care, in this case, to discuss the constitutionality of the act of 1885, or the present obligation or effect of the contract entered into between the complainant and two of the defendant railway companies, under which the latter agreed to furnish proper return wires to the telephone company in order to obviate the difficulties experienced by the escape of electricity from their rails. We prefer to assume that both these parties are lawfully exercising their franchises, and to consider their respective rights and obligations unembarrassed by any previous contracts or understandings. We see no reason to doubt the position assumed by the complainant, that a telephone company is a telegraph company, and that, under its right to construct and operate telegraphs, it was empowered to establish a telephone service. *Attorney General v. Telephone Co.*, 6 Q. B. Div. 244; *Telephone Co. v. City of Oshkosh*, 62 Wis. 32, 21 N. W. Rep. 828.

Complainant, in operating its instruments, connects each telephone with the ground by what is termed a "ground wire," through which the return current of electricity is carried to the earth, and perhaps through the earth, acting as a conductor, back to the telephone exchange. Such return, in some form or other, is necessary to the production of a current of electricity in every case. Defendants, upon the other hand, use a single overhead wire or trolley, suspended over the middle of the track, along which the electric current passes, descending by the trolley rod or

mast through the cars to the motors underneath, and thence to the rails, which are connected together at their ends, and which operate to convey the return current back to the dynamos at the power-house. The evidence, however, establishes the fact that the current does not all return by the rails. Much of it escapes, becomes scattered through the earth, ascends through the ground wires to the telephones, and seriously impairs their operation, by causing a humming or buzzing noise, which drowns the voice of the speaker, and often causes the annunciators in the exchange to fall, and the bells to give false calls, so that it is impossible for the operators to tell which, if any, of its subscribers have called, and, in short, throws the whole system into confusion.

That these evils exist, to the serious detriment of the telephone service, is not denied; but it also appears from the evidence upon both sides that they are not absolutely insurmountable. Indeed, there are but few serious questions of fact in this case, and these turn upon the relative practicability and expense of the several methods of overcoming this difficulty. In solving these questions, we are compelled to bear in mind the fact that the science of electricity is still in its experimental stage; that a device which to-day may be the best, cheapest, and most practicable, may, in another year, be superseded by something incomparably better fitted for the purpose. It is quite possible, too, that the legal obligations of the parties may change with the progress of invention, and the duty of surmounting the difficulty be thrown upon one party or the other, as a cheaper or more effectual remedy is discovered. For example, if it were shown that by the use of a certain device the defendants could control their return current in such a way as not to interfere with the use of complainant's instruments, the law might treat their failure to adopt such measures as negligence in the use of their franchise, and enjoin them, or hold them liable for all damages sustained by the complainant. If, upon the other hand, the difficulty can be better controlled by a device applicable to telephones, it might be incumbent upon the complainant to adopt it, leaving the courts to settle the further question, whether the expense of so doing is recoverable of the defendants. We are thus compelled to consider this case with reference to the present state of the art, and with the possibility, that in another year circumstances may so change as to reverse completely the legal obligations of the parties. Indeed, since the litigation between the telephone companies and the electric railway companies originally began, considerable progress has been made towards a solution of the problem. Let us consider the respective methods now suggested:

1. The double trolley. There seems to be no doubt that if defendants adopt a second trolley wire, the return current might be carried back to the dynamos without coming in contact with the earth at all, and the difficulty be completely overcome. Upon the other hand, we are satisfied from the affidavits that this would not only entail a large expense upon the defendants, but that it disfigures the streets with a complicated net-work of wires, and, wherever there are curves, turn-outs, or switches, renders the road very difficult of operation. There are two



of these double trolley roads in operation in Cincinnati; and they are used to a limited extent in other cities. But the facts that nine-tenths of the electric railways in this country are equipped with a single trolley, and that, in most of the cities where the double trolley was formerly used, including Montgomery, Pittsburgh, Denver, Albany, and Appleton, they have been abandoned, are strong arguments against their practicability. Indeed, it is only where the roads make use of a double track that the double trolley can be made a success. Add to this that, in the numerous cases between the telephone companies and the electric railways which have arisen in other states, the courts have uniformly held the double trolley to be a failure as applied to single tracks, and it would seem that the question could no longer be considered an open one.

2. There seems to be no doubt that the evil may also be remedied by a return wire attached to each telephone, by which the current is carried directly back to the exchange, instead of being dumped into the earth. This, however, is open to the same objection as the double trolley. It is not only very expensive, doubling the cost of the electric plant, but would double the number of wires carried through our streets, already far too numerous for comfort, beauty, or safety. In addition to this, it involves a large outlay and increased complication and expense for the central office; there being not only two line wire terminals to provide for every subscriber, but four terminals to handle for every connection, instead of two, as with the single wire and earth systems. Upon the whole, we deem this to be impracticable.

3. A third device, known as the "McCluer System," remains to be considered. This contemplates the employment of a single return wire upon each route disturbed by the railway service, to which each telephone upon that route is connected, and which operates to complete the metallic circuit. If we are to believe the affidavits of those who are familiar with this device, it affords a perfect remedy for all disturbances produced by leakage or conduction, though there are also slight disturbances produced by induction from parallel wires, from which no complete relief has been discovered by any kind of metallic circuit, unless supplemented by the use of non-inducting cables, and the transposition of wires. This evil, however, is remediable by increasing the distance between the parallel wires, and does not seem to be regarded as a serious matter. It is true, defendants have produced affidavits which tend to throw some doubt upon the utility of the McCluer device, but this doubt seems to have arisen more from the reluctance of the telephone companies to adopt it than from any proven insufficiency. We think we are justified in assuming that the adoption of this device by the complainant would obviate the disturbances now produced by leakage.

The case, then, practically resolves itself into the question, at whose expense shall this change be made? As the testimony tends to show that the introduction of the McCluer device into the telephone service of Nashville would not cost to exceed \$10 to each telephone, the ques-

tion is not vital to the existence of either of these companies. At the same time, as it is one that confronts the telephone and electric railways in every city of the country where both are used, it becomes of great importance. Are the telephone companies, which have the prior right to use the streets, bound to conform their business to the demands of these new-comers, though by so doing they put themselves to large expense? Or are the railway companies bound, as a condition of occupying the same territory, to see to it that, in operating their roads, no incidental damage is done to their neighbors? If the existence of one was absolutely incompatible with the continued operation of the other, it might be incumbent upon us to make a choice between these two great benefactions, both of which will rank among the necessities of modern urban life. But, as we are bound to assume that they can be persuaded to live together in harmony, the case virtually resolves itself into a question of liability for certain damages sustained by the complainant. In this view, it is open to serious doubt whether it is entitled to invoke the aid of a court of equity at all. Conceding that the case made by the bill is one of equitable jurisdiction, still the granting or withholding of an injunction is largely a matter of discretion, and if, upon all the pleadings and the testimony, the court can see that it involves a mere question of dollars and cents, it may well hesitate to stop the operation of these roads by resorting to the harsh remedy of an injunction, especially in view of the fact that defendants are amply able to make reparation. We do not desire, however, to dispose of the case upon this ground.

It would be perfectly competent for us to stay the issue of an injunction, as has already been done in one or two cases, until a reasonable time had elapsed for the ascertainment and payment of these damages; and, as both parties have addressed their arguments to the question of liability, we are disposed to give them the benefit of our views.

We are referred in this connection to a large number of decisions of courts of the highest respectability upon the very questions involved in this case. If these decisions had been harmonious, we should not have hesitated to defer to them; but, as these courts have reached different results, we do not feel like indicating a preference for one or the other. While all are persuasive, none are controlling; and we have deemed it more satisfactory to treat this as an original question, and inquire how far it may be answered by the application of well-settled principles.

We are asked to determine how far a person making a lawful and careful use of his own property, or of a franchise granted to him by the proper municipal authorities, is liable for damages incidentally caused to another; in other words, whether the right of the latter to an injunction does not depend upon something more than the simple fact that he has suffered injury, though his right to an undisturbed use of his own may antedate that of another. It is true that in one case, namely, *Reinhardt v. Mentasti*, 42 Ch. Div. 685, it is said that the principle governing the jurisdiction of the court in cases of nuisance does not depend upon the

question whether the defendant is using his own reasonably or otherwise, but upon the question, does he injure his neighbors? This case lays down a broader doctrine of liability than any to which our attention has been called, but it is sufficient to say in reply to it that nothing which is authorized by competent authority can be treated as a nuisance *per se*. *Transportation Co. v. Chicago*, 99 U. S. 635; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 77; *Easton v. Railroad Co.*, 24 N. J. Eq. 58; *Railway Co. v. Heisel*, 38 Mich. 62; *Davis v. Mayor*, 14 N. Y. 506. We take it to be well settled, so far as persons operating under legislative grants are concerned, that something more than mere incidental damage to another must be proved—something, in fact, in the nature of an abuse of the franchise—to entitle the party injured to an injunction. It is perfectly obvious that there are a large number of instances in which a person may suffer damages without recourse to the offender. Thus, the smoke that fills our lungs, and soils our garments; the dust that enters our dwellings and stores, and damages our furniture; the noxious odors that assail our nostrils; the impure water we are sometimes compelled to drink,—are the necessary penalties we pay for living in cities; but in ordinary cases there is no legal remedy for the evil. In the somewhat flowery language of Lord Justice JAMES, in *Salvin v. Coal Co.*, L. R. 9 Ch. 705:

"If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town, which would drive the Dryads and their masters from their ancient solitudes."

I may expend a fortune in building a handsome house 30 or 40 feet from my front fence. My neighbors upon either side may build theirs upon the line of the street, and completely ruin its market value. In the absence of a prescriptive right on my part, they may wall up my windows, and completely exclude the light, or undermine the foundation of my outer wall so that it crack and tumble down. But, if it be necessary to the beneficial enjoyment of their own property, I have no remedy. *Panton v. Holland*, 17 Johns. 92. There are undoubtedly a large number of cases where persons have been held liable for an infringement upon the maxim, *sic utere tuo ut alienum non lædas*; but, upon examination, they will usually be found to turn upon questions of negligence or nuisance.

1. There is no doubt that every person is bound to the exercise of reasonable care in the use of his own property; and, for any default in that particular, he will be liable to the person injured in an action for negligence. Thus, in *Vaughan v. Menlove*, 3 Bing. N. C. 468, defendant was held liable for negligence in building a hay-rick so near the extremity of his own land that, in consequence of its spontaneous ignition, his neighbor's house was burned, although, in *Higgins v. Dewey*, 107 Mass. 494, this principle was limited to cases where the burning was negligent, or might reasonably have been expected to injure the property of the neighbor. This was the real ground upon which a recovery was permitted

in the leading case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, though the case is often cited for the broader proposition, that the person who, for his own purpose, brings on his land and collects and keeps anything there likely to do mischief if it escapes, must keep it at his peril. This case has not been accepted either in England or in this country without some qualifications. The same rule applies if a man permit a wall which had been negligently constructed to fall upon his neighbor's house, (*Gorham v. Gross*, 125 Mass. 232,) or a chimney to which a gas-light company had fastened a telegraph wire, (*Gray v. Gas-Light Co.*, 114 Mass. 149.) The principle of these cases was also applied in *Tarry v. Ashton*, 1 Q. B. Div. 314, where it was held to be the duty of a person hanging a lamp over the highway to keep it in good repair. This case proceeds, perhaps, as far as any in holding the defendant responsible.

To the same principle is also referable the case of *Coke Co. v. Vestry of St. Mary Abbott's* 15 Q. B. Div. 1, whereby the defendants were held liable for using steam-rollers, in repairing a highway, so heavy that they injured the gas-pipes of the plaintiff. The statement of the case shows that the pipes were laid from 20 to 24 inches beneath the surface of the streets, and that this was a sufficient depth to prevent their being injured by the ordinary travel of the streets, and also by the ordinary mode of repair, if steam-rollers of great weight had not been used. The decision was put by the court upon the express ground that heavier rollers were used than were necessary; and it was said that, if "the defendants were expressly authorized by statute to use steam-rollers of such a weight as necessarily to injure the plaintiff's pipes, the plaintiffs would have no ground of complaint. The case would then be one of *damnum absque injuria*. The same consequence would follow if the defendants were expressly authorized by statute to repair in some way which necessarily required the use of heavy steam-rollers, or other machinery which could not be worked without injuring the plaintiff's pipes."

2. Similar to these are the cases in which persons have been held liable for keeping upon their land anything which operates as a nuisance to their neighbors generally, or to any particular individual. Upon this principle, if a person allows a privy to get out of repair, and the water percolates into his neighbor's cellar, (*Tenant v. Golding*, 1 Salk. 21; *Ball v. Nye*, 99 Mass. 582; *Ballard v. Tomlinson*, 29 Ch. Div. 115; *Cooley, Torts*, 563,) or maintains a mill-dam in an unsafe condition, (*Mayor v. Bailey*, 2 Denio, 433; *Gray v. Harris*, 107 Mass. 492,) or permits injurious accumulations of snow or ice upon his roof, (*Shipley v. Fifty Associates*, 106 Mass. 194,) or permits loud and unnecessary noises, (*Brill v. Flagler*, 23 Wend. 354; *Tanner v. Albion*, 5 Hill, 121,) or carries on a trade offensive to the neighborhood, by reason of dust, smoke, foul odors, or jar of machinery, or otherwise, (*Cooley, Torts*, 600, 601,) he is liable for the consequences. In all this class of cases, the question whether the carrying on of an offensive business is a nuisance or not depends very largely upon the character of the neighborhood, the time it has been carried on without objection, and the prior use of the buildings in the vi-

cinity, as a trade may be adjudged a nuisance in one place, and not in another. *Gilbert v. Showerman*, 23 Mich. 448; *Robinson v. Baugh*, 31 Mich. 290.

A leading case in the federal courts is that of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719. In that case it was held that legislative authority to a railroad company to bring its tracks within the limits of the city of Washington, and to construct shops and engine-houses there, did not confer upon it authority to erect noisy workshops in the immediate vicinity of a church where services had been held several times during the week for a number of years before the erection of the shops. But, in delivering the opinion in that case, Mr. Justice FIELD drew a distinction between nuisances of that description, and a railway through the streets authorized by congress, which, when used with reasonable care, produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, and affords no ground of complaint. "Whatever consequential annoyance may necessarily follow from the running of the cars on the road with reasonable care is *damnum absque injuria*."

3. There are also a few cases which indicate that, even if a man be guilty of no negligence, but is engaged in doing something dangerous in its nature, he is liable for the immediate and direct consequences of his acts. Thus, in *Hay v. Cohoes Co.*, 2 N. Y. 159, the defendant, a corporation engaged in digging a canal, was held liable for blasting rocks in such a way that the fragments were thrown against, and injured, plaintiff's dwelling, upon lands adjoining. It was held that it was liable although no negligence or want of skill was alleged or proved. The doctrine laid down in this case, however, was carefully limited in the subsequent case of *Loose v. Buchanan*, 51 N. Y. 476, in which the owner of a steam-boiler was held not to be liable for damages occasioned by its explosion, in the absence of proof of fault or negligence on his part; and it was said that the defendant was held liable in the *Cohoes Case* upon the ground that its acts in casting the rocks upon the plaintiff's premises were direct and immediate. In the same line is the case of *Cahill v. Eastman*, 18 Minn. 324, (Gil. 292,) in which the defendants were held liable for the consequences of an ordinary spring freshet, without proof of negligence or unskillfulness on their part in the construction and maintenance of a tunnel through which water flowed and damaged the plaintiff's mill. Defendants' liability was put upon the ground that the damages the plaintiff sustained were the direct and immediate result of the defendants' operations on their own land. "The plaintiffs had a right to hold their property free of such a result of the defendants' use of their land." The authorities are carefully collated, and the opinion is a very instructive one. These cases would be apposite, if the defendants had found it necessary, in the construction of their line, to cut the wires of the telephone company, remove its posts, or commit any other direct depredation upon its property.

4. Subject to these exceptions, we understand the law to be well settled that no person is liable for damages incidentally occasioned to another by the necessary and beneficial use of his own property, or of a franchise granted to him by the state. The principle is thus stated by Judge WOODWORTH in *Panton v. Holland*, 17 Johns. 92-99:

"On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others, when there is no just ground for the charge of negligence or unskillfulness, and when the act is not done maliciously."

Illustrations of this principle are plentifully scattered through the reports. It extends not merely to the digging up of ground for a new building, whereby the walls of the next house are injured, (*Panton v. Holland*, 17 Johns. 92-99; *Thurston v. Hancock*, 12 Mass. 220,) but to the burning of fallow land, whereby fire is communicated to adjoining lands, (*Clark v. Foot*, 8 Johns. 329,) to the erection of a mill-dam, whereby water is in part diverted from a lower mill, (*Platt v. Johnson*, 15 Johns. 213,) to the building of a basin or bridge, whereby access to plaintiff's dock is obstructed, (*Lansing v. Smith*, 8 Cow. 148, 4 Wend. 9; *Gilman v. Philadelphia*, 3 Wall. 713,) and even to the pollution of a stream by the discharge of tan-bark from an upper mill, which was suffered to float down upon the mill of the plaintiff, where it was shown to have been the uniform custom of the country to permit it, (*Snow v. Parsons*, 28 Vt. 459.) A distinction is drawn between cases where the pollution of a stream is indispensable to its beneficial use, and cases where the pollution is such as to make it absolutely useless to manufacturers lower down the river. Of the latter class is *Merrifield v. Lombard*, 13 Allen, 16, where the defendant threw vitriol and other noxious substances into the stream a short distance above plaintiff's factory, by means of which the water was corrupted so that it corroded plaintiff's engine and boiler, and rendered them unfit for use. In such cases the court will weigh the circumstances and necessities of the case, and the manner in which the stream has heretofore been used. *Cooley*, Torts, 587. In the case of *Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. Rep. 453, it was held that one operating a coal mine in the ordinary and usual manner may drain or pump water upon his own lands, which percolates into the stream which forms the natural drainage of the basin in which the mine was situated, although the quantity of water may thereby be increased, and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners. It was intimated that the use and enjoyment of a stream of pure water for domestic purposes must, from the necessity of the case, give way to the interests of the communities, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal. It is said, in the opinion of the court, to be "a general proposition, that every man has the right to the natural use and enjoyment of his own property; and if, whilst lawfully

in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*; for the rightful use of one's own land may cause damage to another, without any legal wrong."

The same principle is applicable to the case of a public officer, who, if authorized by law to excavate earth in grading a street, or constructing a tunnel, will not be responsible, in the absence of negligence, for damage to abutting property owners. *Smith v. Washington Corp.*, 20 How. 135; *Transportation Co. v. Chicago*, 99 U. S. 635; *Callender v. Marsh*, 1 Pick. 418; *Radcliff's Ex'rs v. Mayor*, 4 N. Y. 195. In this last case, it is said that an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow. The case of *McCombs v. Akron*, 15 Ohio, 474, in which it was held that a corporation was liable for injuries to plaintiff's property in cutting down and grading a street, is opposed to the great weight of authority, and in a number of cases has been denied to be law. See, also, *Chapman v. Railroad Co.*, 10 Barb. 360. In *Steel Co. v. Kenyon*, 6 Ch. Div. 773, it is said, with regard to the storage of water upon defendant's land, that it was necessary for the plaintiff to show, not only that he had sustained damage, but that the defendant had caused it, by going beyond what was necessary in order to enable him to have the natural use of his own land. In *Attorney General v. Asylum*, L. R. 4 Ch. 146, defendant was held liable for polluting a stream by its sewage, upon the ground that the evil might have been remedied by depositing the sewage elsewhere. Other instances of serious damage, suffered without the possibility of recourse, may occur whenever a rival bridge is authorized to be built across a stream, as was done in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. The building of a new railroad may destroy the value of a turnpike, of a line of coaches, of taverns, public houses, and even of small towns lying along its line. Illustrations are found in *Boulton v. Crowther*, 2 Barn. & C. 703; and *Nichols v. Marsland*, L. R. 10 Exch. 255.

In *Rockwood v. Wilson*, 11 Cush. 226, it is said that "nothing can be better settled than that, if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence." What shall be considered indirect, as distinguished from direct, injuries, is clearly stated in *Railroad Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. Rep. 690, in which a construction was given to a constitutional provision of Pennsylvania securing just compensation by corporations for property "injured or destroyed," as well as "taken." It was held to be confined to such injuries to one's property as are actual, positive, and visible,—the natural and necessary results of the original construction or enlargement of its works by a corporation, and of such certain character that compensation therefor may be ascertained at the time the works are being constructed or enlarged, and paid or secured in advance, as distinguished from indirect injuries to the plaintiff, which were the result merely of a

subsequent operation of its railroad in lawful manner, without negligence, unskillfulness, or malice.

The substance of all the cases we have met with in our examination of this question—and we have cited but a small fraction of them—is that, where a person is making lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. *Hoyt v. Jeffers*, 30 Mich. 181. If, in the case under consideration, it were shown that the double trolley would obviate the injury to complainant without exposing defendants or the public to any great inconvenience or a large expense, we think it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction; but, as the proofs show that a more effectual and less objectionable and expensive remedy is open to the complainant, we think the obligation is upon the telephone company to adopt it, and that defendants are not bound to indemnify it; in other words, that the damage incidentally done to the complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the telephone company has a monopoly of the use of the earth, and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained. We place our denial of an injunction upon the grounds:

1. That the defendants are making lawful use of the franchise conferred upon them by the state, in a manner contemplated by the statute, and that such act cannot be considered as a nuisance in itself.

2. That, in the exercise of such franchise, no negligence has been shown, and no wanton or unnecessary disregard of the rights of the complainant.

3. That the damages occasioned to the complainant are not the direct consequence of the construction of the defendants' roads, but are incidental damages resulting from their operation, and are not recoverable.

The cases involving this principle are almost innumerable; and in our examination of them we are satisfied the great weight of authority bears in the direction we have indicated. As a result, the motion for an injunction must be denied.



## SWEATT v. BURTON.

(Circuit Court, S. D. California. April 28, 1890.)

**EJECTMENT—TITLE TO SUSTAIN—STATE CERTIFICATE OF PURCHASE.**

Recovery in ejectment being only on strict legal title, ejectment cannot be maintained on a state certificate of purchase, which is but a contract for a patent on compliance by the purchaser with its terms, though such certificate is made by the state statutes *prima facie* evidence of title.

Ejectment.

*Wells, Guthrie & Lee*, for plaintiff.

*Frank P. Taylor*, (*T. M. McNamara*, of counsel,) for defendant.

Ross, J. This is an action of ejectment brought by the plaintiff to recover of the defendant possession of certain land which was a portion of the land granted to the state of California as swamp and overflowed land by the act of congress of September 28, 1850. The plaintiff relies for a recovery upon a certificate of purchase issued by the receiver of the state land-office to one Lamberson on the 28th of August, 1884, to whose rights he claims to have succeeded by subsequent assignments and mesne conveyances. It will not be necessary to pass upon the points made and argued by the counsel in the case, for the reason that ejectment cannot be maintained in the federal courts upon a state certificate of purchase, which is but a contract for the sale and conveyance of the land, to be followed by a patent conveying the legal title upon the compliance on the part of the purchaser with the terms of the contract and the full payment of the purchase price. It is true that by section 3514 of the Political Code of California such certificates are made *prima facie* evidence of title, and that by the next succeeding section they, together with all rights acquired thereunder, are made subject to sale by deed or assignment. But it is manifest from the provisions of the California statute upon the subject that, until the issuance of the state patent, the legal title remains in the state, and such is the decision of the supreme court of the state in the case of *Manly v. Howlett*, 55 Cal. 97; and, since it is the established doctrine of the supreme court of the United States that in the federal courts a recovery in ejectment can be had alone upon the strict legal title, it follows necessarily that one holding such state certificate only, cannot maintain such an action in this court, whatever effect may be given in the state courts to the state statute making such certificates *prima facie* evidence of title. In a late case in the supreme court—that of *Langdon v. Sherwood*, 8 Sup. Ct. Rep. 429—the court, in speaking of a statute of the state of Nebraska which declared that the duplicate receipt of the receiver of any land-office that the books of his office show the sale of a tract of land to a certain individual “is proof of title, equivalent to a patent, against all but the holder of an actual patent,” said that, “whatever effect may be given to this statute in the courts of the state of Nebraska, it is obvious that in the circuit court of the United States it cannot be received as establishing the legal title in the holder

of such certificate." It is true that the Nebraska case was one of a derivation of title from the United States, where the existence of the certificate only implied that the legal title remained in the government. But it is just as plain that, in the case at bar, the existence of the certificate only implies that the legal title remains in the state; for, according to the provisions of the state statute in respect to the disposal of the swamp and overflowed lands, the certificate, which is but a contract for the sale of the land, and is issued upon the payment of 20 per cent. of the purchase money, is to be followed by a patent conveying the title when the purchaser has complied with all of the conditions of the contract, and paid the full amount of the purchase money. "The circuit court," said the supreme court in *Langdon v. Sherwood*, "cannot presume that a patent has been issued to the party to whom such certificate was issued, or to any one to whom he may have transferred it. \* \* \* If it never issued, it is obvious that the legal title remains in the United States, and, according to the well-settled principles of the action of ejectment, the plaintiff cannot be entitled to recover in the action at law. To receive this evidence, and to give to it the effect of proving a legal title in the holder of such a receipt, because the statute of the state proposes to give to it such an effect, is to violate the principle asserted in *Bagnell v. Broderick*, 13 Pet. 436, that it is for the United States to fix the dignity and character of the evidences of titles which issue from the government. And it is also in violation of the other principle settled by the cited decisions, that in the courts of the United States a recovery in ejectment can be had alone upon the strict legal title, and that the courts of law do not enforce in that manner the equitable title evidenced by these certificates." To the same effect is *Hooper v. Scheimer*, 23 How. 235; *Fenn v. Holme*, 21 How. 482; and *Sheirburn v. De Cordova*, 24 How. 425, in which latter case the court said:

"By a statute of Texas, 'all certificates for head-rights, land scrip, bounty warrants, or any other evidence of right to land recognized by the laws of this government, which have been located or surveyed, shall be deemed and held as sufficient title to authorize the maintenance of actions of ejectment, trespass, or any other legal remedy given by law.' Hart. Dig. art. 3230. The testimony adduced by the plaintiff, it would seem, would have authorized a suit in the courts of Texas, where rights, whether legal or equitable, are disposed of in the same suit. But this court has established, after full consideration, that in the courts of the United States suits for the recovery of land can only be maintained upon a legal title. It is not contended in this case that the plaintiff has more than an incipient equity. This question was so fully considered by the court in *Fenn v. Holme*, 21 How. 481, that a further discussion is unnecessary."

In view of these decisions, it seems to me clear that there must be judgment for defendant, regardless of the points made by counsel in the case. It is proper to add that, in the case of *Smith v. Mitchell*, 32 Fed. Rep. 680, the point now considered and determined was not brought to the attention of the court. Judgment for defendant.

RAWITZER *et al.* v. WYATT *et al.*

CONNOR v. SAME.

(Circuit Court, S. D. California. April 14, 1890.)

## PLEADING—ANSWER—LIMITED PARTNERSHIP.

Rev. St. N. Y. pt. 2, c. 4, tit. 1, § 7, upon the formation of limited partnerships, requires that an affidavit of one or more general partners shall be filed with the original certificate, stating that the sum therein specified to have been contributed by the special partner was actually and in good faith paid in cash. *Held* that, on a suit to charge a special as a general partner, an answer which, instead of an averment that such sum was paid, alleges that such affidavit was duly filed, is not demurrable, since the affidavit itself, if given in evidence, would be *prima facie* proof of such payment.

At Law. On demurrer to the answer.

*Rothchild & Ach and Brunson, Wilson & Lamme*, for plaintiffs.

*Dooner & Burdett*, for defendants.

Ross, J. In this case the plaintiffs seek to charge the defendant Newhall as a general partner in the firm of C. A. Wyatt & Co., composed of the defendants Wyatt and Newhall, and heretofore existing and doing business in the state of New York. To the complaint, Newhall has answered, and among other things sets up that he was a limited partner, only, in the firm, and that prior to the commencement of this action the business of the firm was suspended, and the firm practically dissolved, by the absconding of Wyatt; that subsequently, and also prior to the bringing of this suit, defendant Newhall commenced an action against Wyatt in the supreme court of the state of New York, in which action a receiver was duly appointed by the court of all of the property and assets of the firm, which receiver qualified, and took into his possession all of its property and assets, which he still holds; that prior to the going into effect of the copartnership, and to the commencement of business by the firm, the respective partners, under and pursuant to the provisions of the statutes of the state of New York providing for the formation of such limited partnerships, executed, acknowledged, and caused to be recorded and published, the certificate required by the statute; and that at the same time each of the partners filed his affidavit, in due form, setting forth that the amount specified in said certificate as contributed by the special partner was actually paid in lawful money of the United States.

The point of the demurrer which has been filed to this defense is that the answer should expressly allege that the contribution of the special partner was paid in, in cash, before the certificate was filed. Undoubtedly such payment must have been made before the protection afforded by the statute could attach to the special partner. But the question now is one of pleading, and the answer of the defendant Newhall seems to me to comply with the requirements of the rule as stated in *Bates' Law of Limited Partnership* at section 199, and in the cases

cited by him in support of the text. It was held by the court in the case of *Bank v. Gould*, 5 Hill, 315, that, the affidavit being a necessary part of the machinery for forming a limited partnership, it was properly given in evidence, along with the certificate and other papers, for the purpose of showing that the requirements of the statute had been complied with, and that, where the papers are regular and sufficient in form, they make out a *prima facie* case for the defendant that the partnership was a limited one, and throws the burden upon the plaintiffs of showing that something was wrong before they could charge the defendant as a general partner. If the affidavit is sufficient proof in the first instance of the fact of payment, it would seem to follow that the allegation of the making of such affidavit is sufficient; for it cannot be that it is necessary to allege a stronger case than it is necessary to prove. The demurrer is overruled. A similar order will be entered in the case of *Connor v. Wyatt and Newhall*, which was submitted at the same time as the present case, and in which the same point arises.

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McKAIG v. NORTHERN PAC. R. Co.

(Circuit Court, D. Minnesota. September, 1889.)

FELLOW-SERVANTS—FIREMAN AND TELEGRAPH OPERATOR.

A telegraph operator employed by a railroad company to give information in regard to the location of trains on the road, and to communicate to the operators on the trains instructions for running them, received by him from the train dispatcher, is a fellow-servant of the firemen on such trains.

At Law. Motion by defendant to instruct the jury to find a verdict for defendant.

The facts in this case are as follows: On November 3, 1886, at 11:15 P. M., there was a collision between an east and a west bound freight train of the defendant, at Tower City, Dak., seven-eighths of a mile east of Tower City station, whereby the plaintiff, a fireman on the west-bound train, was injured, and this action is brought to recover damages for such injuries. The two trains at the time of the collision, and for some time prior thereto, had been running on telegraphic orders emanating from the train dispatcher at Jamestown, to the local operator at Tower City, which method of running said trains had become necessary from the fact that the east-bound train was a special, and was also continually losing time, and the west-bound train was some hours behind time. The stations along defendant's line, as far as are material in this case, are, commencing at the east, Casselton, Buffalo, Tower City, Valley City, and Jamestown. When the east-bound train was at Valley City, the west-bound train was at Casselton, and the train dispatcher at Jamestown, while these trains were at these respective stations, telegraphed orders, which were duly delivered to the trainmen of each train, to meet each

other at Buffalo, and after the delivery of this order to the engineer and conductor of the respective trains each train started on its journey. The east-bound train, however, lost so much time in getting up a heavy grade just east of Valley City that it became necessary to change the meeting point, and place it further west than Buffalo. The orders of the company regulating the movements of trains by telegraphic orders are as follows:

"The general rule to be observed in moving freight trains against each other is to obtain the understanding of the conductor and engineer of the train having the right to the road before running any train against them. If, however, the conditions are favorable for holding freight trains through the operator, and serious delays can be avoided thereby, dispatcher can depend upon the signature of the operator, green signals, and torpedoes, to hold such ruling train for orders at any telegraph station other than the meeting point, and, in extreme cases, trains can be held for each other at the meeting points by putting out red signals and torpedoes 1,000 feet in both directions from the telegraph office in addition to the green signal and torpedoes at the telegraph office. When there is no telegraph office at the meeting point, the red signal and torpedoes must be used for holding at the telegraph office distant from the meeting point."

The train dispatcher at Jamestown telegraphed the operator at Tower City to put out the signals required by the rules to flag and hold the east-bound train for orders, and shortly afterwards said operator telegraphed back to the train dispatcher that the signals were out. The train dispatcher then issued the order changing the meeting place of the trains from Buffalo to Tower City. This order was delivered to the conductor and engineer of the plaintiff's train when it reached Buffalo, and thereupon that train proceeded from Buffalo, expecting to meet the east-bound train at Tower City. Orders were also sent to the operator at Tower City to be delivered to the conductor and engineer of the east-bound train when it reached that point. The east-bound train, however, ran through Tower City without stopping, and collided with the plaintiff's train, seven-eighths of a mile east of Tower City. The negligence charged is that the telegraph operator at Tower City failed to and neglected to put out the signals, as required by the rules of the company, in order to stop said east-bound train, and that the company therefore is liable.

*C. D. & T. D. O'Brien*, for plaintiff.

*J. C. Bullitt, Jr.*, for defendant.

NELSON, J. In this case I am constrained, from my view of the law, to say that the motion made by defendant's counsel must be granted. To entitle the plaintiff to recover under any circumstances, it is necessary for him to show that the injury which he sustained was in consequence of the negligence of the defendant. The collision was due to the negligence of somebody. If it was the negligence of the engineer of the east-bound train, owing to the fact that he was running too fast, so that he could not stop, or he failed to see any signals if any were put out, plaintiff cannot recover, because he was a fellow-servant and co-employee

under the same employer, and the injury was due to the negligence of a fellow-employee in the same employment.

But it is claimed on the part of the plaintiff that the accident was due to the failure on the part of the operator to comply with the orders given him by the train dispatcher, and that his negligence was the negligence of the defendant; or, at least, that the defendant was liable for any injury that was occasioned by a failure on the part of the operator to fulfill his duty. Now, the rule is well settled that any injury occurring to a fellow-servant, through the negligence of another servant engaged in the same common employment, exempts the master from all liability. The best definition I find of a "fellow-servant" is in *McAndrews v. Burns*, 39 N. J. Law, 117. A "common employment" is defined to be "a service of such a kind that in the exercise of ordinary sagacity all engaged in it may be able to foresee, when accepting it, that through the negligence of a fellow-servant it may probably expose them to injury." That is a clear and distinct definition. The definition given and recognized by courts for a long time was that all persons employed by the same employer or master engaged in a common enterprise are fellow-servants, and that any act of negligence done by one of them would exempt the master. One of the limitations to that rule recognized by the courts is that where an employe is placed in charge of the entire operation or of a separate department, either in regard to the entire work or a separate department, with full control of the same, he is a representative of the master, a vice-principal, and for his acts the employer is responsible. As far as railroads are concerned, an example is a general superintendent; he represents the company. So a road-master, a foreman in charge of machine-shops, persons having either entire control of the work and management of it or departments, and heads of departments. Another limitation is that wherever an employer, instead of discharging an absolute duty which he owes to the employe himself, intrusts it to another agent or employe, such agent or employe is not a fellow-servant, within the meaning of the rule of liability for negligence. As an instance of that, the obligation exists that suitable machinery shall be furnished to the employe, and a safe place for the employe to work in. That is an absolute obligation on the part of the employer. If he does not do it himself, but intrusts it to an agent or another employe, and that agent or employe is guilty of negligence in not furnishing suitable machinery, or in not furnishing a proper place for the employe to work in, he represents the employer, and a failure of duty on his part, or want of care on his part, renders the employer responsible for his negligence. Another limitation has been recognized by courts of high authority, and that is where two employes, serving the same employer, are engaged in different classes of work, they are not regarded as fellow-servants or fellow employes. Judge MILLER decided a case (*Gurrah v. Railroad Co.*, 25 Fed. Rep. 258) where a laborer was employed in distributing rails along a track to be used in replacing the old rails. The person managing a switch-engine in the neighborhood, in the same yard, transferring cars in one part of the yard to another, by his negligence injured the laborer, who was distributing these rails in

connection with other laborers under a foreman or boss, and the court held that, inasmuch as the person managing the switch-engine was not transferring cars which were loaded with rails to be used by the laborer in distributing them along the track, he was not a fellow-employee or co-employee with the laborer, and the company was liable for his negligence.

It is claimed that in the *Ross Case*, as it is called, (8 Fed. Rep. 544,) which went to the United States supreme court from this court, (5 Sup. Ct. Rep. 184,) it was held that the fact that one man was subordinate to another, and under his control, made the master responsible for the actions of the person so in authority or control.

I do not think that the supreme court of the United States laid down any such doctrine, and that is the opinion of the present circuit judge of this circuit, Judge BREWER, and he has declined to recognize it in this circuit court. See *Howard v. Railroad Co.*, 26 Fed. Rep. 837.

In the *Ross Case*, Judge FIELD's opinion was confined exclusively to the case in hand,—the negligence of the conductor; and while he reviewed the authorities in regard to the question of fellow-servant, and defined the limitations to the general rule which existed, it cannot be said that the court intended, and I think it expressly says that they did not intend, to decide any further than that decision goes; and that is, that the conductor was the representative of the railroad company in the management and control of that train.

In this case it is claimed that the act which the telegraph operator at Tower City was to perform was an act which the employer, under his obligation to the employe, was required to perform; that it was his act; and that the telegraph operator, in the discharge of his duty in performing that act, represented the company; and that an omission on his part to perform that act was the omission of the railroad company. I do not think this case comes within that limitation. The telegraph dispatcher of that department at Jamestown undoubtedly represented the company, and if he had been guilty of any negligence the company could be held responsible. But he was guilty of no negligence. He telegraphed to this operator, and received an answer back that everything required to be done in order to stop the east-bound train had been done, so that the negligence would be the negligence of the telegraph operator. Is the telegraph operator a fellow-employee with the fireman who was injured on the west-bound train? It is well known, under the rules of the company, that the purpose of his employment was to give information with regard to the location of trains upon the road, and also to communicate any instructions to the operators of these trains how to run, and when and where to stop and start, so that, as far as the operators of these trains were concerned, he was connected with the operation of them. He was instructed by the train dispatcher to take steps to inform the persons operating the west-bound train to stop and meet the east-bound train at Tower City.

The engineers and firemen of the east and west bound trains were in the same common employment, having the same object in view, and so was the telegraph operator at Tower City, who, under his duty and the

orders which were sent to him, was required to communicate information to the engineer of the east-bound train how to run and what to do. He was a co-employee with them in the same common employment—common service—of operating both trains at that time, and, within the definition of who are “fellow-servants” and who are “co-employees,” I think he comes within that rule. So that, as the case now stands, even if the jury should find sufficient evidence tending to show that the telegraph operator failed in his duty, although he states that he had performed it, yet, under the rule of law as I have announced it, the plaintiff cannot recover. The negligence of the telegraph operator was not the negligence of the railroad company.

The motion must be granted. Ordered accordingly.

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UNITED STATES *v.* WINDMULLER *et al.*

(Circuit Court, S. D. New York. April 29, 1890.)

CUSTOMS DUTIES—“WOOD AND WOODEN WARES”—GUN BLOCKS.

Under Act Cong. March 3, 1883, prescribing rates of duty on wood and wooden wares, gun blocks, which are not “rough-hewn or sawed only,” but are planed on two sides, are subject to an *ad valorem* duty of 35 per cent.

At Law. On writ of error from district court.

*Edward Mitchell*, for the United States.

*Hartley & Coleman*, for defendants in error.

WALLACE, J. The provisions of Schedule D of the tariff act of March 3, 1883, in prescribing rates of duty to be collected upon wood and wooden wares, make a plain discrimination between articles that are hewn and sawed, or sawed only, and those that are planed on one or both sides. Unless gun blocks are “rough-hewn or sawed only,” they fall within the classification of “manufactures of wood not specifically enumerated or provided for,” and are subject to an *ad valorem* duty of 35 per centum. The gun blocks imported by the defendants in error were made from planks first sawed to get the proper thickness of lumber, and then passed under a planing-machine, after which they were cut from the planks in the form of the design marked out in pencil on the planed surfaces of the planks. Thus, when imported, they were planed on both sides, and were a manufactured article in a crude form. The court below erred in instructing the jury to find a verdict for the defendants. Such an instruction could only have been warranted by evidence showing that the gun blocks were rough-hewn or sawed only, and the testimony was all the other way. The judgment is reversed, and the case remanded to the district court for a new trial; costs of this court to be paid by the defendants in error.



ELECTRIC GAS-LIGHTING CO. *et al.* v. FULLER *et al.*

(Circuit Court, D. Massachusetts. May 2, 1890.)

## PATENTS—NOVELTY—ELECTRIC GAS-LIGHTING APPARATUS.

In patents No. 225,071, to Henry F. Packard, and No. 232,304, to Frank V. Sanford, for improvements in electric gas-lighting apparatus, the claims consisted of a combination of a gas-burner, a fixed electrode, a ratchet, a pawl, a spring, a lever pivoted loosely on the stem of a stop-cock, and having two arms, to one of which was attached an elastic contact point, and stop-pin; the combination being so arranged as to open and close the gas passage to the tip at each alternate movement of the lever, and, conjointly with such opening, to ignite the gas by an electric spark, generated by such movement,—devices which should, without actuating the gas-cock, repeat the electric spark by the return movement of the opening devices to their normal position for further use. *Held* that, though some parts of the mechanism were old, the combination was new and useful, and the invention was patentable.

## In Equity.

*Causten Browne, Walter D. Edmonds, and Edward P. Payson, for complainants.*

*Livermore, Fish & Richardson, for defendants.*

COLT, J. This is a bill in equity, brought for the infringement of letters patent No. 225,071, granted to Henry F. Packard, and No. 232,304, granted to Frank V. Sanford, for improvements in electric gas-lighting apparatus. The patents relate to that form of electric gas-lighting where the burner is operated by hand, and which does away with the use of matches. Packard says in his specification:

"My invention consists in certain novel devices, hereinafter fully described, by means of which the gas is turned on by pressing or pulling down and then releasing a lever fitted loosely to the stem of the cock, and thereby causing a vibrating arm to sweep past the tip of the burner; also, in the combination, with the said devices, of an electric contact-point fixed upon the end of the said vibrating arm, and of a fixed electrode located in close proximity to the orifice from which the gas issues, one of the said electrodes being insulated from the burner, and which, by the action of the said devices, are caused to make and break contact when the gas is turned on, thereby producing an electric spark and igniting the gas."

The claims relied upon are the third and fourth, which are as follows:

"3. In combination with a gas-burner, A, and a fixed electrode, n, the ratchet, D, pawl, h, spring, F, lever, E, pivoted loosely upon the stem of the cock and having two arms, f and g, to the latter of which is attached an elastic contact-point, and stop-pin, k, as and for the purposes set forth.

"4. In an electric gas-lighting apparatus, in combination with devices constructed and arranged to open and close the gas-passage to the tip at each alternate movement thereof, and, conjointly with such opening to ignite the gas by an electric spark generated by such movement, devices which shall, without actuating the gas-cock, repeat the electrical spark by the return movement of the opening devices to their normal position for further use, substantially as described and shown."

The Sanford device is substantially like the Packard, with the addition of a chain which is attached to the arm of the lever. By pulling the

chain with the hand, the burner is operated. The apparatus covering both of the patents is called the "Packard-Sanford Burner," and it appears to have been the first burner of this class which obtained any large degree of commercial success. The defence mainly relied upon is that there was no invention in what Packard did, in view of the state of the art at the time. It is not denied by the complainants that every element covered by the claims of the Packard patent may have been old, but it is said that they were never so combined before, and that the result is a great improvement over all prior devices of this class. The complainants insist that it is by taking one element from one prior patent, and another element from another, that the defendants seek to destroy this patent; and, in answer to this position, they cite the reasoning of the supreme court in *Parks v. Booth*, 102 U. S. 96, where, in stating the rule as to anticipation of a patented combination, the court says:

"Where the thing patented is an entirety, consisting of a separate device or of a single combination of old elements incapable of division or separate use, the respondent cannot make good the defence in question by proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another, and so on indefinitely, and from the whole or any given number expect the court to determine the issue of novelty adversely to the complainant."

The constituents of the Packard gas-burner are a fixed electrode; a stop-cock with one way or several ways; a ratchet rigidly secured, so as to move with the stem of the cock, and having four teeth for a one-way stop-cock, and a proportionably increased number of teeth according to the number of ways through the cock; an angle-lever fitted loosely upon the stem of the cock, one of its arms for operating by hand, and the other extended so as to carry an electric contact point against and past the electrode fixed at the burner tip when the first arm is depressed; a pawl attached to the lever to engage with the ratchet; a spring to retract the lever when released after being depressed; and a stop-pin to limit the movement of the lever. To light the gas, it is necessary to pull down the lever-arm once, whereby the pawl engages with and turns the ratchet, which opens the valve, and admits the gas through the orifice, while the other lever-arm sweeps past the contact point across the fixed electrode, making and breaking the circuit, and thereby producing an igniting spark. Upon releasing the arm, the spring will return the lever to its position, making another spark on its return, and, the pawl not engaging with the ratchet on its return, the gas will be left burning. To extinguish the gas, a single pull will revolve the plug so as to close the cock, and the spring will return the lever to its position. No one of the prior devices referred to by the defendants discloses the combination of elements embraced in the Packard patent. Those devices, at most, contained but a part of the Packard mechanism; and, if practically operative, they seem to have been of doubtful utility. To have constructed the Packard apparatus, and so make a practical and useful burner, I think showed invention. The Smith patent, No. 20,305, shows a ratchet wheel fixed to a gas-cock, a lever moving freely on the gas-cock,

a pawl which engages the ratchet, and an arm carried by the lever to the tip of the burner; but it does not show that the teeth of the ratchet are proportioned to the ways through the cock. Nor is the curved magnet of Smith, pivoted at its center and carrying a rod, the two-armed lever of Packard. The Smith arm is not carried past, but only up to the burner tip, and, from all that appears, must be moved forward several times to turn on or off the gas. There are also other differences between the two devices. The Tirrell patent, No. 232,661, bears a closer general appearance to the Packard apparatus. The date of the Tirrell patent is subsequent to the Packard, but it appears that the Tirrell invention was prior in point of time. But in the Tirrell patent there is missing the ratchet, the pawl, the spring, and the stop of Packard. It is said that all Packard did was to apply the ratchet and pawl, which were old, to the Tirrell structure, and that this was not invention. But he did something more than this. We must take the combinations in their entirety; and, so viewed, I do not think the Tirrell invention destroys the Packard patent. It is clear that the Packard device is a great improvement over Tirrell's, and that the combination of elements employed is different. For the same reason, and without entering into the specific distinctions between the two structures, the Heyl patent, No. 58,943, does not anticipate Packard. I find in none of the prior devices the combinations referred to in the third and fourth claims of the Packard patent; and, recognizing the prior state of the art, I think it called for the exercise of the inventive faculty, as distinguished from mere mechanical skill, to produce the Packard burner. Upon the question of infringement I have no doubt. Decree for complainants.

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STANDARD OIL CO. v. SOUTHERN PAC. CO. *et al.*

(Circuit Court, N. D. California. March 31, 1890.)

**1. PATENTS FOR INVENTIONS—PATENTABILITY—AGGREGATION—IMPROVEMENT IN OIL-CARS.**

Letters patent No. 216,506, granted to M. Campbell Brown on June 17, 1879, for an improvement in oil-cars, consisting in the division of the car-space into two or more compartments, each end compartment containing an oil-tank, the partitions between all the compartments being removable, and readily adjustable, are not void as being a mere aggregation of devices, since they obviate the necessity of hauling back empty tank-cars, thereby cheapening transportation.

**2. SAME—ACTION FOR INFRINGEMENT—PRACTICE.**

Where the question of the validity of a patent is doubtful, a demurrer to a bill for its infringement will be overruled, and the question reserved for further consideration on final hearing.

In Equity. On demurrer to bill.

This suit was brought by the Standard Oil Company against the Southern Pacific Company and Whittier, Fuller & Co., to restrain the infringement of letters patent No. 216,506, issued to M. Campbell Brown on

June 17, 1889, for an improvement in oil-cars. In the specification it was said:

"My invention relates to cars, and especially to that class of cars designed for transporting merchandise and oil or other liquids; and it consists in the parts and combination of parts hereinafter described and claimed, whereby oil or other liquids may be safely transported in the same car with miscellaneous merchandise. The object, as briefly above stated, of my device is to produce an improved form of car for the transportation of oils and liquids in bulk, which shall also be adapted for the transportation of ordinary merchandise on roads where a load of oil or liquid cannot be obtained on return trip, thus obviating the necessity of hauling empty tank-cars over long distances, as is now commonly done; and to this end the construction of the ordinary freight-car is modified as follows: The car-space is divided into two or more compartments, but for the purpose of the present specification, we will suppose it to be divided into three. The central compartment would embrace about two-thirds of the entire length of the car, and is designed and adapted for ordinary storage, and for this purpose may be constructed in any proper manner. The two end compartments occupy each about one-sixth of the entire length of the car, are located in the ends thereof over the trucks, and are designed and constructed to contain metallic tanks, which tanks are adapted for safely containing and transporting oil or other liquid."

It further appeared from the specification that partitions were provided between the compartments, extending from floor to roof, which were made removable and readily adjustable: that the floor of the central compartment was made level, while that of each end compartment was made slanting so as to afford reliable drainage: that the bottoms of the oil-tanks were made inclining, so as to fit on the bottoms of their compartments, and from the lowest point of each was a discharge-pipe: a filling-in opening was provided at the highest point on the top of the tank, which was also made on an incline, and this opening was made to register with an opening in the car-top. The claim of the patent was as follows:

"A car subdivided into two or more compartments, each end compartment containing an oil-tank, said tank constructed with an inclined or self-draining bottom and resting upon a floor formed in counterpart thereto, said tank also having a tapering or inclined top, with a filling opening placed at or near its highest point and in line with a filling opening in the car-top, and there being a removable partition separating said tank from the next adjacent compartment, all combined substantially as set forth."

*Langhorne & Miller and Pillsbury & Blanding*, for complainant.

*Frank Shay*, for defendant Southern Pacific Co.

*John L. Boone*, for defendants Whittier, Fuller & Co.

Before SAWYER, Circuit Judge.

SAWYER, J., (*orally*.) I have looked over the question in this case. The main proposition raised on demurrer is, whether this patent presents a case of a mere aggregation of devices instead of a combination, which would produce some common result. It lies very nearly on the border line under the various rulings of the supreme court. I am not prepared to say that there is not something more than an aggregation, at all events upon demurrer. It is true that the carrying of oil one way

does not co-operate directly with the performance of carrying merchandise the other way. But do not the two co-operate directly in the performance of carrying merchandise both ways? Do not the two co-operate to produce a common result, that is a reduction of the cost of the transportation of oils by successive acts performed in different parts of the service? The result attained is a carriage at a much less cost. It saves the dead loss of hauling empty cars one way. In many combinations, each single operation by itself is not affected by the following or subsequent operations, but they all constitute one continuous operation and end in a common result. Is not that the nature of this case? One way oils are carried by these compartment cars, arranged expressly for the purpose of carrying oil, and then on the return voyage they carry other merchandise, in the intermediate compartments combined with the others, instead of hauling back empty cars. Each carriage, considered by itself, is a separate performance, but what is the result? The result is a much cheaper transportation of the oil. Is not that a common result? And does not each carriage, though performed by itself, co-operate to produce that common result? As I said before, it lies very nearly on the border line of these cases which the supreme court have held to be a mere aggregation. In illustrating that very point the supreme court in one case said, speaking of the effect of a watch-stem operating, also, as a key to wind the watch, which performed the office of holding and carrying the watch, and also, the office of winding the watch, in distinguishing this from aggregation, the court says:

"The office of the stem is to hold the watch or hang the chain to the watch; the office of the key is to wind it. When the stem is made the key, the joint duty of holding the chain and winding the watch is performed by the same instrument, a double effect is produced, or a double duty performed by the combined result. In these and numerous like cases the parts so co-operate in producing the final effect, sometimes simultaneously, sometimes successively. The result comes from the combined effect of the parts, not simply from the separate action of each, and is, therefore, patentable."

Now, here, with these cars—they carry oil one way, and carry merchandise the other way. They are successive operations, but they operate to cheapen the transportation, and in this sense does it not come within the illustration of the watch-key? It saves the operation of hauling the empty car one way at an expense without any contributory compensation. I am not prepared to say at present on demurrer that the arrangement does not contribute to the common result of cheapening transportation and am not prepared to say that the arrangement is not patentable. I shall therefore overrule the demurrer, and reserve the question for further consideration if counsel desire, when the testimony all comes in, and I have the full case before me.

*Mr. Boone.* Does your honor take into consideration the fact that the result was not new?

*The Court.* Yes. I do not know but that it is new. If the result is the cheapening of transportation of oils, that result must be new.

How can it cheapen if it does not do something which had not been done before? But, as I said before, I shall reserve it for further consideration. If the same oil could never have been carried before at so low a price the result was, necessarily new. I do not know but what the result is new with reference to the transportation of oil.

*Mr. Boone.* I think the patent itself says no, that it is not new.

*The Court.* If it cheapens it must do something not done before. A contrary view would involve a contradiction of terms. I shall at all events, overrule the demurrer. Should counsel desire to further present the question, I will consider it on the further hearing. As I said before, it lies very near the line between an aggregation, and invention as illustrated by the decisions of the supreme court, and it is not very easy to determine on which side it falls.

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COVERT v. SARGENT.

(Circuit Court, S. D. New York. April 28, 1890.)

**INFRINGEMENT OF PATENTS—TREBLE DAMAGES—PROFITS.**

Rev. St. U. S. § 4921, which allows a court of equity to treble the recovery of damages formerly recoverable in actions at law, in suits for infringements of patents, does not authorize an increase in the recovery of profits realized from the infringement, since such profits were not recoverable at law. Following *Campbell v. James*, 5 Fed. Rep. 807.

In Equity.

*W. H. King*, for complainant.

*John K. Bench*, for defendant.

WALLACE, J. The statute (Rev. St. U. S. § 4921) does not confer authority upon a court of equity to treble a recovery of profits decreed against the infringer of a patent, but distinctly discriminates between the profits which are recoverable in a court of equity and the damages which were formerly recoverable in actions at law only, and confines the power of increasing the recovery to the latter. The point has been expressly decided in this court. *Campbell v. James*, 5 Fed. Rep. 807. Until jurisdiction was conferred upon the circuit courts by statute to decree damages in suits in equity, (Act of July 8, 1870, § 55,) they could only decree profits in such suits. *Elizabeth v. Pavement Co.*, 97 U. S. 138. When such jurisdiction was conferred, the power was circumscribed by explicit language to cases in which it could be exercised by courts of law in actions upon the case. Courts of law could award damages, but not profits. *Packet Co. v. Sickles*, 19 Wall. 611; *Burdell v. Denig*, 92 U. S. 716. As the complainant has not recovered damages, he must be content with such indemnity for the violation of his rights as he will receive by a recovery of the profits which the master has found were realized by the defendant.

THE PROCEEDS OF THE GRATITUDE.<sup>1</sup>

BOURDON v. THE PROCEEDS OF THE GRATITUDE and nine other cases.

(District Court, S. D. New York. April 25, 1890.)

## 1. MARITIME LIENS—SUPPLIES—VESSELS PLYING IN HARBOR—PRIORITY.

Liens for supplies furnished to vessels making short trips about the harbor allowed their priority for 40 days.

## 2. SAME—DAMAGES FOR NEGLIGENT TOWAGE—PRIORITY.

Liens for supplies, by the long-prevailing maritime law, take precedence of a lien for damage to cargo, on the same voyage, and similarly to damage arising from negligent towage on the same voyage.

## In Admiralty:

The steam-tug *Gratitude*, belonging to this port, was libeled for supplies by the Communipaw Coal Company, and by the Hoboken Coal Company, on August 26, 1889. She was arrested by the marshal on August 29th, and sold on the 3d of October, 1889. The net proceeds, after defraying the expenses of sale and the marshal's fees, were paid into the registry of the court, amounting to \$3,343.72. In all, 10 libels were filed against the tug, or her proceeds. The claims, as allowed, amount to \$4,171.95. Upon the libel of Bourdon there was found due \$452.32, including costs. His claim was for damages incurred through the negligence of the tug in towing his vessel on August 28, 1889, two days after the first libels were filed. Two libels were for wages; the rest were for materials, repairs, supplies, and labor furnished to the tug. More than two-thirds of the amounts of those items were over a year old.

*Carpenter & Mosher*, for libelant.

*Alexander & Ash*, for lienors.

BROWN, J. The final reason given for the decision in the case of *The R. S. Carter*, 38 Fed. Rep. 515, affirmed, 40 Fed. Rep. 331, a tug which made daily trips about this harbor, is that "the rule extends [unduly] the duration of the liens of material-men," so as to destroy the security of the damage liens. There the supply liens amounted to \$1,072. All arose on previous voyages or trips from nearly two to seven months before the trip on which the collision lien accrued, except the small sum of \$26; and, if allowed priority, they would have absorbed the whole fund, and they were postponed to a lien for collision with an independent vessel on the tug's last voyage. The present case is not like that, which was one of damage done *in invitum* to an independent vessel. This is a case of damage arising by negligence under a voluntary contract of towage. Towage damage, as respects the lien for negligence, is like cargo damage. It is manifestly immaterial whether the case is one of cargo taken on board, or towed along-side, or on a hawser. The other reasons given for the decision in the case above cited have no application to liens for damage to cargoes or to tows. The rank of a lien, moreover, does not depend

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

on the form of pleading to enforce it. It is a part of its character and quality at its inception, and depends on the facts out of which it arises. But the reason above quoted for shortening the *duration* of the priorities of supply liens as affecting the security of all damage liens arising on *subsequent* voyages or trips is a sound one, and is applicable by analogy to this case, though a case of voluntary relation between the parties.

The general maritime law adjusts all liens by the voyage. By this law, as applied everywhere and without exception since the ordinance of Louis XIV., more than two centuries ago, supply liens have been held to be superior in rank to liens for damage to cargo on the same voyage, wherever such liens have been recognized at all. By similitude they are therefore superior to towage damage. The anomalous law of England on the subject of liens has little or no application. No damage liens are there recognized except for collision, and no lien in favor of material or supply men except by bottomry. The statements of recent English text-books, as to priorities, are not warranted by the English adjudications, and are contrary to the universal continental authorities, and to the priorities of all other maritime nations. *The Young America*, 30 Fed. Rep. 794-800.

By the general rule, however, the priority of liens continues only till the next voyage. The liens connected with every new voyage start with a priority over all former ones after the ship has sailed, if there has previously been opportunity to enforce them. A further continuance of the original priority of supply liens diminishes the security of liens for damage to cargoes or to tows accruing on subsequent voyages. The principle of the decision first above cited requires, therefore, that the long continuance of such priority beyond the voyage to the extent heretofore allowed since the case of *The J. W. Tucker*, 20 Fed. Rep. 129, decided in part with a view to harmonize with decisions in other districts, should be much reduced, so as not to violate the general intent and provision of the maritime law as to the protection it is designed to afford to damage claims as they arise on successive voyages. If the general maritime rule, however, were applied literally to the daily or hourly trips of harbor tugs, treating such trips as voyages, liens on them would be practically disallowed altogether, since business could not be carried on with daily libels. In harbor cases, therefore, unless liens for supplies are to be practically abolished altogether, the letter of the general maritime rule cannot be followed, but its general spirit and purpose only. This plainly is to give the ship a short credit, to enable her to earn her freight, to collect it, and pay her bills. The settled practice in this country has sustained these liens in harbor cases for a time. In *The Frank G. Fowler*, 17 Fed. Rep. 653, the priority for a damage lien on towage was continued for 19 days, during a period of daily voyages. But it is an anomaly that a European steamer, which is here but a short time, should shift these priorities with every voyage, *i. e.*, every 5 or 6 weeks, while the original priority on a tug-boat, which remains here, and is amenable to process practically all the time, should continue for as many months or longer.



I think the time allowed for retaining priority in these harbor cases may be justly reduced to 40 days. That will give the short credit incident to the usual rendering of monthly bills, and 10 days more for settlement, or libeling the boat in case of non-payment. It accords in some degree with the period of modern Atlantic voyages; it does not exceed the time ordinarily enjoyed by the ship in the ante-steam period; and it is short enough not to imperil, as a rule, the security, or the partial security, afforded to damage claims, which the maritime law designs also to protect, though subordinately to contract liens on the same voyage, according to the universal practice (except under peculiar circumstances) of at least the last 200 years. The long extension of time heretofore given has led to evils and abuses here, which observation satisfies me ought to be corrected by a nearer approach to the general maritime rule; and the time limit of 40 days, after which such liens will be held to lose their priority as regards any liens arising on a subsequent voyage, or trip, will, I think, subserve all that necessity and that encouragement of commerce for which maritime liens have been created, and for which they are preserved; and that time will not ordinarily or substantially prejudice damage liens, which are of a lower rank, beyond that inferiority which for centuries has been assigned to them as *non-beneficial liens*. The time limit is, indeed, an arbitrary limit; and so is the season limit, or any other limit that can be adopted for harbor tugs consistently with the existence of such liens at all for any practical use. Any other rule than the voyage rule must be arbitrary, and that rule would leave no practical security whatever.

In the above cases there will be paid (1) seamen's wages; next, (2,) supply liens arising within 40 days before August 28, 1889, on which day the towage lien for damage accrued; next, (3,) the lien for damage in towing; next, (4,) the residue to be divided *pro rata* among the remaining claims for supplies. The costs are allowed with the claims.

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### THE ENERGY.

(Circuit Court, D. Massachusetts. April 28, 1890.)

#### COLLISION—MUTUAL FAULT.

Between 8 and 9 o'clock on a foggy night the schooner M. and the brig E. collided on an exposed and frequented part of the ocean, sinking the M. Neither vessel had a proper fog-horn sounded by mechanical means. The wind was southerly, and the M. was sailing close-hauled on the starboard tack, S. S. E. The E. was sailing on the port tack, N. N. W., six knots an hour. No horn was heard on the M., but on the E. a horn was heard just as the green light of the M. showed on the starboard bow, and the wheel was starboarded. The M., though having the right of way, luffed across the bows of the E. On the M. the skipper and nine men were below; the only men on deck being the man at the wheel, who had had but little experience, and the lookout, who also had charge of the navigation and the duty of sounding the horn. *Held*, that the damages should be divided.

In Admiralty

*Frederick Dodge*, for libellant.

*C. T. Russell, Jr.*, for claimant.

NELSON, J. This collision between the fishing schooner *Monmouth*, of Gloucester, and the British brig *Energy*, occurred about 10 miles to the eastward of Highland light, between 8 and 9 o'clock on the evening of July 30, 1887, in a thick fog. The wind was south-westerly. The *Monmouth*, bound out on a fishing trip to George's banks, was sailing close-hauled on the starboard tack, and steering S. S. E. The *Energy* was on a voyage from Porto Rico to Boston, with a cargo of molasses. She was sailing on the port tack, with the wind abast the beam, and was heading N. N. W., directly opposite to the course of the *Monmouth*. On the *Energy*, the sound of a fog-horn being heard ahead, and immediately after the green light of the *Monmouth* showing on the starboard or lee bow, the wheel was starboarded to pass on the starboard side. Had the *Monmouth* held to her course, as she ought to have done, having the right of way, they would have gone clear. But, instead of keeping her course, she luffed across the bows of the *Energy*, and hence the collision. The *Monmouth* filled and sunk immediately, her men escaping on board the *Energy*. The *Energy* also suffered some injury.

There was an attempt made on the part of the *Monmouth* to prove that she was to the windward of the *Energy*, and that it was the latter's luff, and not her own, that was the cause of the accident. The man on the lookout deposed that the first he knew of the approach of the *Energy* was seeing both her lights over the port or lee bow. Upon this point I have no hesitation in deciding in favor of the *Energy*. The only men on deck on the *Monmouth* were the lookout and the man at the wheel, the latter a seaman of little experience. The former, in addition to his duties as lookout, had the sole charge of the navigation of the schooner, and had besides the duty of sounding the fog-horn. The skipper and nine other men were below. This was virtually leaving the vessel without any lookout, and was of itself bad navigation, and sufficient to condemn the *Monmouth*. On the *Energy* the mate's watch was on deck, consisting of the first mate, a man at the wheel, and another on lookout. The master was also on deck. All appear to have been alert, and the master, mate, and lookout were in positions to observe the approach of the *Monmouth* and her bearing. Their testimony that the *Monmouth* was to the leeward of the *Energy* is much more credible than that of the lookout of the *Monmouth*, who deposes that she was to the windward.

It was proved with sufficient certainty that the speed of the *Energy* was not moderate. She was sailing with the wind between two and three points abast the beam. The wind was a good moderate breeze, and the sea smooth. She had all sail set. Her master deposes that she was going five or six knots. I think her speed may be safely taken as something in excess of six knots. This would not be moderate speed in the case of a steam-ship, in an exposed and frequented part of the ocean, in a thick-fog, and I see no reason why it should be in the case of a sailing ship.

Both vessels were without an efficient fog-horn, sounded by a bellows or other mechanical means, as required by the international sailing regulations. I decided in the recent case of *The Catalonia*, (not reported,) and also in two other cases, that neglecting to have on board the regulation fog-horn was a fault in a sailing ship in a collision in a fog, unless it was shown with certainty that the omission could not have contributed to cause the collision. No such proof is furnished here. Both vessels sounded a common fog-horn, blown by the breath; but the fog-horn of the *Energy* was not heard at all on the *Monmouth*, and that of the *Monmouth* was not heard on the *Energy* until just the moment the *Monmouth* came in sight. It was plainly the duty of the *Monmouth*, having the right of way, to give notice of her presence to vessels approaching from the southward, by the means prescribed by the sailing rules. It was argued for the *Energy* that, as she was bound to keep out of the way of the *Monmouth*, and the latter had only to keep her course, she should be excused for the omission. But I am bound to conclude that a regulation horn can be heard further off than a common horn, and that, if the lookout on the *Monmouth* had been sooner made aware of the approach of the *Energy*, he would not, in his fright and confusion, have luffed across her bows. The *Energy* should have shortened sail. The *Energy* is condemned for not going at a moderate speed, and for not carrying the regulation fog-horn. The *Monmouth* was in fault, not only for being without the regulation fog-horn, but also for changing her course, and for not having a competent lookout. Decree for the libelants, damages to be divided. So ordered.

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THE MAINE.<sup>1</sup>

VAN WIE *et al.* v. THE MAINE *et al.*

(District Court, E. D. New York. May 10, 1890.)

**COLLISION—BETWEEN STEAMERS—OVERTAKING VESSEL—EVIDENCE.**

A collision occurred between the tug-boat *E. H.* and the ferry-boat *M.* in the East river. Both vessels had been lying bows up-stream,—the tug-boat further up than the ferry-boat. The question in the case was whether the collision was caused by the ferry-boat moving up against the tug, or by the tug backing down upon the ferry-boat. *Held*, that the weight of evidence showed the collision to have been caused by the backing of the tug against the ferry-boat, and the tug's libel to recover her damages was therefore dismissed.

In Admiralty. Action to recover damages for collision.

*Carpenter & Mosher*, for libelants.

*Wilcox, Adams & Macklin*, for claimants.

BENEDICT, J. This is an action to recover of the steam ferry-boat *Maine* for damages received by the tug-boat *Edwin Hawley* in a collision which happened on the occasion of the naval display at the centennial

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

exhibition of 1889. The two boats were lying near the foot of Wall street, between the steamer Despatch, which had the President and his Cabinet on board, and the New York shore, waiting to see the disembarkation of the President from the Despatch. The tug-boat was lying further up the river than the ferry-boat; both vessels lying bows up the river. The case turns upon the question whether the collision was caused by the ferry-boat moving up the river against the stern of the tug, lying still ahead of her, or by the tug backing down upon the bow of the Maine, lying still astern of her. Upon this question a great number of witnesses have been called by each side,—some 27 in all, I believe; and I cannot doubt that the clear weight of the evidence is in favor of the position taken by the ferry-boat, that the collision was caused by the backing down of the tug upon the Maine, and not by the Maine's moving up against the tug. Let the libel be dismissed, with costs.

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### THE LAGONDA.<sup>1</sup>

THE JAMES A. GARFIELD.

MCCALDIN v. THE LAGONDA.

MATHISEN v. THE JAMES A. GARFIELD.

(District Court, E. D. New York. May 12, 1890.)

#### COLLISION—CROSSING COURSES—FAILURE TO HOLD COURSE.

The yacht L. was going down Buttermilk channel between Governor's island and the Brooklyn shore, when the tug G. came around the south shore of Governor's island, bound for the Atlantic basin. The vessels being thus on crossing courses, and the L. bound by rule to keep out of the way, the G., after hearing a signal of one whistle from the L., and observing that the yacht was porting, starboarded her wheel. The vessels collided, the bow of the yacht striking the starboard side of the tug. Held that, under the circumstances, it was the duty of the G. to hold her course, and that she was responsible for the collision.

In Admiralty. Cross-actions for damages by collision.

*Alfred H. Porter, Jr., and R. D. Benedict, for the Lagonda.*

*Goodrich, Deady & Goodrich, for the James A. Garfield.*

BENEDICT, J. The vessels were on crossing courses. The yacht having the tug upon her starboard side, by the law it was the right of the yacht to choose her own method of avoiding the tug, and it was the duty of the tug to hold her course. The tug's testimony, if believed, shows that she undertook to designate a course to the yacht by blowing two whistles, and she admits that after she had received a signal of one whistle from the yacht, and saw that the yacht was porting, she starboarded, and kept up her speed. In this way she caused the collision. It is plain that the tug alone is responsible for the damage that ensued. Let a decree be entered accordingly.

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

SPANGLER v. ATCHISON, T. & S. F. R. Co. *et al.*

(Circuit Court, W. D. Missouri, W. D. May 5, 1890.)

## 1. REMOVAL OF CAUSES—TIME OF APPLICATION.

Act Cong. Aug. 13, 1888, § 3, (25 U. S. St. at Large, 485,) provides that a petition for removal must be filed at or before the time the defendant is required to plead "by the laws of the state, or the rules of the state court." Rev. St. Mo. § 8514, requires the defendant to plead on or before the third day of the term, "unless longer time be granted by the court." *Held*, that such a petition could not be filed after the third day of the term, though the defendant's time for answering had been extended by order of court, since such an order is not a rule of court, within the meaning of said act.

## 2. SAME—SEPARABLE CONTROVERSY.

An action for a tort against two railroad companies,—one a lessor and the other a lessee,—being joint and several, may be removed by one of the defendants on the ground of non-residence, though the other defendant is a resident of the same state as the plaintiff.

At Law. On motion to remand.

*Davis & Snyder, J. M. Crockett, and Hawley & Snell*, for plaintiff.

*Lathrop, Smith & Morrow*, for defendant.

PHILIPS, J. This action was brought in the circuit court of Jackson county, Mo., returnable to the October term, 1889. Under the state statute (section 3514) the defendants were required to answer by the 16th day of October, 1889, which was the third day of the term. On the first day of the term the defendant the Atchison, Topeka & Santa Fe Railroad Company appeared, and, by an *ex parte* order of the court, the time for answering was extended to the 1st day of November following. On the 30th day of October the defendant filed answer, and presented petition and bond for a removal to this court, which order was then made. Plaintiff files her motion to remand on two grounds: *First*, that the petition for removal was not presented in time; and, *second*, because the action is against two defendants, one of whom is a resident of the state and district with the plaintiff, and the cause of action is not severable.

The defendant the Atchison, Topeka & Santa Fe Railroad Company bases its right of removal, at the time it was made, on the following sections of the state and federal statutes: "In all counties having over forty thousand inhabitants, every defendant who shall be summoned or notified according to law shall demur to or answer the petition on or before the third day of the term at which he is bound to answer, unless longer time be granted by the court," etc. Section 3514, Rev. St. Mo. Section 3 of the act of March 3, 1887, as amended August 13, 1888, (25 U. S. St. at Large, 435,) declares that such petition for removal must be filed "at the time, or any time before, the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." It is conceded by counsel for defendant, as it must be, that, but for the order of the court extending the time for answering, the application for removal came too late on the 30th of October, as that was not the

time fixed by the state statute for filing such answer. But his contention is that the language of the state statute, "unless longer time be granted by the court," brings the case within the language and terms of the act of congress, "or the rule of the state court in which such suit is brought." I have examined all the decisions in the various circuits bearing upon this mooted question, and have reached, after some hesitation, the same conclusion as that of Judge SAWYER in *Dixon v. Telegraph Co.*, 38 Fed. Rep. 377, and *Austin v. Gagan*, 39 Fed. Rep. 626, and that of Judge JENKINS in *Velie v. Indemnity Co.*, 40 Fed. Rep. 545. The reasoning of the latter case is quite unanswerable, when it is read in connection with rulings of the supreme court under the act of 1875, which permitted the filing of the petition for removal at any time during the term. The supreme court held the plain meaning of the act of 1875 to be the term at which the action could first be tried or was at issue, provided the parties filed their pleadings at the time appointed by law. It made no difference whether the parties were ready for trial or not. Neither the extension of time by order of the court, nor consent of parties, could prolong the time for removal beyond the term of court. *Car Co. v. Speck*, 113 U. S. 86, 87, 5 Sup. Ct. Rep. 374; *Gregory v. Hartley*, 113 U. S. 742, 5 Sup. Ct. Rep. 743. The change made in the act by that of 1887 was to require the application for removal to be made "at the time" the defendant is required by the statute law of the state or rule of court to file his answer. But "rule of court" was not intended by congress, in my opinion, to apply to such a provision as that found in the Missouri statute, "unless longer time be granted by the court." It clearly has reference to the practice in those states where no time is fixed by the statute for answering, but under the law the court, by rule, prescribes the time, which is the case in some of the states. A "rule of court" means uniformity,—a regulation in practice applying alike to all suitors, established and fixed, as much so as a statute itself, and known to all litigants and attorneys. This was the idea entertained by the supreme court under the act of 1875, as indicated by the opinion in *Car Co. v. Speck*, 113 U. S. 84-86, 5 Sup. Ct. Rep. 376: "That term in which, according to the rules of procedure of the court, whether they be statutory, or rules of the court's adoption." So Judge SAWYER in *Austin v. Gagan*, *supra*, says the party must "file his petition at or before the time when his pleading is first due under the law, or rules as they exist when service of summons is made." When the summons was served on the defendant in this case, there was no rule of court prescribing the time in which its answer was to be filed. It had no right to suppose the court would extend the time beyond the statutory period of three days. If the time of removal can be made to depend upon the action, capricious or otherwise, of the state judge, in extending it for a month or six months, there would be no uniformity, no certainty, in the law of removal. It would in the state court, in the same jurisdiction, be one time for one defendant, and another time for another defendant, wholly dependent upon the discretion or humor of the court at the return-term. The evident policy of congress in this enactment was to

make certain, fixed, and definite the time of such removal, and to hasten trials, and not permit hurtful delays by removals. Recognizing the fact, as the lawyers of the committee who framed the law did, that in some of the states the time for pleading by defendants summoned to court was wholly regulated by positive rule of the court, in the absence of a stated statutory time, they employed the term, "or rule of the state court." The construction of this act which I have followed tends to make the time of such applications definite, uniform, and equal to all defendants, and, in my opinion, effectuates and carries out the policy of the law.

As to the second ground of the motion to remand, it is to be observed that the action is for a tort against two railroad companies,—one the lessor, the other the lessee. It may be conceded to plaintiff's contention that the other defendant, the lessor, could not escape its liability for the injury and damage by letting its road to another. It may also be conceded that both are liable. But the action is joint as well as several. The plaintiff had the right to proceed against either one of them, and would be entitled in the joint action to take judgment against one, and dismiss as to the other. In such a case the action is removable by the non-resident defendant. *Greene v. Klinger*, 10 Fed. Rep. 689; *Clark v. Railway Co.*, 11 Fed. Rep. 355; *Kerling v. Cotzhausen*, 16 Fed. Rep. 705; *Boyd v. Gill*, 19 Fed. Rep. 145; *Sharp v. Whiteside*, Id. 150; *Stanbrough v. Cook*, 38 Fed. Rep. 369. The motion to remand is sustained on the first ground.

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*In re* MILLER.

(District Court, E. D. South Carolina. May 10, 1890.)

CONFLICTING STATE AND FEDERAL JURISDICTION.

Where a United States marshal is arrested, under state authority, on charge of forgery, the fact that at the time of his arrest he was on his way to serve process issued by a United States commissioner does not oust the state authorities from jurisdiction, where it does not appear that he was arrested for any act done in pursuance of federal authority, or with the intent to interfere with the service of the process in his hands.

At Law. Petition for *habeas corpus*.

On motion to remand the prisoner to the state authorities.

A. Lathrop, Dist. Atty., for the motion.

P. H. Nelson and W. St. Julian Jervcy, for defendant.

SIMONTON, J. W. J. Miller, a deputy United States marshal, was arrested and lodged in Lexington jail. He had with him process issued by John Bauskett, United States commissioner, and was on his way to serve the process when arrested. A writ of *habeas corpus* out of this court was issued for him on the petition of George I. Cunningham, marshal. The sheriff of Lexington, who had him in custody, makes return to the writ

of *habeas corpus*, producing the prisoner, and stating that he had been lodged in jail under commitment by a trial justice of the state of South Carolina, upon charges of forgery and felony. It nowhere appears, in any affidavit read before me, that he was arrested under state authority for any act done in pursuance of federal authority, and warranted by it. Nor does it appear in any way that he was arrested by the state authorities with the motive or intent on the part of any one to interfere with the service of the process of the United States. Under these circumstances, I cannot do anything but remand him into the custody of the state authorities. *In re Bull*, 4 Dill. 323; Rev. St. U. S. § 753. In doing this, however, I desire to commend the action of the marshal in suing out the writ of *habeas corpus*. When any deputy marshal is arrested in possession of the process of a commissioner or of this court, the duty of the marshal is at once to learn in the most authoritative way the reason for such arrest, and the mode selected by him in this instance is the best. Let an order be prepared remanding the prisoner to the custody of the state authorities.

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MURPHY v. EAST PORTLAND *et al.*

(Circuit Court, D. Oregon. June 9, 1890.)

1. MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT—INDEBTEDNESS—ORDINANCE.

An ordinance of a municipal corporation, which provides for the payment of money by the town without providing the means wherewith to make such payment, creates an indebtedness against such corporation, within the meaning of section 5, art. 11, of the constitution of the state.

2. SAME—INJUNCTION OF LEGISLATIVE ACT.

A court of equity will not enjoin a municipal corporation in the exercise of its legislative function, unless the proposed act is beyond the scope of its power, and its passage would work irreparable injury.

3. SAME—INJUNCTION OF ORDINANCE CREATING INDEBTEDNESS—TAXES—JURISDICTIONAL AMOUNT.

In a suit by a tax-payer to enjoin the passage of an ordinance creating an indebtedness against the town on account of its alleged illegality, the matter in dispute is the sum of the taxes which the plaintiff would probably have to pay in discharge of said indebtedness; and it must appear with reasonable certainty from the facts stated in the bill that such taxes exceed in value the sum of \$2,000.

(Syllabus by the Court.)

In Equity.

Charles H. Carey and Paul R. Deady, for plaintiff.

Alfred F. Sears, Jr., for defendants.

DEADY, J. This suit is brought by the plaintiff, a citizen of Washington, to enjoin the defendants, the municipal corporation of East Portland, the mayor and common council of the same, and the Oregon corporation, the East Side Water Company, from passing a certain ordinance, now pending before said council.

It is alleged in the bill that the plaintiff is the owner of a tract of land within the limits of the town of East Portland, assessed therein at



\$5,600, upon which municipal taxes for the year 1890 were levied to the amount of \$42.00; that the act incorporating said town provides "that no debt shall ever be created against the same exceeding in amount the sum of \$25,000," (Sess. Laws 1885, p. 308,) which amount is now incurred; that said town is authorized to levy taxes on the property therein for all purposes at a rate not exceeding 17-20 of 1 per centum; that there is now pending before said council an ordinance granting the defendant, the water company, the right to lay water-pipes in the streets of the town, and furnish water to the inhabitants thereof, which also provides for the making of a contract between said town and said water company, whereby the latter is to furnish the former with water for public use, for 10 years, at the rate of \$200 a month, and for the purchase of said works by the town, within 90 days after it is authorized so to do by the legislative assembly, whereby an indebtedness will be created against said town exceeding the sum of \$25,000, for the payment of which the taxes levied on the plaintiff's property would exceed in amount the sum of \$2,500, in satisfaction of which, said property may be levied on and sold on the warrant of the town, as upon an execution.

The defendants demur to the bill, objecting that the court has not jurisdiction of the subject of the suit.

On the hearing it was also assigned, as a cause of demurrer, that equity will not interfere to prevent legislative action by a municipal corporation.

It is admitted that the promise or undertaking provided for in the ordinance in question will, if formally made or entered into, create a debt against the town for the sum of \$24,000.

Section 5, art. 11, of the constitution of the state provides: "Acts of legislative assembly, incorporating towns and cities, shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit."

In pursuance of this injunction the power of the town to create a debt is limited by its charter to \$25,000, which amount is already incurred.

In *Water Co. v. Salem*, 5 Or. 29, the supreme court of the state held that an agreement to pay the plaintiff \$1,800 a year for 17 years, without any provision being made for the payment of the same as it became due, necessarily created a debt against the defendant, within the meaning of the constitution. It did not, however, decide what would be the effect if the ordinance authorizing such agreement also provided the means for the payment of the indebtedness when and as it became due.

In *Coulson v. Portland*, Deady, 481, held that an ordinance whereby the defendant assumed the payment of the interest coupons, amounting to \$350,000, of the bonds of the Oregon Central Railway Company, created a debt within the meaning of the constitution, although provision was made therein for the levy of taxes to pay such coupons as they became due.

It appearing from the bill that the existing indebtedness of the town has reached the limit prescribed by its charter, the additional \$24,000

contemplated by this ordinance, there being no provision made for its payment, is clearly illegal and void.

Whether the town could, under the restraint imposed on its power of taxation, by subdivision 2, § 2, art. 4, of its charter, (Sess. Laws 1887, p. 202,) levy a tax sufficient to pay such indebtedness, as it becomes due, is a question. It could only be done under the levy for the "general fund," which is limited to one-fourth of 1 per centum.

The authorities are not uniform on the question of the power of a court of equity to restrain a municipal corporation in the exercise of its legislative functions. The more modern, and, I think, the better doctrine is, that the court ought not to interfere by injunction with legislative action of a municipal corporation, unless the proposed legislation is beyond the scope of the corporate power, and its passage would, under the circumstances, work irreparable injury. After the passage of such an ordinance, its enforcement, if attended with such injury, may be enjoined. *Coulson v. Portland*, Deady, 492; *Water-Works v. Bartlett*, 8 Sawy. 555, 16 Fed. Rep. 615; *Alpers v. City and County of San Francisco*, 12 Sawy. 631, 32 Fed. Rep. 503; High, Inj. § 1243.

In the abstract the passage of this ordinance is not beyond the power of the town. By subdivision 7, § 2, of its charter, (Sess. Laws 1887, p. 203,) it is authorized "to provide the city with good and wholesome water," and the cost of this scheme does not exceed the limit of indebtedness prescribed by the charter.

But owing to the existing state of its indebtedness, the town is, for the time being, prohibited, incapacitated, from passing any ordinance on any subject which will increase the same.

But I do not perceive how the mere passage of this ordinance can work irreparable injury to any one. It does not execute itself. Indeed, it may never be passed. But if it is, and an attempt is made to enforce it, by entering into the contract with the water company, as provided therein, or by levying or collecting a tax to pay the indebtedness thereby created, any one so injured may have the officers charged with or attempting such enforcement enjoined.

Neither does it appear that "the matter in dispute" exceeds in value the sum of \$2,000.

It is true, it is so alleged in the bill, but the facts stated therein do not warrant the assertion.

For instance, it is stated that the additional and illegal taxes which the plaintiff will be compelled to pay on her property to meet the assessed expense of the proposed water supply, together with the purchase of "the water-works system," will exceed in 10 years the sum of \$2,500. But the purchase of the plant of the water company is only proposed by the ordinance, and on the condition that the town shall receive the proper authority from the legislature; and then, and in that event, the purchase will be valid.

"The matter in dispute" is the right of the town, by means of this ordinance, to create an indebtedness of \$24,000, payable in installments of \$200 per month, and thereby subject the plaintiff's property to the

payment of its share of the tax necessary for this purpose. And the value of such "matter" to the parties to the suit is the value or amount of the taxes which would be levied on the plaintiff's property in case the ordinance should be passed and enforced.

The burden is on the plaintiff to allege and prove that these taxes would exceed in value the sum of \$2,000. Beyond the bare assertion that this "value" does exceed \$2,000, the bill is a blank on the subject. It appears that the property now pays for all taxes levied under the charter—for the "general fund," "street repairing," "fire purposes," and "payment of indebtedness"—the sum of \$42. In 10 years this would amount to \$420. Would the water-tax amount to more or less? On the facts stated in the bill no one can say. Such tax would have to be about five times the sum of all the taxes now levied on the property to give this court jurisdiction, on account of the value of the "matter in dispute." It is not at all probable that it would amount to so much. But, be that as it may, it must appear with reasonable certainty from the facts stated in the bill that the matter in dispute exceeds the value of \$2,000; and this "matter" is not the ordinance, nor the property of the plaintiff, but the sum of the taxes which the plaintiff might have to pay on account of such property by reason of such ordinance.

If it appeared from the bill what rate levied upon the property now on the assessment roll of the town would be necessary to raise this water-tax, it would be a simple matter of calculation to ascertain how much of this tax the plaintiff would be required to pay. If one-fourth of 1 per centum was the rate, the plaintiff would be required to pay \$14 per annum, which would make the value of the matter in dispute in this suit not to exceed \$140; and the strong probability is that as the town increases in wealth and population, and real property increases in value, the tax would diminish rather than increase.

The demurrer is sustained.

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### WOOLDRIDGE v. STERN.

(Circuit Court, W. D. Missouri, W. D. May 5, 1890.)

#### STATUTE OF FRAUDS—AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR.

A promise to support a child 15 years old until he comes of age is not an agreement "not to be performed within a year," within the meaning of the statute of frauds, since such promise might be fully performed within a year, if the child should die within that time.

**At Law.** On motion for a new trial.

Action by Elizabeth Wooldridge against Jonas A. Stern. Verdict for plaintiff. Defendant moves for a new trial.

*G. J. Clark and C. M. Ingraham*, for plaintiff.

*Saml. Boyd and Saml. Davis*, for defendant.

PHILIPS, J. This is an action predicated on a parol agreement for the support and maintenance of a bastard child, and grows out of substantially the following state of facts: The child was born to plaintiff in 1872 or 1873, when the plaintiff was about 16 or 17 years old. The evidence tended to show that defendant was the father of said child. The mother seems to have had the care and burden of the support of the child from its birth up to the year 1887. After repeated efforts to have the defendant fulfill his alleged promises to assist the plaintiff in its maintenance, and failing therein, the plaintiff visited the defendant at his place of business in Slater, Mo., and insisted that he must either take charge and custody of the child, or provide for its support and education. The plaintiff's evidence—which the jury, by their verdict, must have credited—was to the effect that the defendant, at the time of this visit, had recently married another person, and that in order to keep the fact of the paternity of this child, and the scandal thereof, from his wife, he then and there promised plaintiff that if she would leave the state, and remain with the child in the state of Colorado, he would pay her what was right, not only for her past trouble with and support of the child, but that he would from time to time send her money to support and educate the child until it was 21 years of age; that thereupon she accordingly took the child to Denver, Colo., where she remained with it, supported and educated it, up to the time of the institution of this suit, in 1889; that the defendant wholly failed to keep his said promise and agreement, for the breach of which this action is brought. At the conclusion of plaintiff's evidence, the defendant demurred thereto on the ground that such a contract was contrary to public policy and good morals, and that the same was within the statute of frauds, as being a parol contract not to be performed within one year. The demurrer was overruled. The jury returned a verdict for plaintiff for \$1,050; and the defendant moves for a new trial, urging the same grounds therefor as presented in the demurrer to the evidence.

The first ground of error is practically abandoned by counsel for defendant. The only real question to be determined is as to the applicability of the statute of frauds to this agreement. So much of the agreement as refers to the future clearly indicates that its continuance might extend over a period of years. The contention of plaintiff's counsel is that it was none the less an agreement which might be performed within a year, as its longer continuance depended necessarily upon the contingency of plaintiff's life, as also that of the child. There is a general *consensus* among text-writers and courts that the term "not to be performed" does not include an agreement not likely to be performed within the year, nor one scarcely expected to be performed within that time; but rather does it purport such agreements which, by a reasonably clear or fair interpretation of all the parts, viewed by the then existing circumstances, do not admit of performance according to the language and intention within so short a period. Out of this root has grown the recognized rule that, notwithstanding it may have been within the contemplation of the parties that more than one year might be occupied in its

performance, yet if it might, consistently with its terms, be fully performed within that time, the statute does not apply. Such are agreements to pay a given sum of money on the day of the promisor's marriage, to leave money by last will, or to pay during or at the end of a life, or to board one during life, and the like. This rests upon the presumption that it was within the contemplation of the parties to the agreement that the person whose life is concerned may not improbably die within the year; and, on principle, this presumption is extended to other contingencies which are liable to happen or occur within the year, and put an end to the undertaking. Had the agreement in question simply provided that the plaintiff, for a reasonable compensation, should take and keep the child in the state of Colorado for an indefinite length of time, the authorities are generally agreed that such an agreement would be within the rule of exemption from the operation of the statute. *Murphy v. O'Sullivan*, 11 Ir. Jur. (N. S.) 111; *Souch v. Strawbridge*, 2 C. B. 810; *Browne*, St. Frauds, (4th Ed.) §§ 274, 276a. But where a limit is fixed to the duration of the agreement, such as the attainment of majority by a minor, the applicability of the statute cannot be said to be so well settled. *Browne*, in his treatise on the Statute of Frauds, (section 282a,) seems inclined to the opinion that such a contract is within the statute, while *Smith's Leading Cases*, (8th Ed. vol. 1, p. 619,) on the strength of the authorities, regards such contracts as unaffected by the statute. See *Wood*, St. Frauds, § 275.

The case of *Peters v. Westborough*, 19 Pick. 364, is perhaps the strongest American case in support of the proposition that a parol agreement to pay for the support and maintenance of a minor, then 11 years old, until the age of 18, is not within the statute. The decision is planted broadly on the ground that such a contract is predicated of the contingency of the life of the child, which is presumed in such case to have been within the contemplation of the parties. So that, if the child should die within the year, the agreement would not be avoided, but would be fully performed. The doctrine of this case is reaffirmed in *Lyon v. King*, 11 Metc. 411. These decisions are predicated of the language of DENISON, J., [in *Fenton v. Emblers*, 3 Burrows, 1279:]

"The statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon contingency."

So in *Ridley v. Ridley*, 34 L. J. Ch. 462, it is said the statute "is to be confined to cases where the agreement is not to be performed, and cannot be carried into execution, within the year." The doctrine of *Peters v. Westborough* is not touched by the holding in *Hill v. Hooper*, 1 Gray, 131. The agreement in that case was that the plaintiff's son, between 15 and 16 years of age, should enter the service of the defendants, and work for them until he arrived at the age of 21 years, in consideration that during the time they would pay to plaintiff for such service, quarter yearly, certain sums, and in addition, semi-annually, certain sums as clothes money, until the boy arrived at the age of 18 years, then

a certain sum semi-annually until he arrived at the age of 20, and then a certain other sum semi-annually until he arrived at the age of 21 years. It is at once apparent, from the statement of facts, that the contract could not possibly be performed within the year. The undertaking of the promisor to make the specified payments was based upon the services to be performed by the minor through a series of years. As such a contract was an entirety, it could not be halved, nor in less degree subdivided; and in such case it cannot be said that the contingency of life was in the contemplation of the parties. This distinction is very aptly illustrated in the case of *McKinney v. McCloskey*, 8 Daly, 368, affirmed by the court of appeals, 76 N. Y. 594. The agreement was to support, educate, etc., a boy, 7 years old, until he was 21 years of age, who died during his minority. The opinion directs attention to the important distinction between such a case and one like *Shute v. Dorr*, 5 Wend. 204, which was an agreement to pay the sum of \$100 for services of a minor until of the age of 21. That was clearly within the statute, because it was to pay a fixed sum for the five-years service. It was indivisible, and could not be performed within one year. So the court, in the opinion, observes:

"There is a material difference between an agreement to pay one certain sum for the whole of a person's services during a fixed period of time, and to pay for the support of a person until he reaches a certain age. In the one case, if the party who is to serve dies before the expiration of the time, the promisor loses the benefit of what he contracted for, as he has received only a part of it. In the other, the death, before the end of the term, of the party to be supported, instead of being a loss to the promisor, is a pecuniary benefit," etc.

The doctrine of the last-named case obtains in Indiana, Maryland, and Kentucky, and, in effect, in New Hampshire, Maine, and Illinois. *Wiggins v. Keizer*, 6 Ind. 252; *Hill v. Jamieson*, 16 Ind. 127; *Frost v. Tarr*, 53 Ind. 390; *Ellicott v. Turner*, 4 Md. 476; *Howard v. Burgen*, 4 Dana, 137; *Stowers v. Hollis*, 83 Ky. 544; *Blanding v. Sargent*, 33 N. H. 246; *Hutchinson v. Hutchinson*, 46 Me. 154; *White v. Murland*, 71 Ill. 266-268. The case of *Deaton v. Railroad Co.*, 12 Heisk. 650, when analyzed, does not conflict with the doctrine of the above authorities. In that case plaintiff's husband was killed by one of defendant's trains. In consideration that she would not sue the company for damages, the company agreed to support and maintain the widow and her three children—all minors—during the life of the widow, and, if she should die before the youngest child became of age, the children should be supported and maintained until that time arrived. The chief justice, who wrote the opinion, expressly recognized the doctrine of *Peters v. Westborough*, for he says:

"When the promise is to continue to do something until the contingency occur, as, for instance, to pay during the promisee's life, or to support a child who is eleven years old until she is eighteen, in these cases the promise is not affected by the statute, because the party whose life is involved may die within the year."

The opinion then proceeds to point out the peculiarities of the agreement in question,—that the promise was to support the children, at all events, until the youngest child had become of age:

"It was not to support and maintain the youngest child only until it should arrive at age, but to support the widow until that time, if she should live to that period; and, if she should die before that period, the support of the children was to continue until the youngest should come of age. Hence if the mother and the youngest child should both die within the year, the contract would continue in force until the period when the youngest child would have arrived at age, if it had lived. In other words, the contract was that the monthly amount of the husband's wages should continue, at all events, until the time when the youngest child should become of age, and might continue longer if the widow should live beyond that time. The contract, therefore, could not be performed within the year, except upon the death of the widow and all three of the children within that period."

The idea evidently within the mind of the court was that the occurrence of so many events of death was so extraordinary and improbable that it could not constitute a contingency within the terms of the contract, and that "in such case the performance of the contract is defeated, not completed, upon the occurrence of the contingency." In my humble judgment, much of the confusion in considering the applicability of the statute to these agreements arises from failing to keep in mind the important distinction between a contingency of such a nature as fulfills the obligation, and one that defeats or prevents it from being performed. In other words, it is the distinction between a matter of avoidance, or a defeasance and fulfillment. The one depending upon the defeasance or matter of avoidance is within the statute. The other is not. So it is said in 1 Smith, Lead. Cas. 621: "But there is a manifest distinction between avoidance and fulfillment." After referring to certain cases, it concludes:

"There is, however, no real contradiction between these cases; the *ratio decidendi* in *Souch v. Strawbridge*, [*supra*,] being, not that the contract to support the defendant's child was defeasible, but that it depended on the continuance of her life, and might be fulfilled in less than a year if she died."

The case of *Packet Co. v. Sickles*, 5 Wall. 580, as shown by the opinion, (page 595,) was based upon the idea of a defeasance; and, thus viewed, there is no conflict in principle between the holding there and the overruling of the motion herein, which is ordered.

## ELLINWOOD v. STANCLIFF.

(Circuit Court, S. D. California. April 23, 1890.)

## 1. LOCATING PATENT—SURVEYS.

On a question as to the true location of a patent, boundaries fixed by reversing the courses and distances must govern when found to coincide with the natural calls of the patent.

## 3. SAME.

When the points fixed by reversing the courses and distances do not coincide with the natural calls of the patent, or the natural calls cannot be identified, then the regular courses and distances must govern.

At Law. Action to recover land.

*Wells, Guthrie & Lee*, for plaintiff.

*R. Dunnigan*, for defendant.

Ross, J., (*charging jury*.) The documentary evidence in the case shows the title to the land in controversy to have been in the plaintiff at the time of the commencement of this action, if the land is embraced within the boundaries of the Rancho Tejunga, as described in the patent for that rancho issued by the government of the United States. The patent was issued October 19, 1874, and the survey embodied in it was made in the year 1858. The survey is therefore an old one, and it will not be surprising if the evidence shows that some or all of the stakes placed by the surveyor who made the government survey have disappeared, or that some or all of the trees called for in the description contained in the patent have been cut down or destroyed. The facts of the case are for you to determine, and of the credibility of each and every witness you are the sole and exclusive judges. There are certain facts, however, about which there is no dispute between the parties. One is that the defendant was at the time of the commencement of this action, and still is, in possession of that portion of the land sued for which lies between the line claimed by the plaintiff to be the true northerly boundary of the rancho, and which is represented on the plaintiff's maps by the black line, and on the defendant's maps by the red line, and the line claimed by the defendant to be the true northerly boundary of the rancho, and which is represented on the plaintiff's maps by the red line, and on the defendant's maps by the black line. So that if you find the true location of the northerly boundary of the rancho to be as claimed by the plaintiff, your verdict should be for the plaintiff; but if you find its true location to be as claimed by the defendant, your verdict should be for the defendant. The real question for determination, therefore, is, what is the correct location of the northerly boundary of the rancho? That there is an error somewhere in the description of the rancho, as embodied in the patent, is a conceded fact in the case. To solve the difficulty, the entire description in the patent must be taken, and the identity of the land thereby conveyed ascertained, by a reasonable construction of the language used, together with the plat of the survey annexed to the patent, and forming a part of it. That plat should be referred to and



considered in connection with the notes of the survey, for it forms an important part of the patent. The object in cases of this kind is to ascertain the intent of the parties to the instrument. The rule by which to find the intent is to give most effect to those things about which a mistake is least likely to have occurred. On this principle, the things usually called for in a grant—that is, the things by which the land granted is described—are thus marshalled: *First*. The highest regard is had to natural boundaries. *Secondly*. To lines actually run, and corners actually marked, at the time of the grant. *Thirdly*. If the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established, and no other departure from the deed is thereby required; marked lines prevailing over those that are not marked. *Fourthly*. To courses and distances, giving preference to the one or the other, according to circumstances. In cases like the present one, where the description is ambiguous and doubtful, parol evidence of the practical construction given by the parties by acts of occupancy, recognition of monuments or boundaries, is admissible, and is to be considered in aid of the interpretation of the instrument. The identity of the natural calls of the patent is for you to determine, and this you must do from all of the evidence in the case. If the evidence satisfies you of their true location, and you find that by taking one of the natural calls, as to the correct location of which you are satisfied, and from there reversing the courses and distances given in the patent, the line of the rancho would answer all of the natural calls of the patent back to station 2 of the survey, then, and in that case, I instruct you that such line should be adopted, and the line should be closed by running a straight line from such station 2 to the acknowledged point of beginning of the rancho, which is station 3 of the adjoining Rancho ex-Mission San Fernando. In that case, your verdict should be for the plaintiff. If, however, such line so run by the reversed courses and distances would not answer the natural calls of the patent, or if from the evidence you are unable to correctly locate the natural calls, then, and in that case, you are instructed that the courses and distances given in the patent must govern, and in that event your verdict must be for the defendant.

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UNITED STATES v. TERRY.

(District Court, N. D. California. March 11, 1890.)

1. RESISTING OFFICER—"KNOWINGLY AND WILLFULLY"—INSTRUCTION.

Where defendant, under indictment for resisting an officer, alleges that she did not knowingly and willfully resist the officer in the execution of an order to remove her from the court-room, for the reason that she was rendered unconscious by the opinion of the court then being pronounced, the jury may consider the fact that she entered the court-room with a loaded revolver, to hear the decision in a case to which she was a party.

## 2. SAME.

If defendant knew the order for her removal from the court-room was directed to the marshal, it is immaterial that the court addressed it to the clerk, if he immediately changed it to the marshal.

## 3. SAME—UNNECESSARY FORCE AND VIOLENCE.

Any unnecessary force or violence used by an officer in the execution of an order to remove one from the court-room may be resisted by force sufficient to overcome it.

## 4. SAME—MARRIED WOMEN—PRESUMPTION.

The presumption that a married woman committing a misdemeanor acts under coercion of her husband may be overcome by circumstances showing that he, though in the same room, exercised no control over her.

Indictment against Sarah Althea Terry for resisting, by assaulting, an officer, in the execution of an order to remove her from the court-room.

*John T. Carey and David Louderback*, for the United States.

*Patrick Reddy and W. W. Foote*, for defendant.

Ross, J., (*charging jury*.) The statute upon which the indictment in this case is founded provides that "every person who knowingly and willfully obstructs, resists, or opposes any officer of the United States in serving, or attempting to serve or execute, any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process, or assaults, beats, or wounds any officer, or other person duly authorized, in serving or executing any writ, rule, order, process, or warrant, shall be" punished in a certain prescribed way. The indictment charges, in effect, that at a certain stated time and place the defendant knowingly, willfully, and unlawfully resisted, obstructed, and opposed, by assaulting, beating, and wounding, J. C. Franks, at the time being United States marshal for the northern district of California, in the execution of an order then and there made by the United States circuit court for said district, addressed to the said marshal, and directing him to remove the said defendant from the court-room of said court because of her gross misbehavior therein.

To convict the defendant, you must be satisfied from the evidence, beyond a reasonable doubt, that the order made by the court, and referred to in the evidence, directed the marshal to remove the defendant from the court-room, and that in the execution of such order the defendant knowingly and willfully resisted the marshal, by assaulting, beating, or wounding him. The words "knowingly" and "willfully," employed in the statute defining the offense with which the defendant is charged, imply that she must have known that the order directed the marshal to remove her, and, knowing such fact, that she determined, with a bad intent, to resist him in its execution. It is claimed on behalf of the defendant that she was so overcome by the opinion of the court, at the time being read, as to render her unconscious of the making of the order for her removal, and unconscious of her subsequent acts in the court-room. Of course, if she was really unconscious of these things, she should not be found guilty under this indictment. But you are to look at this defense as reasonable, sensible men, and in connection with it consider the testimony going to show that, contrary to law, she entered the court-room, with a loaded revolver, to hear a decision

announced in a case to which she was a party, and that the decision of the court had not been announced at the time of her interruption of the court, and the making of the order for her removal from the room, although, from what had already been read, what it would be may have become apparent. It is also proper for you to consider in the same connection the declarations referred to in the evidence as having been made by the defendant concerning her conduct on the occasion in question, as also every other fact and circumstance given in evidence. No amount of feeling or exasperation or resentment can be held to justify her acts, or to warrant you in finding a verdict of not guilty, if you are satisfied beyond a reasonable doubt that the order was given to the marshal, and that the defendant was aware of that fact, and that in its execution by the officer the defendant knowingly and willfully resisted him by any or all of the means stated in the indictment.

Some evidence has been given on behalf of the defendant tending to show that the order of the court directing the removal of the defendant from the court-room was directed to the clerk of the court, instead of to the marshal. If the court, in making the order, used the word "clerk," and immediately substituted therefor the word "marshal," and the defendant knew that the order was addressed to the marshal, and, so knowing, willfully resisted him in its execution by any or all of the means set out in the indictment, then and in that case you are instructed that the use of the word "clerk" was a mere slip of the tongue, and was and is unimportant. If, however, the order was addressed to the clerk, and not to the marshal, the defendant cannot be convicted under this indictment.

An officer, in the execution of a valid order, has the legal right to use such force as is necessary to execute it, but no more. Any unnecessary force or violence that may be used in the execution of such order or process is without authority of law; and such excess, if any, may be lawfully met by force or violence sufficient to overcome it.

Where a married woman commits a misdemeanor in the presence of her husband, the presumption of law, nothing to the contrary appearing, is that she acts under the threat, command, or coercion of her husband; but, if the circumstances are such as to show that the husband, though in the same room with the defendant, did not exercise any control or coercion, but that the wife was the active, moving party, the presumption arising from the husband's presence will be removed and overcome.

The defendant in this case, like the defendant in every other criminal case, is by the law presumed to be innocent of the crime charged against her. The burden of proving her guilt rests upon the prosecution, and this must be done beyond a reasonable doubt. But by "reasonable doubt" is not meant a mere imaginary or possible doubt, but such a doubt as arises out of the evidence, and is reasonable, in view of all of the facts and circumstances of the case. If, after an impartial comparison and consideration of all the evidence, you can candidly and truthfully

say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully and candidly say that you have a settled conviction of her guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt. The facts of the case are for you to determine, and of the credibility of each and every witness you are the sole and exclusive judges. In determining the credibility to be given to witnesses examined,—who are to be weighed, not counted,—it is your right to take into consideration their interest or feeling in the result of the proceeding, their appearance and deportment while being examined, the probability of the truth of their statements as compared with other testimony given, their opportunities of observation or knowledge of the matters to which they have testified, their friendly or unfriendly feelings towards the respective sides, and how far they may have been contradicted. While a person charged with crime may testify in his own behalf, he is under no obligation to do so, and his failure to testify does not create any presumption against him. You should not, therefore, indulge in any presumption against the defendant for the reason that she did not testify as a witness in her own behalf. You are not to permit your minds to be diverted from the real issue in the case by any argument or arguments of counsel, or by any other consideration. So far as the arguments have any legitimate bearing upon the real issue, you should give them the consideration and weight to which you think them fairly entitled. Outside and beyond that, it is your duty to entirely disregard them. If, upon the whole evidence, you are satisfied beyond a reasonable doubt that, at the time and place charged in the indictment, the court made an order directing the marshal to remove the defendant from the court-room, and that the defendant was aware of that fact, and, knowing it, willfully resisted, obstructed, or opposed the marshal in the execution of such order by any or all of the means set out in the indictment, it is your sworn duty to return a verdict of guilty as charged. Unless you are so satisfied, you should find her not guilty.

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UNITED STATES *v.* WARD.

(Circuit Court, S. D. California. May 1, 1890.)

**INDIANS—CRIMINAL OFFENSES—HALF-BREED.**

The son of a negro father by an Indian mother is not an Indian, within the meaning of Act Cong. March 3, 1885, (28 St. at Large, 335,) providing for the punishment of Indians committing certain offenses, as the child follows the condition of the father.

Indictment against Francisco Ward, alleged to be an Indian.  
*Willoughby Cole*, U. S. Atty.

*George J. Dennis*, for defendant.

Ross, J. If the defendant is, as is alleged in the indictment, and as is claimed by the district attorney, an Indian, it is clear that he is not embraced by section 5345 of the Revised Statutes; for that section is one of the general laws of the United States in relation to crimes committed in places within their exclusive jurisdiction, from which, by virtue of sections 2145 and 2146 of the Revised Statutes, crimes committed in the Indian country, by one Indian against the person or property of another Indian, were excluded. *Ex parte Crow Dog*, 109 U. S. 567-570, 3 Sup. Ct. Rep. 396. The first statute of the United States making Indians triable and punishable by the United States courts was the act of March 3, 1885, (23 St. at Large, 385,) which reads as follows:

"That, immediately upon and after the date of the passage of this act, all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively, and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

Prior to this act, it had been the policy of the government to permit the Indians preserving their tribal relations to regulate and govern their own internal and social concerns. But by this act congress made a radical change in the pre-existing policy, and thereby subjected the offenses therein defined to the jurisdiction of the United States tribunals. It is under and by virtue of that act that the indictment in the present case was found, and by which it must be governed. Manifestly, to bring a defendant within the provisions of the act, he must be an Indian; and it was therefore necessary that the indictment should allege the defendant to be an Indian. Such allegation being necessary, it is of course essential that the proof should correspond; for it is a cardinal rule in criminal procedure that every material averment of the indictment must be established by proof to justify a conviction. In the present case, it is a fact conceded by the respective counsel that the defendant's father was a full-blooded negro, and his mother a full-blooded Indian; that he was taken by his father, when very young, from the reservation where he was born to reside with the father in Los Angeles city, and he did so reside for a number of years, but has since returned to and lived on the reservation, where the offense in question is alleged to have been committed. And the question now raised is whether the defendant is an

Indian, within the meaning of the act of March 3, 1885. If his parentage was a matter about which there was conflicting evidence, or if the fact in relation to it was not conceded, it would have to be passed upon by the jury, along with all the other facts of the case; but, being conceded, it is useless to go into the circumstances of the alleged offense, if it be true, as contended by counsel for defendant, that he is not an Indian, within the meaning of the statute upon which the indictment is founded. The statutes of the United States nowhere define an "Indian." As a matter of fact, the defendant is no more an Indian than he is a negro, and no more a negro than he is an Indian. In the case of *U. S. v. Sanders*, Hemp. 486, the court held that the quantum of Indian blood in the veins did not determine the condition of the offspring of a union between a white person and an Indian, but further held that the condition of the mother did determine the question; and the court referred to the common law as authority for the position that the condition of the mother fixed the *status* of the offspring. In the subsequent case of *Ex parte Reynolds*, 5 Dill. 403, the court said that the first point decided in the *Sanders Case* was sustained by the common law, as also the last point, if applied to the offspring of a connection between a free-man and a slave. But in *Ex parte Reynolds* the court pointed out that—

"By the common law this rule is reversed with regard to the offspring of free persons. Their offspring follows the condition of the father, and the rule, *partus sequitur patrem*, prevails in determining their *status*. 1 Bouv. Inst. p. 198, § 502; *Ludlam v. Ludlam*, 31 Barb. 486; 2 Bouv. Law Dict. 147; *Shanks v. Dupont*, 3 Pet. 242. This is the universal maxim of the common law with regard to freemen,—as old as the common law, or even as the Roman civil law, and as well settled as the rule, *partus sequitur ventrem*,—the one being a rule fixing the *status* of freemen, the other being a rule defining the ownership of property; the one applicable to different political communities or states, whose citizens are in the enjoyment of the civil rights possessed by people in a state of freedom, the other defining the condition of the offspring which had been tainted by the bondage of the mother. No other rules than the ones above enumerated ever did prevail in this or any other civilized country. In the case of *Ludlam v. Ludlam*, 31 Barb. 486, the court says: 'The universal maxim of the common law being *partus sequitur patrem*, it is sufficient for the application of this doctrine that the father should be a subject lawfully, and without breach of his allegiance beyond sea, no matter what may be the condition of the mother.' The law of nations, which becomes, when applicable to an existing condition of affairs in a country, a part of the common law of that country, declares the same rule. Vattel, in his *Law of Nations*, (page 101,) says: 'As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, these children naturally follow the condition of their fathers, and succeed to their rights. \* \* \* The country of the father is therefore that of the children, and these become true citizens merely by their tacit consent.' Again, on page 102, Vattel says: 'By the law of nature alone, children follow the condition of their fathers, and enter into all their rights.' This law of nature, as far as it has become a part of the common law, in the absence of any positive enactment on the subject, must be the rule in this case."

It results from these views that the defendant is not an Indian, within the meaning of the statute upon which the indictment is based; and, that

being so, the jury must be directed to return a verdict of not guilty upon the conceded fact in regard to the parentage of defendant, without going into the circumstances of the alleged offense.

### SCHOFIELD *et al.* v. DUNLOP *et al.*

(Circuit Court, E. D. Pennsylvania. May 9, 1890.)

#### 1. PATENTS FOR INVENTIONS—NOTICE—INFRINGEMENT.

Rev. St. U. S. § 4900, provides that the public shall be notified that an article is patented by a notice attached to it, and that in absence thereof damages cannot be recovered for infringement "except on proof that the defendant was notified of the infringement, and continued after such notice" to infringe. *Held* that, in the absence of proof to the contrary, it would be inferred that the notice was attached to the patented article. Following *Rubber Co. v. Goodyear*, 9 Wall. 788.

#### 2. SAME—BURDEN OF PROOF.

It is only when defendant has proved that the notice was not attached to the patented article that it is incumbent on complainant to prove that actual notice was given to defendant.

#### 3. SAME—PRESUMPTION.

Act Cong. Feb. 4, 1887, (St. U. S. 1886-87, c. 105,) relating to design patents, provides for the recovery of certain damages against persons who shall "apply the design secured by such letters patents, or any colorable imitation thereof." *Held* that, though the act applies only to persons infringing with actual knowledge of the patent, yet, where the design has been copied, it will be presumed that it was with knowledge of the patent, in the absence of proof that a notice was not attached to the patented article.

In Equity.

*Hector T. Fenton*, for complainants.

*Jos. C. Fraley*, for defendants.

BUTLER, J. The suit is for infringing letters patent No. 18,996,—*"Design for Rugs."* The patent, we think, is valid. This question is not free from doubt; but there is nothing in the proofs sufficient to repel the usual presumption in its favor. The infringement is reasonably clear. The dominant and characterizing features of the plaintiffs' and defendants' rugs are substantially identical. The plaintiffs are therefore entitled to an injunction. Are they entitled to damages, also? This is the only serious question presented. Section 4900 of the Revised Statutes provides:

"It shall be the duty of all patentees, and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word 'patented,' together with the day and year the patent was granted; or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice; and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented."

The plaintiffs are within the section; they manufacture the rug. While the evidence respecting this is meager, it is nevertheless sufficient. There is no proof that the word "patented" was affixed, nor that notice was given as required by the section. The word is found on the rug exhibited; but as this came from the plaintiffs' hands, without explanation of the time when, or circumstances under which, it was stamped, the fact is unimportant. The bill avers notice, in apparent conformity with the alternative provision of the section; and without explanation this might possibly be taken as an admission of neglect to mark, especially in the absence of contrary evidence. The notice is only required in case of such neglect, and can be of no advantage under other circumstances. With the explanation before us, however, the averment cannot be accorded this effect. It would be improper to refer it to the statute. An examination shows that similar averments of notice, or knowledge, are found generally in injunction bills—no matter what the wrong complained of. Its office, doubtless, is to show aggravation, and enhance the claim to protection.

While the averment is denied, the proofs are silent respecting it. If the issue is unimportant its introduction must be treated as surplusage. If it is regarded as raising the question whether the plaintiffs performed the duty of marking, on whom is the burden of proof? The form of the issue is immaterial. If the plaintiffs are entitled to a *presumption* of performance, their averment will not, of course, shift the burden to them. If it is on the defendants, their answer is sufficient to raise the question, and admit the proof.

Marking the goods, or notifying the infringer, is a prerequisite to the claim of damages. The object of the section is reasonably plain. To mulct an infringer, who is ignorant of the patent, and without reasonable means of information, in damages is unjust. They frequently exceed the profits realized from infringement, and operate as punishment. While knowledge might be inferred, (and in the absence of this statute would be,) from the patent-office record, the implication would be weak; and when applied to such a case would be unjust. In most instances infringers would be ignorant of the patent. Congress therefore imposed on patentees the duty of marking their manufactures, in the manner stated, and made compliance a condition of the right to recover damages,—"except on proof that the defendant was notified of the infringement, and continued after such notice." Marking, or notice, is therefore the foundation of the right to damages. The one or the other must, consequently, be established, to justify recovery. If marking is omitted, and notice relied upon, the burden is on the plaintiff. The section, as we have seen, so places it, in express terms. As marking is a condition of the right to recover damages, it must, as before observed, be established,—either by proof, or inference. It is a little difficult to understand why it should be inferred. It is not like questions of novelty, invention, and others involving the patent, which are held to be matters of defense. They are so held because of presumptions arising from the patent, or because of statutory provision. It is true that statutes of limitation must



be pleaded, generally, and that they bear some analogy to this section. The ruling, however, which required this was arbitrary, applying at first to certain cases only, and was then rested on the ground that the debt is still due in conscience, and should be considered so in law, unless the statute is interposed. All such legislation was formerly unpopular, and begrudgingly administered, even by the courts. In the absence of contrary authority we would, therefore, feel inclined to hold the plaintiffs to proof. There is authority, however, which cannot be disregarded. *Rubber Co. v. Goodyear*, 9 Wall. 788, we think, involved the question. The plaintiff neither averred nor proved compliance with the section. Before the master, his claim to damages was opposed for this reason. The court overruled the objection on the ground that "the pleadings did not raise the question," and "that compliance with the statute was therefore admitted." The court says:

"It is said that the bill contains no averment on this subject, and that the record is equally barren of proof that any such notice was ever given to the defendant, except by the service of process, upon the filing of the bill. Hence it is insisted that the master should have commenced his account at that time, instead of the earlier period of the beginning of the infringement. His refusal to do so was made the subject of an exception. The answer of the defendant is as silent upon the subject as the bill of the complainants. No such issue was made by the pleadings. It was too late for the defendant to raise the point before the master. They were concluded by their previous silence, and must be held to have waived it."

From this ruling it is plain that the court treated the question as matter of *defense*, to be presented and proved by the defendant. While this conclusion might, possibly, have been more clearly expressed, the language and ruling will not bear any other construction. If the duty of presenting the question, and furnishing proof to establish performance, was on the plaintiff, his failure to raise it and furnish the proof would not preclude the defendant's objection when made. It would have been sufficient, in such case, to point (as the defendant did) to the fact that the plaintiff had not laid the necessary foundation for his claim; it could not have been held that the defendant had waived his right to object. It is only on the hypothesis that *he* was bound to set up and prove non-compliance with the duty, that his silence on the subject could be held to estop him. This case must, therefore, be regarded as deciding that the burden of proof, in such cases, is on the defendant; that in the absence of proof performance is to be inferred. In *Goodyear v. Allyn*, 6 Blatchf. 33, the question was not directly involved. The application was for a preliminary injunction. The court nevertheless considered it; and while what is said is but a *dictum*, it is the expression of an eminent judge (BLATCHFORD) and is entitled to weight. He says:

"It was for the defendants to show a failure by the plaintiffs to mark, as required, the articles made or vended, and then the burden of proof would be on the plaintiffs to show that, before suit was brought, the defendants were notified that they were infringing the patent."

This language is unambiguous. Again, in *Herring v. Gage*, 15 Blatchf. 129, 130, Judge WALLACE says:

"It is insisted \* \* \* for the defendants, that no damages are recoverable, because the device was not labeled or marked as patented, under section 4900 of the Revised Statutes. The statute has no application to a case like this. \* \* \* If it had, the defendants cannot avail themselves of the defense, because they have not set it up in their answer,"

—Citing *Rubber Co. v. Goodyear*. This, also, is but a *dictum*. It nevertheless shows the court's understanding of the question.

The interpretation of the statute by the bar, as shown in practice, is entitled to much weight. Investigation has satisfied us that this interpretation is in conformity with the views expressed in the cases mentioned. From the enactment of the statute down, the bar has proceeded upon the hypothesis that the burden of averring and proving failure to mark is on the defendant. No case has been found in which the plaintiff was held to proof of marking in the first instance. A decree must therefore be entered in the plaintiffs' favor for damages, as well as for an injunction.

Are they entitled to the benefit of the statute of February 4, 1887, (St. U. S. 1886-87, c. 105,) relating to design patents? This statute does not apply to all infringers. One who innocently infringes—in ignorance of the patent—is not within its provisions. It contemplates a willful appropriation of the design. The words "apply the design secured by such letters patent or any colorable imitation thereof," clearly imply knowledge of the design. It could not be "applied" without such knowledge; and a different reading would render the words "or a colorable imitation thereof," unmeaning. Other language employed leads to the same conclusion. We entertain no doubt on this subject, and need not enlarge upon it.

A comparison of the plaintiffs' and defendants' rugs justifies a belief that the latter was copied from the former. While the conclusion does not necessarily follow that they had knowledge of the patent, we must, for the reasons before stated, infer they had, in the absence of proof to the contrary. Presuming the rug to be marked we must hold him to such knowledge, under the circumstances. A decree will be entered accordingly.

**NOTE BY THE COURT.** Since preparing the foregoing opinion we find the principal point discussed is considered briefly in Mr. Walker's excellent book on Patents, at section 463, and the failure to mark patented articles treated as a *defense*. I have also since seen the case of *McComb v. Brodie*, 1 Woods, 153, in which a different view was adopted. The question does not, however, appear to have been discussed in this case.

## EDISON ELECTRIC LIGHT CO. v. PERKINS ELECTRIC LAMP CO., (two cases. Nos. 655, 656.)

(Circuit Court, D. Connecticut. May 20, 1890.)

## PATENTS—FOREIGN INVENTIONS—DURATION OF RIGHT.

Rev. St. U. S. § 4887, provides that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent." *Held* that, where a foreign statute, under which a foreign patent has been extended, was in force at the time a United States patent for the same invention was applied for and issued, and where by such statute the extension of the foreign patent was, in the absence of unfulfilled conditions, a matter entirely of right, at the option of the patentee, on his payment of a required fee, and such fee has been accepted by the foreign government, and the patent extended, the United States patent does not expire until the expiration of such extension, though the foreign patent, before the extension was granted, had lapsed by the non-observance or the happening of a subsequent condition prescribed by the statute.

In Equity.

*Eugene H. Lewis*, for plaintiff.*E. D. Robbins and Edmund Wetmore*, for defendant.

SHIPMAN, J. These causes are in equity, for alleged infringement of letters patent. The questions now at issue arise upon the defendant's pleas, which the plaintiff has set down for argument.

The bill in equity in No. 655 avers that the letters patent upon which the suit is based were dated January 27, 1880; that a previous Canadian patent for the same invention was granted for the term of 15 years from its date; that said term has not expired; and that the same is in full force and effect. The plea in that case alleges that the Canadian patent was granted on November 17, 1879; that said Canadian patent was originally granted for the term of five years, with the privilege of extending the same, after the expiration of the said period, upon the payment of a further fee; that it bore upon its face its liability to be terminated before the expiration of five years by the non-observance of two conditions subsequent, similar to those which are recited in *Pohl v. Brewing Co.*, 10 Sup. Ct. Rep. 577; and that said two conditions were not fulfilled. Its actual attempted extension by the Canadian government is not denied. The plea further alleges that during said period of five years the Canadian patent expired by virtue of the expiration of a subsequent Swedish patent for the same invention, and that the Canadian patent was incapable, under the law of Canada, of extension beyond said original term of five years; and that any attempt to extend the same by any officer of the Canadian government was void, and of no effect. It is understood that the Swedish patent was issued after the date of the United States patent, and that the Canadian statute of 1872 in regard to the extension of patents by payment of fees, which is recited in the *Bate Case*, is the statute under which the Canadian patent was issued.

In *Bate Refrigerating Co. v. Hammond*, 129 U. S. 151, 9 Sup. Ct. Rep. 225, it was held that—

"Where the Canadian statute, under which the extensions of the Canadian patent were granted, was in force when the United States patent was issued, and also when that patent was applied for, and where, by the Canadian statute, the extension of the patent for Canada was a matter entirely of right, at the option of the patentee, on his payment of a required fee, and where the fifteen-years term of the Canadian patent has been continuous and without interruption, the United States patent does not expire before the end of the fifteen-years duration of the Canadian patent."

This decision, being confined to the facts which are therein stated, does not control the present case. In *Pohl v. Brewing Co.*, 10 Sup. Ct. Rep. 577, (decided at the October term, 1889, of the supreme court,) it was held that a patent of the United States subject to the limitations prescribed by section 4887,<sup>1</sup> by reason of a previous German and a previous French patent, did not expire prior to the expiration of the 15 years for which the German patent was issued, although each of said patents had theretofore expired by virtue of the operation of conditions subsequent which, by the law of the respective countries, made said respective foreign patents void. The court says "there is nothing in the statute which admits of the view that the duration of the United States patent is to be limited by anything but the duration of the legal term of the foreign patent in force at the time of the issuing of the United States patent, or that it is to be limited by any lapsing or forfeiture of any portion of the term of such foreign patent by means of the operation of a condition subsequent according to the foreign statute," and furthermore construes the words in section 4887, "having the shortest term," to mean the foreign patent which, at the time the United States patent is granted, has then the shortest term to run, irrespective of the fact that the foreign patent may afterwards lapse or become forfeited by the non-observance of a condition subsequent prescribed by the foreign statute. The facts in this case are not the same with those in the *Pohl Case*, because the French and German patents were on their face for the term of 15 years. It is said in the plea that the Canadian patent was for the term of five years, with the privilege of renewing the same, upon the payment of a fee, for a further term, and that, previous to the expiration of the first five years, it had expired by means of the provisions of the Canadian statute, and therefore could not be renewed, and that two of these conditions subsequent were expressed upon the face of the patent.

Aided by such light as the decisions which I have quoted furnish, I am of opinion that, when the Canadian statute under which the extensions of the Canadian patent were granted, or attempted to be granted, was in force when the United States patent was issued, and when it was applied for, and when, by the Canadian statute, the extension of the patent for Canada was, in the absence of unfulfilled conditions, a matter entirely of right, at the option of the patentee, on his payment of a required fee, and when the 15-years term of the Canadian patent has been, by the affirmative action of the government in apparently renewing the

<sup>1</sup> Rev. St. U. S. § 4887, provides that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent."

patent, continuous and uninterrupted, the United States patent does not expire before the end of the 15-years duration of the Canadian patent, although the Canadian patent, before the expiration of the first five years, may have lapsed or become forfeited by the non-observance of a condition subsequent, or by the happening of a subsequent condition, prescribed by the statute of Canada. If the Canadian government has in fact accepted the renewal fee, and renewed the patent for a continuous and uninterrupted period of 15 years, as though the subsequent conditions had been complied with, the United States patent has not expired before the expiration of said 15 years. I am confirmed in the construction which I have given by the hardship of a construction which should compel the life of United States patents to be determined by the operation of conditions subsequent in prior foreign patents which may secretly affect, or be claimed to affect, the life of such foreign patents, although they are apparently, upon their face, in full force, and have apparently been uninterruptedly continued in existence by the government which granted them.

In No. 656 the dates of the respective patents differ from those in No. 655. The plea in No. 656 sets up, *mutatis mutandis*, the facts which have been heretofore stated, omitting those in regard to the Swedish patent. I understand the facts to be substantially those of the *Pohl Case*, except that in the plea the conditions subsequent are alleged to be stated upon the face of the Canadian patent. I do not regard this as a vital difference. The pleas are overruled, and the defendant will answer in 30 days.

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MESKER *et al.* v. THUENER *et al.*

(Circuit Court, E. D.-Missouri, E. D. October 30, 1892.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—UTILITY—PRESUMPTION.

In the absence of satisfactory evidence to the contrary, the subject-matter of every patent is presumed to be useful and patentable.

2. SAME—INFRINGEMENT—ORNAMENTAL CEILINGS.

Letters patent No. 361,438, granted April 19, 1887, to Mesker & Bro., for an improvement in sheet-metal ceilings, walls, or panels, *held* valid, and infringed by ceilings made in accordance with letters patent No. 376,926, granted January 24, 1888, for an improvement in metallic ceilings.

In Equity.

This was a suit for the infringement of letters patent of the United States No. 361,438, granted April 19, 1887, to the firm of Mesker & Bro., for an improvement in sheet-metal ceilings, walls, or panels, by ceiling manufactured and sold by defendants, made in accordance with the letters patent No. 376,926, granted to Charles Thuener, January 24, 1888. The claim of the patent sued on is as follows:

"The combination of the sheets, A, A, A, and the cross-bars, B, are sheet, A, having the fold,  $a^2$ ,  $a^3$ , and receiving the edge of the adjoining sheet, A,

and being secured to the frame of the structure, and said bar, B, having the folds,  $b$ ,  $b'$ , substantially as described."

The "fold,  $a^2$ ,  $a^3$ ," referred to in the claim of the patent, is a re-entering fold, capable of receiving and supporting the edge of the adjoining sheet, and having the return bend or part,  $a^3$ , carried far enough out to project beyond the edge of the supporting ledge beneath, and forming a nailing flange, which is hidden when the ceiling is in place. Each sheet has but the one nailing flange. The folds,  $b$ ,  $b'$ , of the bars, are re-entering folds, capable of each receiving the end of a sheet, so that the ends of two sheets may be joined together by means of it. The cross-bars have no nailing flanges, but are supported upon the ends of the sheets. The whole ceiling is supported upon the concerted nailing flanges formed on one side edge of each sheet in the manner above stated. The fold,  $a^2$ ,  $a^3$ , shown in the drawings of the patent sued on, forms a ledge having an inclined bearing. The fold used by the defendants formed a flat bearing. In other respects the folds were the same. The bars shown in the complainant's patent have two sides, sloping inward until they meet. The bars in the infringing ceiling differed from them only in the fact that they presented three sides to view, the top being flat. The defenses were lack of novelty and patentability and non-infringement. A very large number of patents were offered in evidence. Those upon which most stress was placed by the defendants' counsel are the following: Patent granted J. D. Ottiwell, No. 343,775; patent granted F. Roys, No. 95,732; and patent granted P. A. Thomas, No. 358,175.

*Benjamin F. Rex*, for complainants.

*George H. Knight*, for defendants.

THAYER, J., (*orally*.) This case was argued for a day and a half. The questions and patents discussed are so numerous that it is impossible, in the time at my disposal, to go over all of the points in detail. Hence in this case I content myself with a statement of the conclusions I have formed. In view of the state of the art, and the numerous kinds of metallic ceiling heretofore patented, it is no doubt questionable whether the metallic ceiling patented by Mesker possesses patentable novelty. But inasmuch as the patent creates the presumption that the combination claimed is patentable, and is a useful combination, and inasmuch as the evidence does not satisfactorily overcome that presumption, and furthermore, as it is evident from an examination of the ceiling made by the defendants that it was copied from the ceiling manufactured by complainants, with merely a colorable difference in one particular, (that is, in the form of the fold,) I have determined to order a decree in favor of complainant. In view of the amount of testimony that has been taken, it appears to me that it is unnecessary to order a reference in this case for the purpose of ascertaining the damages resulting from the infringement. From the testimony already taken, it is probable that counsel can easily agree as to the amount of damages to be assessed. Hence a reference to a master will not be ordered, unless complainants' counsel insists upon a reference. If he does so insist, a reference will,

of course, be ordered; but the court will reserve the right to put the costs of such reference where they shall belong, if, at the conclusion of the reference, as now, it appears that the reference was unnecessary.

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THE THINGVALLA.<sup>1</sup>

THE GEISER.

*In re DAMPSKIBSELSKABET THINGVALLA.*

(District Court, E. D. New York. May 8, 1890.)

**COLLISION—BETWEEN STEAMERS—CROSSING COURSES—LIMITING LIABILITY.**

The steam-ships Thingvalla and Geiser, belonging to the same company, met on the high seas about 4 o'clock of a dark and rainy morning. The Thingvalla ported, and kept a-port. The Geiser starboarded, and remained so. Both vessels reversed, but the Thingvalla struck the starboard side of the Geiser, sinking her almost immediately. On petition by the owner of the vessels for limitation of its liability, various claimants alleged that the collision was caused by the fault of the Thingvalla. Claimants' contentions were as follows: (1) That the vessels were on crossing courses, not meeting end on, as petitioner alleged; but *held* that, in either case, the right of the Thingvalla to port was the same. (2) That, after the Thingvalla had ported to the Geiser's red light, she lost that light, and saw the green, and that thereupon it became her duty to starboard. *Held*, that under the circumstances, knowing her own right to port and the Geiser's error in starboarding, and not knowing but what the Geiser would attempt to correct her error by porting, there was no fault in the Thingvalla's omitting to starboard during the comparatively short period from her losing the Geiser's red light to the collision. (3) That either the Thingvalla was running full speed in a fog, or had an insufficient lookout. *Held*, that the evidence did not show fog, and did show that the Geiser was seen in time for the Thingvalla to have avoided her if the Geiser had maintained her course. (4) It was also charged that the Thingvalla showed no mast-head light, but *held*, that the evidence did not sustain the charge. *Held, therefore*, that the collision was not due to fault on the part of the Thingvalla, and the petitioner was entitled to a limitation of its liability.

In Admiralty. On hearing of petition for limitation of liability.

*Wing, Shoudy & Putnam*, for petitioner.

*Sidney Chubb, R. D. Benedict, E. B. Convers, J. Edward Swanstrom, August Reymert, and Herbert Kettell*, for various claimants.

BENEDICT, J. The petition in this case is filed by a corporation owning the Danish steam-ships Thingvalla and Geiser, to obtain a limitation of its liability for damages occasioned by a collision which occurred between those two vessels on the high seas, not far from Sable island, on the 14th day of August, 1888. At the time of the collision, the Geiser was outward bound from New York with passengers and cargo, and the steamer Thingvalla was bound to New York, also laden with cargo and passengers. These two steamers came in collision about 4 o'clock of a dark and rainy morning, the Thingvalla striking the Geiser on her starboard side, almost at right angles, and cutting her nearly

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

in two, so that she sunk in deep water almost immediately; the steamer and her cargo being totally lost, and some 50 persons on board of her being drowned. The bow of the Thingvalla was smashed in by the collision, and she reduced to a sinking condition, but her master, by the exercise of a care and skill which deserves mention, succeeded, by running her stern foremost for the whole distance, in reaching Halifax, some 180 miles distant. The name of this master is Soren J. Laub. The Geiser and her cargo being lost, of course nothing has been brought into this court to represent her. The petitioners' interest in the Thingvalla and her pending freight is represented by upwards of \$60,000, which has been brought in by them, and is now in the registry. The petition sets forth that the collision occurred through no negligence upon the part of the persons having charge of the navigation of the Thingvalla, and prays that, if it so appears upon hearing of the cause, the petitioner may be decreed to be free from responsibility for the loss and damage caused by the collision. Several insurance companies and others interested in the cargoes laden on board these steamers appear, and deny the allegation of the petition, and assert that the collision was caused by fault on the part of the Thingvalla.

As the collision happened about 4 o'clock in the morning of a rainy day, there would be, in the ordinary course of events, no one on the deck of either vessel except those whose duty required them to be there. The first and third officer of the Thingvalla were on the bridge. They have been called and examined by the petitioner. The lookout is not called. Of the Geiser's survivors, the third officer and a young man were on the deck at the time of the collision. The former has been called as a witness, the latter not. Her second officer, who was below deck and asleep, and her master, who came on the bridge a moment before the collision, have also been examined. Two master mariners of great experience testify, as experts, at the call of the claimants, and also a single passenger from the Geiser.

Upon the testimony given by these witnesses, the claimants of the fund in court contend, first, that the steamers were upon crossing courses, and not, as the petitioner asserts, meeting end on, within the meaning of article 15. But, assuming the testimony to support this contention, it does not follow that the navigation of the Thingvalla was faulty. What the navigation of the respective vessels was, is not in dispute. The Thingvalla, upon discerning the Geiser, ported her helm, and kept under her port helm until the two vessels were in contact, meanwhile stopping and reversing her engines. The Geiser, upon discovering the Thingvalla, starboarded her helm, and kept under her starboard helm until the vessels were in contact, meanwhile stopping and reversing her engines. The vessels were either meeting end on or upon crossing courses. In either case, the right of the Thingvalla to port was the same. So, in either of these cases, it was wrong navigation for the Geiser to starboard, as she did. The main contention on the part of the claimants is that if it be that the Thingvalla had the right to port in the first instance, and if it be that the Geiser was wrong in starboarding as she did, nevertheless it



was the duty of the Thingvalla, when she saw the red light of the Geiser disappear, to starboard her helm, because by so doing she would have avoided collision. In the light of the facts disclosed by the testimony, I am inclined to believe that if the Thingvalla had swung sharply to port under her starboard helm, as soon as the Geiser shut out her red light and displayed only her green, collision would have been avoided. But it by no means follows that the Thingvalla can be adjudged to be in fault for not swinging under her starboard helm when the Geiser's red light was shut out. The facts then known to the officer in charge of the Thingvalla were these, and these only, namely, that he had the right to avoid the Geiser by porting; that the Geiser, under a starboard helm, was in the wrong; and that, as the vessels were then approaching, risk of collision was manifest to those in charge of both vessels. What had induced the Geiser to starboard, the officer in charge of the Thingvalla did not know; nor did he know what is now known, that no effort to return to her true course would be made by the Geiser. On the facts known to him, he was entitled to presume that the Geiser, upon discovering the Thingvalla under her port helm, would be conscious of error, and would at once endeavor to correct it by shifting the Geiser's helm from starboard to port. Knowing what he did, and nothing more, no obligation to starboard his helm attached to the officer in command of the Thingvalla. Capt. Thompson, testifying as an expert, expresses a belief that, under the circumstances narrated, he would have taken the chances, and starboarded, as soon as the Geiser's red light was shut out. But it is easy to arrive at such a belief after the event. Whether this experienced and skillful navigator, if he had been in command of the Thingvalla at the time, charged with the responsibility of the lives and property on board, would have "chanced it," and put his vessel at full speed under a starboard helm, cannot now be known. What is known is that if he had done so it would have been in violation of law. Capt. Milbank, also testifying as an expert, is likewise of the opinion that if he had commanded the Thingvalla under the circumstances, with 50 seconds of time, he would have taken the chances of assuming the green light of the Geiser to be a persistent green light; and with a persistent green light ahead he would starboard his helm, and go on at full speed. But the law does not compel the taking of such chances. The officer in command of the Thingvalla did not and could not know that the Geiser's green light was a persistent green light. The presumption was the other way. In the absence of that knowledge, it seems to me clear that it cannot be held to have been the duty of the Thingvalla to starboard, and go at full speed; especially when, there being then risk of collision, the law made it obligatory to stop and reverse; and to stop and reverse would be inconsistent with a starboarding of the wheel, for the power of the helm to swing the vessel is dependent on the forward movement of the screw. The question is not what bold and daring men would do, but what the law made it the duty of the officer in command of the Thingvalla to do. After a careful study of the case, aided, as I have been, by elaborate arguments on both sides, I am unable to hold the officer in

charge of the Thingvalla to be in fault for omitting to starboard his helm upon losing the Geiser's red light.

Another contention on the part of the claimant of the fund is that the Thingvalla was in fault, either for not seeing the Geiser sooner than she did, or, if that was impossible by reason of the weather, in keeping up her speed of 11 knots an hour in thick weather. But there is no evidence of any fog. The testimony from those on deck is positive that lights could be seen at a sufficient distance, although the night was dark and rainy. None of the numerous passengers who were on the deck of the Thingvalla immediately after the collision are called to show that the weather was thick, and it is impossible to conclude from the evidence that the weather was such as to require the steamer to reduce her speed. As to the failure to keep a proper lookout on board the Thingvalla, the proof shows that there was a stationed lookout, and that the Geiser was seen at a sufficient distance to have enabled the Thingvalla to avoid her if she had maintained her course. Indeed, the main argument made on the part of the claimants is based upon the assumption that there was time enough for the Thingvalla to clear the Geiser by starboarding the helm after the Geiser was seen to be starboarding. It is plain, therefore, that the collision cannot be attributed to the want of a lookout on the part of the Thingvalla, nor to improper speed in thick weather.

Another contention on the part of the claimant is that the starboarding of the Geiser's helm upon discovering the Thingvalla arose from the fact that, to those in charge of the navigation of the Geiser, the Thingvalla displayed a green light, but no mast-head light; and it is urged that the collision should be attributed to the failure of the Thingvalla to display a mast-head light. But while it would seem to be the fact that no mast-head light on the Thingvalla was seen by the two witnesses who are called from the deck of the Geiser, and while it is not easy to understand how the mate in charge of the Geiser, who is shown to have been a competent navigator and who was lost by the collision, could have starboarded his helm if he had known that the approaching vessel was a steamer, it is in proof that the Thingvalla carried a mast-head light, not only from those called from the deck of the Thingvalla, but from the master of the Geiser who came on deck before the vessels struck, and who says that he then saw the mast-head light of the Thingvalla. The suggestion is made that a sail on the Thingvalla's stays might have hid the mast-head light, but of this there is no proof. It might also, perhaps, be suggested that some sudden dash of rain obscured the light, but suggestions like these do not form foundation for a judgment that the Thingvalla is responsible for the collision because of the failure to show the mast-head light. My conclusion, therefore, is that the Thingvalla must be adjudged free from any fault conducing to the collision in question, and the petitioner held entitled to exemption from liability for the damages occasioned thereby.

BOOYE v. A CARGO OF DRY BOARDS.<sup>1</sup>

(District Court, E. D. New York. May 10, 1890.)

## SHIPPING—CHARTER-PARTY—CONSTRUCTION—FURNISHING CARGO—DELAYS BY WEATHER.

Under a contract of charter, absolute in its terms, to deliver to a vessel a certain quantity of cargo per day, the charterer assumes the risk of the weather being such as to forbid handling cargo.

In Admiralty. Action for demurrage.

*Owen, Gray & Sturges*, for libellant.

*Bartlett, Wilson & Hayden*, for claimant.

BENEDICT, J. This is an action to recover three days' demurrage in loading the libellant's vessel at Atlantic City, Norfolk, Va., and five days' demurrage in discharging the vessel at New York.

In regard to the detention in Atlantic City in loading the vessel, the fact is undisputed that the vessel was detained three days, and that the detention arose solely from the fact that the weather was rainy, and that the boards, having been kiln-dried, could not be put on board in such weather without damage. The provision of the charter was as follows:

"It is agreed that the lay days for loading and discharging shall be as follows, if not sooner dispatched: From the time the vessel is ready to receive or discharge cargo, 30,000 feet per day, Sundays excepted, to be furnished for loading, and quick dispatch for discharging, and that for each and every day's detention of the vessel by default of said party of the second part, or agent, \$25.00 per day, day by day, shall be paid by said party of the second part to the party of the first part, or agent. The cargo or cargoes to be received and delivered along-side, in reach of the vessel's tackles, at ports of loading and discharging."

There is no dispute as to the fact that the vessel was ready for loading at Norfolk at the appointed time, and that, if 30,000 feet of boards had been furnished her each day, she would have been loaded three days sooner than she was. Nor is there any dispute as to the fact that the sole cause or failure of the charterer to deliver the boards along-side the vessel as agreed in the charter-party was that the weather was rainy, and the boards, which were kiln-dried, would be damaged if loaded in the rain. Under such a contract, absolute in its terms, for the delivery to the vessel of 30,000 feet of boards per day, I am of the opinion that the risk of the weather is assumed by the charterer. It would have been so easy to have said "weather permitting" that the absence of words of that import indicate an understanding that the weather was at the risk of the charterer. The words "by default of the party of the second part" mean the default in furnishing 30,000 feet per day along-side the vessel for the loading thereof. *Thiss v. Byers*, 1 Q. B. Div. 244.

In regard to the detention of the vessel in New York in unloading, the evidence makes it clear that the delay was by fault of the master of the ship in not proceeding to the place designated for the discharg-

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

ing of the cargo on Saturday, or even Monday morning. If he had arrived at the place on Monday morning, even, it is evident that he would have been discharged at once.

The libelant must recover for three days' detention at Atlantic City at the rate provided in the charter. Let a decree be entered in favor of the libelant for \$175 and costs.

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THE STEPHEN BENNETT.<sup>1</sup>

THE ELIZABETH T. COTTINGHAM.

(District Court, E. D. New York. May 10, 1890.)

**COLLISION—OVERTAKING VESSEL—MISSING STAYS.**

Two schooners were beating up the coast, the B. following in close proximity to the C., and gaining slightly on her. The C. went about, and immediately afterwards the B. attempted to do the same, but misstayed, and, gathering sternway, got under the bow of the C., and was struck by her. The B. had misstayed once before that morning. *Held*, that the collision was caused by the B. in tacking so close to the C., with knowledge that she was liable to misstay.

In Admiralty. Cross-actions for damages by collision.

*Owen, Gray & Sturges*, for the Elizabeth T. Cottingham.

*Goodrich, Deady & Goodrich*, for the Stephen Bennett.

BENEDICT, J. These are cross-libels filed to recover damages by reason of a collision which occurred about noon of December 6, 1888, off the New Jersey coast near to Barnegat, between the schooner Stephen Bennett and the schooner Elizabeth T. Cottingham. The weather was clear, wind blowing very hard from the N. N. W., and a heavy sea rolling in from the N. E. Both vessels, loaded with lumber, were beating up the coast. They had stood in from off shore towards the beach for about an hour, the Cottingham being ahead and a point on the lee bow of the Bennett. When the master of the Cottingham judged that he was near enough to the beach he tacked. At the same time, or perhaps a moment later, the Bennett also came up into the wind, intending to tack, but misstayed, and, gathering sternway, got under the bow of the Cottingham, and was struck by her. Upon the evidence, the Bennett alone is responsible for the collision. She was the overtaking vessel. She had misstayed before that morning, and knew that she was liable to misstay again. She had no right to tack so close to the Cottingham as to render collision inevitable in case she should misstay. The Cottingham was guilty of no fault. She was in the open sea, and, although she might perhaps have gone a little nearer to the shore than she did, it was no fault in her to tack where she did, and it was the duty of the Bennett, following her so closely,—gaining on her, indeed, as the evidence shows,—not to tack so close to her as she did. The libel against the Cottingham must be dismissed, with costs, and the libelants in the first action must have a decree, with an order of reference.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

DETWEILER v. HOLDERBAUM *et al.*

(Circuit Court, S. D. Iowa. June 3, 1890.)

## 1. FEDERAL COURTS—JURISDICTION—SUITS TO FORECLOSE MORTGAGES—PARTIES.

Rev. St. U. S. § 737, provides that, when there are several defendants in any suit in the federal courts, one or more of whom are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to trial and adjudication of the suit between the parties who are properly before it; but the judgment rendered thereon shall not conclude or prejudice other parties not regularly served with process, nor voluntarily appearing to answer, and the non-joinder of such other parties shall not constitute matter of abatement or objection to the suit. *Held*, that the act does not give the circuit court jurisdiction of a suit to foreclose a mortgage given by an executor under a power in the will on land devised to testator's children, where some of the devisees are non-residents, and are neither made parties defendant, nor appear to answer.

## 2. SAME.

In such case the court cannot proceed with the suit, and foreclose the mortgage, without affecting the interest of the devisees who are not parties, since, the mortgage covering all the land, and the devisees being joint tenants, a decree would affect the interest of the non-resident devisees just as if they owned the entire property.

## 3. SAME.

Nor can the mortgage be foreclosed as to the interest of those devisees only who are parties to the suit, since the entire lien would thus be cast on their interest.

In Equity. Bill to foreclose a mortgage on real estate.

Rev. St. U. S. § 737, relating to the jurisdiction of federal courts, provides that, "when there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, nor voluntarily appearing to answer, and non-joinder of parties who are not inhabitants nor found within the district as aforesaid shall not constitute matter of abatement or objection to the suit."

*Kauffman & Guernsey*, for complainant.

*John Leonard & Son and Gatch, Connor & Weaver*, for defendants.

SHIRAS, J. Michael Holderbaum was during his life-time a resident of Iowa, owning a farm in Page county, in this state. By his will, he appointed A. C. Holderbaum executor thereof, and authorized him to negotiate a loan to take up certain mortgages then existing against his realty. His property was devised to his children and grandchildren. After his death, his executor negotiated a loan of complainant for the purpose named in the will, and to secure payment thereof executed, as executor, a mortgage on the realty in Page county. The present bill was filed for the purpose of foreclosing this mortgage; the complainant being a citizen of the state of Ohio. To this bill, as it now stands, there are made defendants the executor and the immediate children of Michael Holderbaum. Two grandchildren, who represent the interest of their

deceased mother, a daughter of the testator, are not parties to the bill. They reside in Ohio, and are citizens of that state. The parties made defendants to the bill contest the validity of the mortgage, denying the right of the executor to give the same. Under the provisions of the will of Michael Holderbaum, the title of one-twelfth of the realty is held by the grandchildren residing in Ohio.

The objection interposed of want of proper parties presents the question whether the court would be authorized to hear and determine the issue of the validity of the mortgage, and, if held valid, to grant a decree foreclosing said mortgage, in the absence of the parties who hold the title to the undivided one-twelfth of the property. As the grandchildren are citizens of the same state as the complainant, they could not be made parties defendant without affecting the jurisdiction of the court, and hence the question is narrowed down to the proposition already stated. Can the court, under the provisions of section 737 of the Revised Statutes and equity rule 47, proceed to hear and determine the issues presented, in the absence of the parties who hold the title to an undivided share of the realty? The general rule is that all persons materially interested, either legally or beneficially, in the subject-matter of the controversy, should be made parties, in order that the court may by the one hearing and decree bind all the parties, thereby preventing further litigation. Story, Eq. Pl. § 72. The exceptions to this general rule, and the reasons why such exceptions have been introduced, are fairly stated in *Shields v. Barrow*, 17 How. 130, and the cases therein cited, in which it is held that the equity rule and statutory enactment above cited are only declaratory of the principles recognized and enforced by the court. In *Ribon v. Railroad Co.*, 16 Wall. 446, it is said:

"The rule in equity as to parties defendant is that all whose interests will be affected by the decree sought to be obtained must be before the court; and, if any such persons cannot be reached by process, do not voluntarily appear, or, from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties, the bill must be dismissed. Where a decree can be made as to those present without affecting the rights of those who are absent, the court will proceed; but, if the interests of those present and of those absent are inseparable, the obstacle is insuperable." See, also, *Gregory v. Stetson*, 133 U. S. 579, 10 Sup. Ct. Rep. 422.

As already stated, the questions to be heard and determined are as to the validity of the mortgage, which involves the power of the executor to execute the same, and, if held valid, the consequent right to enforce the same by decreeing a sale of the mortgaged property. The first consideration is whether the party owning the title, and the beneficial interest in the realty, is a necessary party defendant; in other words, if, under the will of Michael Holderbaum, there was only one devisee, A. B., would the court proceed to foreclose a mortgage given by the executor without the presence of A. B. as a party defendant? There could be no question that, under such circumstances, A. B. would have a direct interest in the subject-matter of the suit. If the mortgage is to be foreclosed, and the land sold thereunder, it is his title and interest that is affected. The executor has no beneficial interest in the land. If the

mortgage by the executor is valid, it reaches the title and interest which passed under the will to the devisee. Granting that the executor had the same power under the will to mortgage the land that the testator had in his life-time, that power has been executed, and the executor has ceased to have any further power over the land, and he never had any actual beneficial interest therein. If the mortgage sought to be foreclosed had been executed by the testator during his life-time, is it not clear beyond question that the court should refuse to proceed unless the party to whom the title passed, and in whom the equity of redemption existed, was made a party defendant. Story, Eq. Pl. § 196; 2 Jones, Mortg. § 1414; *Shields v. Keyes*, 24 Iowa, 298. The necessity for the presence of the owner of the title and of the equity of redemption is still greater when, as in the case at bar, the mortgage was executed after the death of the testator, and after the devisee's rights had vested in him. The reasons for such a course are of a substantial, and not a purely technical, character. If a decree of foreclosure is taken without the presence of the heir or devisee, and a sale is had, such proceedings cast a cloud upon the title of the heir or devisee which may be a material injury to him. If the court proceeds to a decree and sale, it invites persons to purchase at such sale; and it ought not to do so if it is apparent that the sale is practically formal, and will not convey a substantial interest. Furthermore, a court ought not to decree a sale of realty under circumstances that clearly show that a fair price cannot probably be realized at such sale, owing to the doubt and uncertainty as to the interest and title which will pass at such sale. If the court, in the case supposed, should proceed to a decree and sale of the realty without the presence of A. B., the owner of the title, he would not be bound by the decree in any particular, and the foreclosure decree and sale would amount to little beyond an assignment of the mortgage debt to the purchaser at such sale. Under such circumstances, it seems to me clear that the court should refuse to proceed in the supposed case unless the devisee, A. B., was made a party defendant; and, if this could not be done without ousting the jurisdiction of the court by reason of the citizenship of the parties, then the cause should be dismissed.

But it is claimed that, as the owners of the undivided eleven-twelfths of the realty are before the court, the cause should be proceeded with, leaving the other interests unaffected. Can this be done, in justice to all parties? The absent parties in question have just the same rights and interest to be considered, and to be affected by the decree and sale, as though they owned the entire property, instead of an undivided share thereof. If the decree entered forecloses the mortgage, and orders a sale of the realty, their interest is affected just the same as though they owned the entire property. The cloud cast by such decree and sale upon their interests is just the same. It was suggested in argument that the decree might order the sale of the undivided eleven-twelfths of the property owned by the parties defendant before the court. The result of this would be that the lien of the entire debt would be cast upon the title of the owners of the eleven-twelfths interest, which would be manifestly unjust to

them, as it would compel them to pay the entire debt, or else to seek reimbursement from the share left unsold, and they would then be compelled to assume the burden of proving the validity of the mortgage in another suit against their co-devisees. Again, the sale of an undivided eleven-twelfths of a farm will never realize as good a proportionate price as a sale of the entirety. When a court sees that difficulties of this nature will ensue if the cause is sent to a decree in the absence of parties having a beneficial interest in the property sought to be foreclosed, it should require them to be brought in; and if this cannot be done, for jurisdictional reasons, then the cause will be dismissed, and the litigants will be remitted to the courts of the state wherein all the parties may be brought in, and thus the one proceeding may settle once for all the matters in controversy. The facts do not present a case wherein a mortgage is sought to be foreclosed upon the interest of a part owner or of a tenant in common, and where the decree is sought only against interests of such owner. The bill charges that the mortgage is upon the interest of all the parties, and, if validly executed, such is its legal effect. The children and grandchildren all take title under the will of Michael Holderbaum, and they are therefore joint tenants of the realty.

The case, cited by counsel for complainants, of *Stephen v. Beall*, 22 Wall. 329, and mainly relied on as an authority in support of the jurisdiction, clearly indicates the different rule that should be applied to cases wherein a mortgage on realty is given on the interest of a part owner, and that interest alone is sought to be reached by a foreclosure decree, and a case like the present, where the mortgage is upon the entire interests of joint tenants. In that case, Mrs. Beall was the owner of one-fourth of the property, and gave a conveyance in the nature of a mortgage, which described the entire property, but the legal effect of which was to create a lien upon her one-fourth interest, and no more. A bill to enforce the mortgage lien was filed against Mrs. Beall and her husband; her children, who owned the remaining three-fourths of the property, not being made parties defendant. The circuit court dismissed the bill for want of proper parties, and on appeal the supreme court reversed the ruling. In the opinion filed, the supreme court points out the fact that the record clearly showed, notwithstanding the general terms used in the conveyance, that it conveyed only the one-fourth interest of Mrs. Beall, without affecting the interests of the children, and further that the bill did not seek to affect their rights, but declared only against the interests of Mrs. Beall. Under these circumstances, the supreme court held that the children had no interest whatever in the controversy, and that it would not be proper to make the children parties to the proceedings. Instead of supporting the view of complainant in this case, the reasoning in this opinion tends in the opposite direction; for it assumes that it is necessary to establish the fact that the children's interest in the property was not affected by the conveyance of the mother, in order to support the conclusion that they had no interest in the foreclosure proceedings. The difference in the facts of the two cases is such that I do not see how the ruling of the supreme court can be held to apply to the case at bar.



Deeming the objection of want of parties well taken, under the facts shown upon the face of this record, and as the absent parties cannot be made defendants without ousting the jurisdiction of the court, the order will be that the cause be dismissed without prejudice to the right of complainant to proceed in a court of competent jurisdiction.

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AMES v. HOLDERBAUM *et al.*

(Circuit Court, S. D. Iowa. June 3, 1890.)

FEDERAL COURTS—JURISDICTION—SUIT TO FORECLOSE MORTGAGE.

Under Act Cong. March 3, 1875, § 8, (18 U. S. St. p. 470, c. 187,) which is expressly left in force by amendatory Act Cong. Aug. 13, 1888, (25 U. S. St. p. 433, c. 866,) and which provides that "when, in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon \* \* \* real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, \* \* \* it shall be lawful for the court to make an order directing such absent defendant or defendants to appear," etc., the circuit court has jurisdiction of a suit by a resident of another district to foreclose a mortgage on land situated within the district, though some of the defendants are, and others are not, residents of the district in which the suit is brought.

In Equity. Bill to foreclose mortgage on real estate.

*Kauffman & Guernsey*, for complainant.

*John Leonard & Son*, and *Gatch, Connor & Weaver*, for defendants.

SHIRAS, J. The complainant is, and was when this suit was brought, a citizen of the state of Illinois; A. C. Holderbaum was a citizen of Iowa, and Henry and David Hochstetler were citizens of Ohio; and the property covered by the mortgage sought to be foreclosed is in Iowa. The motion to dismiss is based upon the theory that under the statute of August 13, 1888,<sup>1</sup> the jurisdiction of the circuit court of the United States is based solely upon the diverse citizenship of the adversary parties, and that, under the construction given thereto by the supreme court in the case of *Smith v. Lyon*, 10 Sup. Ct. Rep. 303, this court cannot take jurisdiction of this cause, because two of the defendants are citizens of Ohio. If this suit was a purely personal action, wherein the place of bringing the suit was dependent upon the residence of the parties, the objection urged to the jurisdiction would have weight; but is the rule recognized in *Smith v. Lyon* applicable to suits for foreclosure of mortgages on realty, wherein the place of bringing suit is determined by the location of the realty covered by the mortgage? Under the statutes of Iowa, the mortgagor retains the legal title and right of possession of mortgaged realty, and proceedings for the foreclosure thereof must be brought in the county wherein the realty, or some part thereof, is situated. The decree operates *in rem*, and may be rendered without per-

<sup>1</sup>25 U. S. St. p. 433, c. 866.

sonal service upon or jurisdiction over the person of the mortgagor, and the suit is therefore to be deemed to be local in its nature. 2 Jones, Mortg. § 1444. When the suit is of a purely personal nature, the place of bringing suit, when jurisdiction depends solely upon the diverse citizenship of the parties, is by the act of 1888 restricted to the districts wherein the plaintiff and the defendant reside; and, unless all the plaintiffs reside in one district, suit cannot be brought in that district. Nor, unless all the defendants reside in the same district, can suit be brought therein, because the statute does not confer the right to bring the suit in a district wherein a part only of the defendants reside. In *Smith v. Lyon* it is shown that this has been the construction placed upon the judiciary act of 1789, and all succeeding acts regulating the jurisdiction of the circuit courts. In the act of 1875,<sup>1</sup> by section 8 thereof, it is provided "that when, in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear," etc. This section clearly recognizes and confers jurisdiction to proceed in the class of cases therein named, which includes the foreclosure of mortgages, even though one or more of the defendants was not an inhabitant of the district wherein the suit was brought.

If the controversy was between citizens of the United States, and included a sufficient amount, the controversy came within the jurisdiction of the federal courts. If the foreclosure of a mortgage on real estate was the purpose of such suit, the place of bringing the action was determined by the location of the mortgaged property. In other words, under the provisions of the act of 1875, if a citizen of Ohio held a mortgage on realty in Iowa to secure a debt in excess of \$500 given by a resident and citizen of Iowa and by a resident and citizen of Missouri, he could file a bill of foreclosure in the federal court in Iowa, and procure and publish an order for the appearance of the non-resident defendant. The act of 1888 expressly provides that section 8 of the act of 1875 remains in force, notwithstanding the passage of the former act. The statute of 1888 is therefore to be construed as though section 8 formed a part of it, as in substance it does. This section is clearly intended to define the place of bringing suit when the purpose is the enforcement of a lien upon title to realty, and under its provisions it is the location of the property, and not the residence of the parties, that settles the place of suit. In the classes of cases coming within its provisions, section 8 has the same force in connection with the act of 1888 as it had in connection with the act of 1875. As stated in *Smith v. Lyon*, the first clause of the act of 1888 "describes the jurisdiction common to all the circuit

<sup>1</sup> Act Cong. March 3, 1875, (18 U. S. St. p. 470, c. 137.)

courts of the United States as regards the subject-matter of the suit, and as regards the character of the parties who, by reason of such character, may, either as plaintiffs or defendants, sustain suits in circuit courts; but the next sentence in the same section undertakes to define the jurisdiction of each one of the several circuit courts of the United States with reference to its territorial limits." In other words, the first clause of the section defines the jurisdiction of the circuit courts of the United States,—that is, defines the several classes of cases which may be brought in such courts. The second clause determines the place of bringing suit in personal actions; and section 8 of the act of 1875, which, in effect, becomes the third clause of the act of 1888, determines the place of suit when the purpose is to enforce a claim to or lien upon realty, and authorizes the bringing suit in the district where the property, or some part of it, is situated. This construction preserves the full force of section 8 of the act of 1875, which was evidently the intent of the act of 1888, and conforms the meaning thereof to that which it had in the former act. In fact, the statute of 1888 is declared to be merely an amendment of the act of 1875; and it is clear that, if the present proceeding could have been brought in this court under the act of 1875 before it was amended, it can be brought under that act as amended.

The amount involved is sufficient. The parties plaintiff and defendant are citizens of different states. The controversy is the enforcement of a mortgage lien by a proceeding seeking the sale of the realty. The suit is pending in the district wherein the mortgaged realty is situated. Under these circumstances, there is nothing in the language of the act of 1888 which shows that it was the intent of congress, in the passage of that act, to defeat the jurisdiction which would have attached under the provisions of the act of 1875. The motion to dismiss is therefore overruled.

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UNITED STATES TRUST CO. *v.* WABASH, ST. L. & P. RY. CO. *et al.*

(Circuit Court, S. D. Iowa, W. D. June 2, 1890.)

RAILROAD COMPANIES—INSOLVENCY—JURISDICTION.

The St. L., K. C. & N. R. Co., after executing a mortgage on its line, was consolidated with another road, to form the W., St. L. & P. R. Co. The latter company then executed a mortgage covering all the property of the consolidated lines. The W., St. L. & P. Co. filed its bill in the circuit court of the United States for the eastern district of Missouri, admitting its insolvency, and asking that receivers be appointed. Said court appointed H. and T. receivers, and they took charge of the property of the consolidated lines. Bills of foreclosure of the mortgage by the St. L., K. C. & N. were filed in the state district court of Iowa and circuit court of Missouri, and were each removed to the United States circuit courts for those districts. The trustee in the mortgage given by the St. L., K. C. & N. R. Co. applied to the United States circuit court in Missouri for the surrender to the receiver to be appointed in the foreclosure suit in Iowa by the receivers H. and T. of so much of the property in their possession as was subject to the lien of the mortgage given to complainant. The court granted the order, providing for the use by such receiver, during the time in which the rolling stock of the two companies should be apportioned, of the rolling stock which had been needed in the business of the St. L., K. C. & N. R. Co., and submitting the apportionment of the rolling stock of the

consolidated companies to the courts in which the foreclosure suits were pending. K. was appointed receiver, by the United States circuit court in Iowa, of the St. L., K. C. & N. R. Co., and possession of the line was delivered to him by H. and T., including certain stock. K. then filed a petition in the circuit court in Iowa, setting forth the order of the circuit court in Missouri as to the apportionment of the rolling stock, averring that it had never been made, praying for an account of the stock belonging to the St. L., K. C. & N. R. Co., and asking that the receivers H. and T. be ordered to deliver the stock belonging to said St. L., K. C. & N. R. Co. A decree was entered deciding that the road was entitled to certain stock, and authorizing the receiver K., or the purchasers of the St. L., K. C. & N. R. Co. at the foreclosure sale, to institute proceedings to ascertain what other rolling stock the company was entitled to. The circuit court in Missouri granted a decree of foreclosure, under which a sale was had to the trustees in the mortgage, who afterwards conveyed the property to the W. R. Co., and the receivers of the court in Missouri delivered the property to it. Afterwards a decree of foreclosure was rendered in the circuit court in Iowa, and a sale was made to a committee of the bondholders secured by the mortgage, who organized the O. & St. L. R. Co. Held, that the circuit court in Iowa had no jurisdiction of a controversy between the O. & St. L. R. Co. and the W. R. Co., both of which companies were incorporated under the law of Missouri, as to the damages to be paid for the detention of the cars, and the destruction of a portion thereof while in possession of the receivers appointed by the court at St. Louis, since the court in Iowa never had possession of the property.

#### In Equity.

Supplemental petition on behalf of the Omaha & St. Louis Railway Company to recover from the Wabash Western Railway Company rental claimed to be due for use of certain rolling stock.

*Theodore Sheldon*, for complainant.

*H. H. Trimble and H. S. Priest*, for defendant.

SHIRAS, J. On the 15th day of February, 1879, the St. Louis, Kansas City & Northern Railway Company executed a mortgage on its line of railway, then in course of construction, between Pattensburg, Mo., and Council Bluffs, Iowa. In the following November the named company was consolidated with the Wabash Railway Company, under the title of the Wabash, St. Louis & Pacific Railway Company. In June, 1880, the latter company executed a blanket mortgage covering all the property of the consolidated lines to the Central Trust Company of New York, and in 1883 a further mortgage to the Mercantile Trust Company. In the spring of 1884 the consolidated company filed its bill in the circuit court of the United States for the eastern district of Missouri, at St. Louis, admitting its insolvency, and asking that receivers of the property be appointed to take charge of the property for the protection of all interested therein. To this bill the trustees in the several mortgages were made parties. On the 29th day of May, 1884, the court at St. Louis appointed Solon Humphreys and Thomas E. Tutt receivers according to the prayer of the bill, and they forthwith took possession and control of the entire property of the Wabash, St. Louis & Pacific Railway Company, including that upon the line from Pattensburg to Council Bluffs, which was known as the "Omaha Division of the Wabash, St. Louis & Pacific System." In carrying on the process of disintegration necessary to settle the rights of the various mortgagees holding liens upon the different lines of railway that had been consolidated to form the Wabash system, bills for the foreclosure of the mortgage executed to the United States Trust Company by the St. Louis, Kansas City & Northern Rail-

way Company were filed in the state district court of Iowa and circuit court in Missouri, which were each removed into the United States circuit courts for these districts. On the 6th day of January, 1886, the United States Trust Company, the complainant in said bills of foreclosure, applied to the United States circuit court at St. Louis for the surrender to the receiver to be appointed in the foreclosure case in Iowa, by the receivers Humphreys and Tutt, of so much of the property in their possession as was subject to the lien of the mortgage given to complainant. The court at St. Louis granted the order sought, which contained the following:

"Provided that, inasmuch as the rolling stock and equipment properly covered and conveyed by said mortgage has been used indiscriminately with the rolling stock and equipment belonging to other divisions of the railway, and inasmuch as an equitable apportionment of the rolling stock and equipment will be made as hereinafter provided, it is further ordered that for the time being, and until a final distribution and apportionment of the rolling stock is made to the said Omaha Division, Receivers Humphreys and Tutt shall permit said trustee, or its representatives, or receiver appointed as hereinafter provided, to have the use of such rolling stock and equipment in kind and amount as has been needed in the business of said Omaha Division during the three months last past. \* \* \* It is further ordered that the matter of the division and equitable apportionment of the rolling stock and equipment between said Omaha Division and said Wabash, St. Louis & Pacific Railway Company be, and the same is hereby, submitted to the courts in which the actions brought by said trustee for the foreclosure of its said mortgage are pending for adjudication and settlement and decree."

On March 1, 1886, Thomas McKissock was appointed receiver by this court of the line known as the "Omaha Division," and possession of this line was delivered to him by Messrs. Humphreys and Tutt, in accordance with the order previously made by the circuit court at St. Louis, including certain stock as contemplated in that order.

The question in dispute between the mortgagees under the blanket mortgage of June, 1880, and the mortgagees under the mortgage of February 19, 1879, as to the rolling stock covered by the latter mortgage, was brought before this court by means of a petition filed by Thomas McKissock, receiver, setting forth the order made by the circuit court at St. Louis in regard to the necessity of an apportionment of the rolling stock, averring that such apportionment had never been made, praying that an account might be taken of the rolling stock belonging to the Omaha Division, and "that the said Wabash receivers may be ordered and decreed to deliver to your petitioner the full amount of the rolling stock and equipment covered and conveyed by the said mortgage, or its equivalent in amount and kind, as this court may determine." Upon the hearing on this petition a decree was entered on the 6th of October, 1887, adjudging that the mortgage of February 15, 1879, covered the rolling stock marked "Omaha Division," and naming certain specific cars which belonged thereto, and further authorizing the petitioner or the purchasers of the Omaha Division at the foreclosure sale, or their successors or assigns, by proceedings in equity or otherwise, to procure an adjudication as to what other rolling stock in addition to that specifically

named was covered by the lien of the mortgage in question; it being further provided that nothing in the decree contained should be regarded as affecting the right of the petitioner or the purchasers of said Omaha Division, or their successors or assigns, from recovering from Humphreys and Tutt as receivers, or any person or corporation succeeding to the possession of the property held by them, a reasonable rental for the use by said receivers or those succeeding them of such rolling stock as might be adjudged to belong to the Omaha Division. The present complainant, the United States Trust Company, thereupon filed a supplemental petition, in which it prayed that it might have the benefit of the original suit and the proceedings thereunder; that an account be taken of the rolling stock belonging to the Omaha Division; that the same be ordered to be transferred to it as the trustee in the mortgage executed February 15, 1879, or to McKissock as receiver; and that said mortgage of February 15, 1879, be declared to be the first lien on such rolling stock. At the March term, 1889, of this court, on the hearing on this petition, it was held that the lien of the mortgage of February 15, 1879, attached to all the engines and cars which in fact had been purchased for the Omaha Division, and had placed thereon the proper designating marks, according to the requirements of the mortgage. See opinion reported, in 38 Fed. Rep. 891. In the mean time in the circuit court at St. Louis, in the original cause therein pending, there was granted a decree of foreclosure on the 6th of January, 1886. In May following, a sale was had under this decree, and the trustees in the mortgages became the purchasers, and a deed of conveyance was executed to them. In April, 1887, the property thus purchased was conveyed to the Wabash Western Company, a corporation created under the laws of the state of Missouri, and the receiver delivered up possession of the property; the said Wabash Company entering into a stipulation to be responsible for all claims existing against said receiver growing out of such receivership. On the 12th day of October, 1886, in the suit pending in this court for the foreclosure of the mortgage of February 15, 1879, a decree was rendered, and under it a sale was made, December 28, 1886; the property being bought by a purchasing committee acting on behalf of the bondholders, who subsequently organized a corporation known as the "Omaha & St. Louis Railway Company," and created under the laws of the state of Missouri.

Upon the filing of the opinion reported in 38 Fed. Rep., a decree was entered, which, among other things, decreed that the mortgage of February 15, 1879, was the first lien upon certain described rolling stock, formerly belonging to the Wabash, St. Louis & Pacific Railway Company, but purchased for and used upon the Omaha Division; that the said Omaha & St. Louis Railway Company was entitled to the possession of the remainder of said equipment belonging to said Omaha Division, and enumerated in the decree, which had not already been delivered over; it being further decreed that the said defendant, the Wabash Western Railway Company, do within 30 days surrender and deliver to the Omaha & St. Louis Railway Company each and all of the cars, engines,

and other rolling stock decreed to belong to the Omaha Division. The ninth paragraph of this decree is as follows:

"(9) That upon the receipt by the Omaha and St. Louis Railway Company of the equipment enumerated in the sixth paragraph of this decree, it is ordered that the said master take an account, and report to this court, the reasonable amount, if any, to be paid to the complainant or the Omaha & St. Louis Railway Company by the Wabash Western Railway Company for the use, from March 6, 1886, to the date of its surrender, of so much of the rolling stock hereinbefore adjudged to belong to the Omaha Division as is in excess in value and in amount of the rolling stock actually used upon said Omaha Division from said March 6, 1886, to the date of the surrender aforesaid; and any further amount due for any equipment covered by complainant's mortgage, and injured or destroyed since March 6, 1886, while in the possession of the said Wabash receivers or said Wabash Western Railway Company; and also any sum that may be found due from said Omaha & St. Louis Railway Company by reason of any cars (other than those covered by said mortgage of February 15, 1879) having been heretofore injured or destroyed while temporarily in its possession, or any sum due for use of said cars."

On May 29, 1889, the general managers of the Wabash Western and the Omaha & St. Louis Companies, by agreement in writing, made an exchange of the rolling stock required to be delivered up; the exchange thus made having the effect of performing the requirements of the decree of April 4, 1889, for the delivery of the rolling stock adjudged to belong to the Omaha & St. Louis Railway Company. In this agreement it was further stipulated that all claims of either party, that is, of the Wabash Western or Omaha & St. Louis Railway Companies, for rental, mileage, loss, damage, repairs, or improvements suffered or made prior to June 1, 1889, upon the equipment described in the third paragraph of the decree of April 4, 1889, as well with respect to such equipment as had been in use on the Omaha & St. Louis road since March 6, 1886, should be deemed to be among the issues to be determined upon the reference ordered in the ninth paragraph of said decree. Under the reference ordered in this paragraph of the decree, the master has taken a large amount of testimony, and has filed his report, stating the account between the Wabash Western Railway Company and the Omaha & St. Louis Railway Company; finding a balance due the latter company of \$83,613.43. On behalf of the Wabash Western, various exceptions have been filed to the report of the master; and, the matter coming before the court, it is now insisted on behalf of that company that this court has no jurisdiction of the matters sought to be settled by the reference in question, nor of this controversy between the named railway companies, they being both corporations created under the laws of the state of Missouri, and that the issue is a purely legal one, of which a court of equity cannot take cognizance; and it is therefore asked that the reference ordered in the ninth paragraph of said decree of April 4, 1889, be set aside.

From the foregoing statement of facts it will be noticed that from time to time, in the progress of the several foreclosure proceedings, the original parties have ceased to longer have an interest in the litigation, and new parties have been introduced upon the record. Thus, in the consolidated case pending in the court at St. Louis, by the decrees therein rendered,

and the sales based thereon, the interests therein involved have passed to the Wabash Western Company, and in the case pending in this court the interests involved have passed to the Omaha & St. Louis Company. The present position of affairs is correctly stated by counsel for the latter company in the opening statement of his brief herein submitted, which is as follows:

"This proceeding is brought on behalf of the Omaha and St. Louis Railway Company (hereinafter called the 'Omaha Company') to recover from the Wabash Western Railway Company (hereinafter called the 'Wabash Company') for the use of and damage to 752 cars and fifteen engines between March 6, 1886, and May 29, 1889, which equipment, by a final decree entered herein April 4, 1889, was adjudged to be the property of the Omaha Company."

Upon the record the United States Trust Company is a party, but only as the trustee in the mortgage executed by the Omaha & St. Louis Company; and, as the trustee therein, it has not the right to enforce the claim belonging to the mortgagor company. It being an admitted fact that the Wabash Western and the Omaha & St. Louis Companies are both Missouri corporations, it is clear that this court cannot take jurisdiction originally of a matter in litigation between them. Support to the jurisdiction, if it exists at all, must be found in the subject-matter of the suit, or in its relation to the preceding foreclosure proceedings. Viewing the question as a mere matter of damages, to be compensated by a money judgment, there is nothing in the nature of the litigated question which confers jurisdiction on this court. Counsel for complainant present two grounds for sustaining the jurisdiction; the one being that the supplemental bill presents an issue which was necessarily and primarily involved in the original proceedings, and that the supplemental bill is only, therefore, ancillary and auxillary to the original bill, and jurisdiction thereof is therefore to be supported by the jurisdiction of the original proceedings.

The thought presented is that in the foreclosure proceedings the court took possession and control of the mortgaged property, and that all parties becoming interested therein, and desiring to assert their rights to the property, or any portion of it, would have the right to intervene in the court having the original jurisdiction, and could do so irrespective of the citizenship of such intervening parties. Special reliance is placed by counsel upon the case of *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, which in many of its aspects is quite analogous to the present case, and in which it was held that the United States court, in which the original foreclosure proceedings were had, could entertain jurisdiction to determine, as between purchasers at the foreclosure, what portions of the rolling stock belonged to the several divisions of the road that had been separately sold. The main ground upon which the ruling is placed was that, "in contemplation of law, this property is still in the hands of the receiver of the court. If in the hands of the receiver of the circuit court, nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties." Jurisdiction in that case was sustained in the United States court on the ground



that the property was to be deemed to be still in the possession and under the control of that court, and for the further reason that the question in dispute arose upon the construction to be given to the orders and decrees of the federal court. The question decided in that case was as to the jurisdiction of the federal court, in which the original foreclosure proceedings were had, and is not directly applicable to the real difficulty presented on this record. I entertain no doubt that all questions touching the possession and other rights in property rightfully in the control of a federal court may be litigated in that court, irrespective of the citizenship of the adversary claimants. As I understand it, however, the court of original jurisdiction in this sense is the United States circuit court at St. Louis. The first foreclosure proceedings were pending in that court. The receiver appointed by that court took possession of the rolling stock on the entire system for the benefit of all interested. In the control and management of the property, the receivers Humphreys and Tutt were subject to the orders of that court. When the foreclosure in this court was begun, the court at St. Louis directed its receivers to allow McKissock, the receiver appointed by this court, to use such rolling stock as might be necessary to run the Omaha Division, pending the final decision of the question of the apportionment of the rolling stock used in common among the several mortgagees claiming priority of lien thereon. As to such rolling stock as in fact came into the possession of this court through the possession of its receiver, McKissock, this court would have jurisdiction to hear and determine the rights of the parties claiming the possession thereof. As to the rolling stock that remained in the possession of Humphreys and Tutt, and as to the questions between parties arising out of the orders of the court putting said receivers in possession of said property, and controlling the disposition thereof, the jurisdiction is in the court at St. Louis. Humphreys and Tutt were not receivers of this court, and the property in their possession has never been in the possession of this court, and no jurisdiction in this court can be based upon their possession of the property, or upon any alleged failure to deliver up possession thereof. Paragraph 9 of the decree of April 4, 1889, requires an accounting of the amount to be paid as rental for the use of cars by Humphreys and Tutt, as receivers of the Wabash, St. Louis & Pacific Railway Company, or by the Wabash Western Company, as the successors thereof, and of any sum due for cars destroyed while in their possession. The ruling in *Minnesota Co. v. St. Paul Co.*, *supra*, sustains the right of the Omaha & St. Louis Company to appear in the court at St. Louis for the assertion of any rights it may have to the property in question; but that does not sustain the jurisdiction of the federal court in Iowa.

The real ground taken by counsel for complainant is that Humphreys and Tutt, as receivers of the court at St. Louis, took and held possession of certain rolling stock which in reality belonged to the Omaha Division, and that after the initiation of the foreclosure proceedings in this court they should have delivered up the possession of these cars to McKissock, and that, as they did not do so, they must account for the

rental value thereof, as well as for the value of the cars destroyed. If jurisdiction of the present proceeding is to be sustained by reason of the original jurisdiction and possession taken in the foreclosure suit, it is clear that this original jurisdiction is vested in the court at St. Louis. The same result follows if the question is deemed to arise on the orders of the court directing Humphreys and Tutt as to the disposition to be made of the rolling stock coming into their possession as receivers. These orders were made by the court at St. Louis, and it is the tribunal to settle the questions arising thereon. This court did not have the possession or control of the property during the time rental for its use or damages for its destruction are claimed, nor did it have possession thereof when the present proceedings were brought. There is nothing, therefore, upon which to found a valid claim to jurisdiction on the ground that this court has or ever had jurisdiction of the property, for the use of which rental is claimed.

The second ground of jurisdiction suggested by counsel is that the proceeding by supplemental petition by which the question of what property was covered by the mortgage of February 15, 1879, was presented to this court, was, in effect, an equitable suit in replevin; and that, under the Code of Iowa, damages for the unlawful detention of property are recoverable in the replevin suit; and that the court, having taken jurisdiction to construe the mortgage, and determine what property was subject to the lien thereof, should proceed to settle the question of damages, and thus save further litigation. The action of replevin is based upon the right to the possession, and does not necessarily involve the question of title. It is too clear to need any elaboration that this court could not have entertained an action in replevin, on part of its receiver, to recover possession of the cars in question from the receivers appointed by the St. Louis court. They were rightfully in possession of the property, regardless of the ultimate question of the priority of the liens of the respective mortgages. The proceeding in this court was not in the nature of replevin to recover mere possession, but to settle the question of the titles derived from the sales under the respective foreclosure decrees. The pleadings framed to present the issues did not present the question of rental for the use of the cars, nor of damages for cars destroyed, nor of the wrongful detention of the cars by Humphreys and Tutt. The question of title having been finally closed by the decree of April 4, 1889, and the property having been apportioned by agreement of the parties in satisfaction of that decree, there is nothing in the nature of a replevin suit pending giving this court jurisdiction to now adjudicate on a question of damages for the use or destruction of any of the property. The argument based upon the assumption that the proceedings were in the nature of proceedings *in rem*, and that the court, having once acquired jurisdiction, will proceed to do complete justice between the parties, must fall, for the reason that this court has not now, and never did have, possession of the property. Possession was originally taken by the court at St. Louis; and, so far as the cars which it is claimed were wrongfully detained by the Wabash receivers are concerned, they never passed into

the possession of this court, but, so far as delivered at all, were delivered directly to the Omaha & St. Louis Company. I appreciate the force of the suggestion that it is highly desirable to end all these questions promptly, but that consideration can have no weight when the jurisdiction of the court is challenged.

I have given the arguments of counsel full consideration, but I can find no substantial ground to uphold the jurisdiction of this court to hear and determine the issue sought to be presented upon the questions raised by the ninth paragraph of the decree of April 4, 1889. When that reference was ordered, the question of jurisdiction as between citizens of the same state was doubtless not considered. Being satisfied that the court is without jurisdiction to proceed as between the parties now before the court, the order will be that the reference made under paragraph 9 of the decree in question be set aside, and that the proceedings thereon be dismissed, at cost of complainants therein, without prejudice to their right to proceed in a court of competent jurisdiction.

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UNITED STATES v. WALLAMET V. & C. M. WAGON ROAD Co. *et al.*

(District Court, D. Oregon. May 12, 1890.)

PUBLIC LANDS—GRANT IN AID OF WAGON ROAD—COMPLIANCE WITH CONDITIONS—SUIT TO ENFORCE FORFEITURE.

In 1866 congress made a grant of lands to the state of Oregon, to aid in the construction of a wagon-road from Albany through the Cascade mountains, to the eastern boundary of the state, and provided that the land might be sold, as the work progressed, on the certificate of the governor of the state that the portion of the same coterminous with said lands was "complete." The state transferred the grant, without further condition or qualification, to the Wallamet Valley & Cascade Mountain Wagon Road Company, which undertook the construction of the road, and within the five years allowed therefor, procured certificates from the governors of the state that the road was completed as required by law. Soon after the company sold the lands to the defendants Weill and Cahn, who are now the legal owners thereof, except a small portion which has been disposed of. In 1874, congress authorized the issue of patents for these lands to the state or its assignee, when it was shown by the certificates of the governor that said road was "constructed and completed." Between 1878 and 1883 a question was made before the department of the interior whether the company had completed the road according to law, and testimony was received thereon, *pro* and *con*; and after argument the secretary of the interior directed patents to issue to the company, which was done on October 30, 1882, for 440,856 acres, in addition to a patent for 107,893 acres issued on June 19, 1876. In consequence of this action by the secretary the defendants believed that the due construction of the road was admitted by the complainant, and were thereby induced to expend a large sum of money on and about said property. In 1889, congress passed an act requiring the attorney general to bring a suit in this court, against all persons claiming an interest in this grant, to determine the question of construction of the road, the legal effect of the governor's certificates, the right of the United States to resume the grant, and to obtain judgment declaring the land coterminous with any uncompleted portions of the road forfeited, saving the rights of any *bona fide* purchasers; the suit to be tried and adjudicated like other suits in equity. On August 29, 1889, in pursuance of this authority, this suit was commenced to obtain the relief therein specified. The defendants Weill and Cahn filed two pleas to the bill, in one of which they set up the foregoing facts as an estoppel, and in the other the defense of a *bona fide* purchaser for a valuable consideration, and without notice of any failure on the part of the company to comply with the terms and conditions of the grant. *Held*, (1) that this suit must be tried as a suit between private persons, in which the defendants may set up any

defense, including estoppel and the statute of limitations, that they could if the complainant was merely a private person; (2) that the claim of the complainant to set aside these patents, and declare these lands forfeited, is, under the circumstances, a stale one, and therefore ought not to be allowed; (3) that the complainant, by the passage of the act of 1874, either accepted the certificates as conclusive evidence of the due construction of the road, or thereby waived all further performance of the condition on which the grant was made; (4) that the complainant, by the action of its executive department, in issuing the patent of 1883, impliedly recognized and accepted the performance of such condition, and, having thereby induced the defendants to change their relation to said property by expending a large sum of money thereon and thereabout, is now estopped to allege or claim that said condition was not performed; (5) that the certificate of the governor of Oregon was made by the act of 1866 the only evidence of the compliance with the terms of the grant by the completion of the road; (6) that upon the facts stated in the plea, the defendants are purchasers in good faith and for a valuable consideration, within the saving clause of the act of 1889, and within the general principles of equity jurisprudence; and (7) that, on the case made by the bill and first plea thereto, it appears that the complainants ought not to prevail in this suit, and therefore it is dismissed.

*(Syllabus by the Court.)*

In Equity.

*Mr. Lewis L. McArthur*, for the United States.

*Mr. John A. Stanley*, *Mr. C. E. S. Wood*, and *Mr. Henry Ach*, for defendants.

DEADY, J. By the act of July 5, 1866, (14 St. 89,) congress made a grant to the state of Oregon, to aid in the construction of a military wagon road from Albany to the eastern boundary of the state, of the odd sections of the public lands, equal to three sections per mile of said road, to be selected within six miles thereof, together with the right of way for the same. The legislature of the state was authorized to dispose of the lands for the construction of the road as the work progressed, and the governor of the state certified "to the secretary of the interior" that any 10 miles of the same were completed. If the road was not completed within 5 years, no further sales were to be made, and the land remaining unsold should "revert" to the United States. The act also provided that the road should be constructed with such "width, graduation, and bridges as to permit of its regular use as a wagon road," and in such other "special manner" as the state might prescribe, and that the road should remain a public highway for the use of the government of the United States.

On October 24, 1866, the legislature of the state granted to the Walamet Valley & Cascade Mountain Wagon Road Company, hereinafter called the "Wagon Road Company," a corporation theretofore formed, under the general laws of Oregon, for the purpose of constructing and maintaining a wagon road from Albany, across the Cascade mountains, to the Deschutes river, "all lands, right of way, rights, privileges, and immunities" theretofore granted to the state, "for the purpose of aiding said company" in constructing the road described in the act of congress, "upon the conditions and limitations therein prescribed." Sess. Laws, 58.

Between April 11, 1868, and June 24, 1871, both inclusive, there were issued by the governors of Oregon, and duly filed with the secretary of the interior, four certificates, which, taken collectively, showed that

the road had been completed, according to the acts of congress and of the legislative assembly, to the eastern boundary of the state, a distance of 448.7 miles.

On June 18, 1874, congress passed "an act to authorize the issuance of patents for lands granted to the state of Oregon in certain cases," (18 St. 80.) which reads as follows:

"Whereas, certain lands have heretofore, by acts of congress, been granted to the state of Oregon to aid in the construction of certain military wagon roads in said state, and there exists no law providing for the issuing of formal patents for said lands, therefore, be it enacted, \* \* \* that, in all cases when the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the governor of the state of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the state of Oregon as fast as the same shall, under said grants, be selected and certified, unless the state of Oregon shall, by public act, have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the general land-office to such corporation or corporations upon the payment of the necessary expenses thereof: provided, that this shall not be construed to revive any land-grant already expired, nor to create any new rights of any kind, except to provide for issuing patents to lands to which the state is already entitled."

On June 19, 1876, and October 30, 1882, patents were issued to the wagon road company under the act of 1874,—the first one for 107,893 acres, and the second one for 440,856 acres,—since which no patent has been issued for any portion of the grant.

On June 6, 1881, the secretary of the interior, in a communication addressed to the speaker of the house of representatives, estimated that the company is entitled under the grant to 1,346 sections of land, or 861,440 acres.

On March 2, 1889, congress passed an act making it the duty of the attorney general to cause a suit to be brought against all persons or corporations claiming an interest in wagon-road grants made to the state of Oregon, including the one made by the act of 1866, "to determine the questions of the seasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part, the legal effect of the several certificates of the governors of the state of Oregon of the completion of said roads, and the right of resumption of such granted lands by the United States, and to obtain judgments, which the court is hereby authorized to render, declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon roads which were not constructed in accordance with the requirements of the granting acts, and setting aside patents which have issued for any such lands, saving and preserving the rights of all *bona fide* purchasers of either of said grants, or any portion of said grants, for a valuable consideration, if any such there be. Said suit or suits shall be tried and adjudicated in like manner, and by the same principles and rules of jurisprudence, as other suits in equity are therein tried."

The act also provides, among other things, for the disposition of the lands in case the same are declared forfeited by the final determination of said suit.

In pursuance of this act, this suit was commenced by the attorney general on August 29, 1889, on behalf of the United States against the wagon road company and others, to have the lands included in said grant forfeited to the United States, and the patents issued therefor, as well as the certificates of the governors of Oregon, concerning the construction of the road, declared fraudulent and void, on the ground and for the reason, as alleged, that the road never was "constructed and maintained" as required by law, either in whole or in part, so as to be a public highway, over which the property, troops, or mails of the United States could be transported; that the proceeds of said lands were not applied to the construction of the road; that the certificates of the governors were false, and were obtained on the false and fraudulent representations of the wagon road company, without examination on the part of said governors, and in one instance—that of September 8, 1870,—with his knowledge that the same was false; all of which was known to the defendants at the time they acquired an interest in these lands.

The bill also shows that by sundry conveyances, commencing with that of the wagon road company of August 19, 1871, to H. K. W. Clarke, and ending with that of Fred W. Clarke, the son of said H. K. W. Clarke, to Alexander Weill, of April 9, 1879, the title to said lands has become vested in the defendants Alexander Weill and David Cahn, and that T. Edgenton Hogg, and certain corporations of which he is an officer, made defendants in the bill, claim an interest in said lands.

The defendants Weill and Cahn, by leave of the court, have filed two pleas to the bill and their joint and several answers in support thereof.

The first plea may be called an estoppel.

Briefly, it alleges that after these defendants had acquired the title to the lands in question, as stated in the bill, and in March, 1878, a complaint was received at the office of the secretary of the interior to the effect that the road had not been constructed as required by the act of July, 1866, in consequence of which the commissioner of the general land-office, with the approval of said secretary, appointed a special agent to examine the road, and report thereon; that in October, 1880, said agent reported that the road had not been constructed as required by law; that said report, and the evidence accompanying the same, was laid before congress, and in the house of representatives was referred to the committee on military affairs, which committee, upon consideration of said report and evidence, and evidence contradictory thereof, made a report in February, 1881, recommending that no action of congress be had in the premises.

In their report the committee say they "do not feel called upon to investigate the disputed question of fraud arising from the *ex parte* testimony submitted, or warranted in expressing an opinion in regard to the same, but believe that to be a matter within the province of the judicial, and not the legislative, department of the government," and conclude as follows:

"(1) That the act of congress approved July 5, 1866, vested a present title to the land in question in the state of Oregon; (2) that by the act of the leg-

islature, and the acts of the governor of Oregon, the title to said land was vested in the Wallamet Valley & Cascade Mountain Wagon Road Company; (3) that by the deed of said company to Clarke, and the subsequent deeds from Clarke and others, the title of said land is now lawfully vested in the present claimant, Alexander Weill; (4) that said title cannot be forfeited or annulled, or reinvested in the United States, excepting by a judicial proceeding; and that the same has become a vested right, which congress cannot impair or take away."

That afterwards, on February 8, 1882, a communication from the secretary of the interior was laid before congress, containing further charges, and alleged proofs that the road was not constructed as required by the act of July 5, 1866; and the matter was referred in the house of representatives to the committee on public lands, and in the senate to the committee on military affairs, which committees reported, recommending that congress take no action in the premises. Both these reports are annexed to the plea, and made a part thereof; and each states that the title to this land passed to the state and its assigns under the act of congress and the state legislature.

The senate committee say that "it is impossible" for them "to make such an investigation as will justify action by congress which would do justice and equity in the premises," and that "the executive department of the government had ample authority in law" to investigate the matter, and, if necessary, to institute legal proceedings in the courts of the United States to secure a forfeiture of the grant, or any part thereof, for failure to comply with the terms and conditions thereof, "without any legislation or instructions from the legislative department."

That by the proceedings thus had the matter of the completion of the road was referred to the executive department of the government; whereupon the secretary of the interior, after due investigation of the subject, including the hearing of argument thereon, did on July 5, 1882, direct the commissioner of the general land-office to proceed and certify the lands for patent under the act of June 18, 1874, and thereafter, in October, 1882, said patent for 440,856 acres was duly issued to the wagon road company; that these defendants, relying in good faith upon the action of the legislative and executive department of the government, were induced to, and did, before the passage of the act of 1889, "so alter and change their position in reference to said lands" as to "render it inequitable and unconscionable for the complainant to assert any right \* \* \* to forfeit or reclaim said lands;" that these changes consist, in part, in the expenditure of \$2,660.62 in securing the issue of patents therefor; in the payment of \$29,885.79 of taxes levied thereon; in the payment of \$109,800.97 to agents and attorneys for grading, selecting, and platting said lands, and defending the possession of the same from adverse claimants and trespassers; by the sale of sundry parcels of said lands with warranty of title, on which the liability of the defendants exceeds the sum of \$22,609.71; in the expenditure of \$86,805.75 in rebuilding and improving said road through its entire length, which has greatly increased the value of the lands along the line thereof, a very large portion of which still belongs to the complainant, and in the payment of

\$31,651.71 interest on said sums of money, making in all the sum of \$280,754.03.

In the second plea, these defendants aver that they are purchasers in good faith, for a valuable consideration, and in support thereof allege, in substance and effect, that in 1871 said lands were in the market for sale, when Weill and H. K. W. Clarke purchased the same of the wagon road company, through their agent, T. Edgerton Hogg; that in pursuance of said sale the vendor conveyed the lands, on August 19, 1871, to said Clarke, who on September 1st of that year conveyed the same to the defendant Cahn, in trust for Weill, Clarke, and Hogg; that at this time the greater portion of these lands were unsurveyed, and, for the purpose of continuing the existence of the wagon road company, and thereby securing the selection and patenting of the lands, Weill and Clarke, in the month of August, 1871, purchased the stock of said company, and, as a matter of convenience, some of said stock was bought in the name of Hogg, and by him held for Weill and Clarke, but said stock had no value apart from said land-grant; that, at the time of the conveyance of said lands by the company, Weill had expended in the purchase thereof \$140,636.39, and Clarke, \$20,000; that at the time of said purchase the several certificates of the governors of Oregon to the construction and completion of said road, as required by the act of July 5, 1866, were on file in the department of the interior and the office of the secretary of state of Oregon, and these defendants then believed, and do still believe, that the same were altogether true, and never heard anything to the contrary until 1880, when the attention of congress was called to the matter by the secretary of the interior; that, before purchasing the lands, Weill employed counsel learned in the law, who advised him that the title of the wagon road company to the same was perfect, and that he had a right to rely on the certificates of the governors as conclusive evidence that the conditions of the grant had been duly performed; that in making said purchase he did so rely, and but for the existence of said certificates would not have made it; that, at the date of the purchase, these defendants were living in San Francisco, and had never been in Oregon, except Cahn, who was there a short time in June, 1867, nor have either of them ever been there since; that prior to said purchase neither Hogg nor Clarke had any knowledge or information that these certificates were not true in point of fact, and, if they, or either of them, were obtained by false or fraudulent means, neither of these defendants, nor Hogg nor Clarke, had any knowledge or information thereof; that in 1879 Weill purchased all the interest of Hogg and Clarke in said lands, the same being 11-24 thereof, for \$21,400, and the release to the former, and the estate of the latter, from the repayment to him of their proportions, amounting to many thousand dollars, of the money advanced by him in the purchase of the lands, and received conveyances from them accordingly, as set forth in the complainant's bill.

The answer in support of the plea avers that the price paid by Weill on August 19, 1871, for the lands, was the full value thereof, and denies



all knowledge or notice that the road had not then been duly constructed and completed, as required by the act of congress, or that the certificates of the governors were in any respect untrue, or had been procured by false or fraudulent representations.

The case was heard on the sufficiency of the pleas, admitting the truth of the facts stated therein.

The act authorizing the bringing of this suit empowers the court to consider and determine these three questions, and no others:

(1) Was the road seasonably and properly completed, either in whole or in part, as provided in the act making the grant?

(2) What is the legal effect of the governor's certificates concerning the completion of the road? And,

(3) What right has the United States to resume the granted lands? *U. S. v. Railway Co.*, 98 U. S. 608.

In the determination of these questions the court is required, by the act of 1889, to proceed "in like manner," and be governed "by the same principles and rules of jurisprudence," as in other suits in equity; that is, as in suits between private individuals. And such is the rule of procedure and adjudication in the case, independent of the directions of the statute.

When the United States comes into a court of equity to assert a claim, it is subject, and must submit to, the rules of procedure and principles of jurisprudence which obtain in suits between private parties. *U. S. v. Arredondo*, 6 Pet. 711; *U. S. v. Flint*, 4 Sawy. 58; *U. S. v. Tichenor*, 8 Sawy. 156, 12 Fed. Rep. 449.

The grant of 1866 was a grant *in presenti*. The language of the act is "that there be, and hereby is, granted to the state of Oregon." As soon as the line of the road was designated, the grant attached to the odd-numbered sections, within the prescribed limits, on either side of said line, and took effect from the date thereof. *Cahn v. Barnes*, 7 Sawy. 53, 5 Fed. Rep. 326; *Pengra v. Munz*, 12 Sawy. 238, 29 Fed. Rep. 830; *Schulenberg v. Harriman*, 21 Wall. 44; *Missouri Ry. Co. v. Kansas Ry. Co.*, 97 U. S. 491; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336.

The grant, however, was a conditional one; the condition being that the road should be completed in the manner provided within five years from the date of the act.

This was a condition subsequent; and, unless it was complied with, the complainant, as grantor, might, by proper legislation or judicial proceedings, have enforced the forfeiture of the grant on account of such failure. But no one else could do so; and, unless the grantor does, the title remains unimpaired in the grantee. *Schulenberg v. Harriman*, *supra*, 63.

As appears from the first plea, congress has repeatedly refused to declare the forfeiture of the grant, or take upon itself the investigation of the question whether the condition had been complied with or not. The attorney general declined to institute judicial proceedings to that end until required to do so by the act of 1889, which appears to have been

passed on the memorial of the legislature of the state. It is also well understood that congress was influenced to the passage of the act by the desire of these defendants to have a speedy and complete determination of their rights in the premises.

On the facts stated in this plea, the demand made by this suit for the forfeiture of this grant on the ground stated in the bill is what is known in equity as a "stale claim," and therefore ought not to be allowed. The period prescribed for the construction of this road expired in July, 1871, full 18 years before the commencement of this suit. During all this time, it was open to the complainant to bring this suit, by its attorney general, to have this grant declared forfeited on the grounds now stated in its bill. *U. S. v. Throckmorton*, 98 U. S. 70; *U. S. v. Tin Co.*, 125 U. S. 278, 8 Sup. Ct. Rep. 850.

This, in my judgment, is such a delay or lapse of time as renders the claim stale, and constitutes, under the circumstances, a bar to the relief sought.

Lapse of time, particularly when coupled with possession, as in this case, is a defense, in equity, in cases not within the reach of the statute of limitation. Story, Eq. Pl. § 813; 2 Story, Eq. Jur. § 1520; *U. S. v. Tichenor*, 8 Sawy. 156, 12 Fed. Rep. 449; *U. S. v. Beebe*, 4 McCrary, 12, 17 Fed. Rep. 36.

For seven years after the expiration of the time prescribed for the construction of the road and filing of the certificates of the governors, in which its completion was formally and officially declared, nothing appears to have been said or suggested to the contrary by any one, when a trespasser on the lands made a complaint to the secretary of the interior that the road had not been constructed according to law. Investigation ensued under the direction of the secretary, and the matter was submitted to congress, who referred it back to the executive department in 1882, where, after due consideration, patents were ordered issued to the company under the act of 1874, which was done, as to the greater portion of the lands.

The statute of limitations does not ordinarily run against the United States. But this suit is required by the act of congress to be tried and adjudicated as a suit between private parties; and therefore, in my judgment, the lapse of time, or the bar of the statute of limitations, is to have the same effect as in a suit between such parties.

Since 1878 the analogous action at law, to recover the possession of these lands on account of a breach of the condition on which they were granted, would be barred in 10 years, and prior to that time in 20 years; and although the statute of limitations does not apply, *proprio vigore*, to suits in equity, yet in cases like this, of concurrent jurisdiction at law, the court will apply the same limitation to one as the other. *Hall v. Russell*, 3 Sawy. 515; *Manning v. Hayden*, 5 Sawy. 379.

No case has been cited from the supreme court in which it has been distinctly held that the defense of estoppel can be made against the

national government. But in many cases it is so assumed, even where the term is not used.

For instance, in *Clark v. U. S.*, 95 U. S. 543, it was held that a defense to a claim against the government for the use of a steam-boat, which involved bad faith on its part, could not be made.

In *Branson v. Wirth*, 17 Wall. 39, it is assumed in the opinion of the court that the United States may be estopped.

In *U. S. v. McLaughlin*, 12 Sawy. 201, 30 Fed. Rep. 147, it was said by Judge SAWYER "that the law of estoppel, in a proper case, applies to the government."

In *Indiana v. Milk*, 11 Biss. 209, 11 Fed. Rep. 389, the court having found that the state, by its conduct, had recognized the validity of the defendant's title, and thereby induced them to alter their position, by investing their money on the strength of it, Judge GRESHAM said:

"The state cannot now, in fairness or law, assert its invalidity.

"Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel."

In my judgment, the complainant ought not, in fairness and justice, to be allowed to assert, as against these defendants, that this road was not completed as required by law, and claim a forfeiture of the grant on that ground.

In the *first* place, the certificates of the governors to the completion of the road are the acts of the agent of the complainant. By the express terms of the grant, the governor of the state was authorized and required to determine if and when the road was constructed, as provided therein, and his certificate to that effect is the necessary and only legal evidence of that fact.

On the faith of these certificates, the truth of which does not appear to have been questioned then, or for long after, these defendants invested their money in their lands.

By this means the complainant proclaimed to these defendants: "This road has been constructed according to law. The condition on which this grant was made has been complied with, and the same has become absolute." And it ought not now to be heard to allege anything to the contrary, even if it should be true, to the prejudice or injury of those who, like these defendants, have in good faith acted upon such representation as true.

In the *second* place, after the investigations in congress and the department of the interior, between the years 1878 and 1882, concerning the effect and verity of these certificates, and the fact of the compliance of the wagon road company with the conditions of the grant, the complainant practically affirmed the right of the company to the lands, and listed the same for patent under the act of 1874, and actually issued such patent for the greater portion of the grant, on the faith of all which these defendants were induced to materially change their position in relation to the property by expending large sums of money thereon and

thereabout, including the payment of \$29,885.79 taxes levied thereon by the authority of the state, and \$86,805.75 disbursed in the repair and improvement of the road.

In addition to the grounds above stated, on which this estoppel ought to be allowed as against the United States, there is the express provision in the act of 1889 to the effect that this suit shall be tried and adjudicated as a suit in equity between private individuals. This direction is without qualification or exception, and, in my judgment, includes the setting up of an estoppel, as well as any other procedure or defense known to equity practice or jurisprudence. By this provision the complainant consents in advance that an estoppel for conduct may be availed of against it in this suit.

And even admitting, what is denied by the plea, that their certificates are false in fact, and were procured by the fraud of the wagon road company, and that these defendants had notice of the same when they made the purchase, and therefore the complainant is not estopped to show these facts in any litigation between it and them in which they may be pertinent and material, still, by the deliberate action of the complainant, the inquiry has become immaterial.

Congress had the same right to waive the performance of the condition subsequent to the grant as to make it in the first place. When, therefore, congress decided by the act of 1874 that patents should issue for these lands in case it was shown by the certificates of the governors of Oregon that the road was "constructed and completed," in effect, it thereby affirmed, for the purpose of the grant, the integrity and efficacy of said certificates, and accepted them as final and conclusive evidence of the performance of the terms and conditions of the grant, or waived the same. Again, admitting that the complainant could as a matter of fact, and notwithstanding the certificates to the contrary, show that the road was not completed in all respects according to law, and that these defendants had notice thereof, still, the complainant having subsequently investigated the question upon evidence taken *pro* and *con* thereon, and decided, by and through its proper officers, that the grantee or its assignee, the wagon road company, was entitled to a patent for the lands under the act of 1874, either on the ground that the road had been sufficiently constructed, or that under said act the certificates were conclusive of that fact, in consequence of which these defendants made the expenditures and incurred the liabilities on and about the property as above stated, the complainant would be estopped to show such failure or notice in this suit.

The second plea is also good. All the elements of a *bona fide* purchase appear in the transaction. The original grant passed the legal title to the state, which it transferred to the wagon road company, who conveyed the same to these defendants. Their grantor was not only the apparent, but the actual, owner of the property. The purchase is alleged to have been made in good faith, and nothing appears to the contrary; and it was made for a valuable consideration,—\$140,636. It is a matter of com-

mon knowledge, of which the court may take notice, that at the date of this purchase the country along the greater portion of the line of this road was unsettled, and much of it occupied by, or within the range of, wild Indians. Its value was purely speculative. Neither had the purchasers any notice of any defect or flaw in the title of their grantor, or any failure on its part to comply with the condition of the grant.

But on this point the district attorney contends that, the grant having been made by statute on a condition subsequent, the purchasers were bound to inquire and see that this condition was fulfilled before they can claim to have purchased in good faith. Admit this. But how were they to ascertain whether the condition was fulfilled or not? In effect, the district attorney answers: "By a personal examination of the work on the ground." This would be a very unsafe proceeding. The purchasers might think the work was all that the law required, and some judge or jury before whom the question might be raised years afterwards might think otherwise. The only specific direction in the act on the subject is that the road shall be constructed, so as "to permit of its regular use as a wagon road, and in such other special manner as the state of Oregon may prescribe." The state assigned the grant to the wagon road company without prescribing any "special manner" in which the road should be constructed. It follows that the construction was only to be such as "to permit of its regular use as a wagon road." Nothing could be more indefinite than this. Probably no two men in Oregon could have been found who would agree in all particulars as to what was necessary to constitute such a road.

The act provides for the sale of the lands, as the work progresses, in sections of not less than 10 continuous miles, on the certificate of the governor to the secretary of the interior that the same "are completed." No lands were in fact sold until the certificates were furnished of the completion of the whole road. But this is a matter of which the grantor cannot complain. The provision was intended solely for the benefit of the grantee, and could be waived, as it was.

The power to declare the road, or any portion thereof, not less than 10 miles, "completed," was thus vested in the governor. When his certificate to that effect was filed with the secretary of the interior, the fact of completion was established; and any one thereafter seeking to purchase the lands need go no further, or seek elsewhere, for information on this point.

And so these defendants, finding the evidence on file as to the completion of the road, that authorized the sale of the lands, freed from all conditions thereabout, purchased the same in good faith, and for a valuable consideration.

On the facts stated in the plea there can be but one conclusion in the premises,—that these defendants are *bona fide* purchasers, within the purview of the act of 1889, and the principles of equity jurisprudence on that subject; therefore, they are not liable to have the lands so purchased by them declared forfeited to the United States, even if the certificates of the governors should prove false and fraudulent, of which there

is no evidence beyond the formal allegations of the bill, unsupported by any specific statement showing wherein or how they are false or fraudulent.

The pleas are both sustained, and in my judgment the bill ought to be dismissed.

The facts stated in them are not only admitted for the purpose of this hearing, but they are manifestly true. The only exception to this statement is the denial of the falsity of the certificates, or, if they are false, notice to these defendants of that fact. That they ever had any such notice is extremely improbable, under the circumstances. Naturally enough, a purchaser would rely on the certificates, and not travel hundreds of miles, through an unsettled country, to determine by personal observation a matter which the law made the governor the unqualified judge of, and which, as I have said, no two persons were likely to agree about.

Admitting that the falsity of the certificate may be shown in conjunction with notice to these defendants of that fact, the time which has elapsed since the period for the construction of the road has expired, and the absence of any resident population along its line at that time, would render it extremely difficult to make any satisfactory proof on the subject. The company was not bound to do more than construct the road. Its maintenance was no part of the condition of the grant. If the state had constructed the road, it would no doubt have been left to the people who wanted the use of it to keep it in repair, as in the case of the other public roads.

The state assigned the grant to the wagon road company without condition in this respect. Nor is it likely that any one would at that day have accepted the grant on the onerous and uncertain condition of keeping the road indefinitely in repair. The fact that the act authorized the land to be sold, freed from all conditions, of course, as fast as the road was constructed, shows conclusively that the grant was not intended to be charged with the burden of maintaining the road through all time, or at all. In the nature of things, in many places the road would soon deteriorate and disappear, if not kept in repair. Snow and rain, floods, wash-outs, and slides must occur yearly on the line of this road, or some portions of it. Therefore it would be very difficult to show at this late day what was the character and quantity of work done in its construction. The persons employed on the work, who would be the best, and almost the only, witnesses on this point, are likely, in 20 or more years, to have died or disappeared.

These alone are probably sufficient reasons for dismissing this bill. But the conclusions reached on the first plea make it certain, in the judgment of this court, that the complainant cannot, and ought not to, prevail in this suit—*First*, because the claim is clearly a stale one, and also, by analogy to the statute of limitations, is barred by the lapse of time; *second*, because, by the act of 1874, it has either accepted the certificate as conclusive evidence of the due construction of the road, or thereby waived all further performance of the condition subsequent; and,

third, by the action of its executive department prior to 1883, whereby it distinctly recognized and accepted the performance of such condition, and thereby induced these defendants to so alter their position in relation to the property that it would be unconscionable and unjust now to allege the contrary to their serious injury and prejudice.

As an authority applicable to this case generally, see *U. S. v. Road* Cb., 41 Fed. Rep. 493.

Let a decree be entered dismissing the bill as to these defendants.

### HENRY *et al.* v. TRAVELERS' INS. CO.

(Circuit Court, D. Colorado. May 15, 1890.)

#### 1. ACCOUNTING—EVIDENCE—CORPORATE DEBTS.

Plaintiff and defendant made a contract by which defendant was to take bonds of certain ditch companies, in which they were interested, in payment of all debts due defendant from the companies, and for advances thereafter to be made to them. Plaintiff was to surrender the obligations of the companies and those given by plaintiff for the benefit of the companies. This agreement did not apply to the private debts of plaintiff to defendant. On an accounting directed in a suit to enforce the contract, the master included in the debts of the companies certain notes, on their face the personal obligations of plaintiff to defendant. All the other obligations were notes executed by the companies, and indorsed by plaintiff. At the time plaintiff applied for the loan of defendant, for which all these notes were given, he stated that he wanted for personal uses an amount equal to that for which the individual notes were given. Moreover, some of it was paid by defendant for the purpose of obtaining the release of stock owned by plaintiff individually. Furthermore, in a statement of plaintiff's personal resources made after the loan, and under plaintiff's direction, for defendant, these individual notes were included in his personal liabilities. *Held*, that they were improperly included in the statement of the companies' debts.

#### 2. SAME—CONSTRUCTION OF CONTRACT.

Defendant is entitled to receive bonds of the companies for advances made, since the commencement of this suit, for the completion of the companies' canals.

#### 3. SAME—COLLATERAL NOTES.

Plaintiff gave defendant certain chattel notes as collateral security for "past, present, or future indebtedness." *Held* that, in the absence of negligence, defendant should be charged only with such amount as it had collected.

#### 4. SAME—INTEREST.

As judgments in Colorado draw interest, defendant should have been allowed interest on such judgment to the time of its payment.

#### 5. SAME.

Defendant should be allowed interest on its claims against plaintiff to the date of the master's report, and, on its claims against the companies, to the time it received, or should have received, bonds in payment.

#### 6. SAME—ACCOUNT-BOOK—EVIDENCE.

In the absence of proof that an entry in defendant's books, showing that a certain claim against plaintiff was paid, was made without the direction of some officer or agent of defendant having authority to direct it, it will be presumed to have been made by its authority, and to be correct.

In Equity. On exceptions to master's report.

For former reports, see 33 Fed. Rep. 132; 34 Fed. Rep. 258; 35 Fed. Rep. 15.

*J. P. Brockway*, for complainants.

*Wolcott & Vaile* and *D. V. Burns*, for respondent.

CALDWELL, J. This case is before the court on the defendant's exceptions to the master's report. For six days the court has listened to the reading of the testimony bearing on the exceptions, and to an intelligent discussion of it by counsel. The perfect familiarity of counsel with the large volume of evidence in the case is highly creditable to them, and has proved extremely gratifying and helpful to the court.

In considering the exceptions to the master's report in matters of fact, I shall observe and keep in view the rule recognized and affirmed by the supreme court of the United States in *Tilghman v. Proctor*, 125 U. S. 136, 149, 8 Sup. Ct. Rep. 894, and *Callaghan v. Myers*, 128 U. S. 617, 666, 9 Sup. Ct. Rep. 177, namely, that "the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."

The decree establishing the contract between Mr. Henry and the insurance company states the terms of that contract in these words:

"That the contract was entered into on or about the month of November, A. D. 1884, by and between the said complainant T. C. Henry and the defendant, the Travelers' Insurance Company, as is alleged in said complaint herein, by which the defendant agreed to take the bonds of the several ditch companies as aforesaid, to be by them issued, for its holding of old bonds theretofore issued by said companies, and for all advances which the defendant had made or should make on account of, or for the benefit of, the several ditch companies, no matter how they were evidenced, or by what security, in payment thereof, and in payment of all the notes and obligations held by it, given by the said ditch companies, or by the said T. C. Henry, or the Colorado Loan & Trust Company, for the benefit of the said companies mentioned in said complainant's bill, and that all of the said bonds issued by the said several ditch companies, to-wit, the Grand River Ditch Company in the amount of \$200,000, the Uncompahgre Canal Company in the amount of \$200,000, the Citizens' Ditch & Land Company in the amount of \$200,000, and the Del Norte Land & Canal Company in the sum of \$400,000, were issued by the said several ditch companies, and that all of the notes and obligations of the said several ditch companies, and of the said T. C. Henry, and of the said Colorado Loan & Trust Company, given by them or either of them to the said defendant for moneys advanced or paid to or for the said several ditch companies, have been paid and satisfied by the delivery of said bonds of said several ditch companies as aforesaid, which bonds the said defendant agreed to take at par in payment of said obligations."

In the opinion of the court rendered at the time this contract was established, it is said:

"Of course, it is not claimed that this contract reaches to any matter outside the obligations of the ditch companies, or that the private debts of Mr. Henry were in any way discharged or to be affected by it." 33 Fed. Rep. 143.

In the opinion of the court rendered on the application to modify the decree, it is said:



"The defendant wishes the decree modified in two respects,—one by the insertion of a clause excluding the private debts of the complainants Henry and the Colorado Loan & Trust Company. \* \* \* So far as the first matter is concerned, it is clearly unnecessary. The decree does not include the private debts referred to; and when the decree was being prepared the language of the draft, as presented to me, was changed purposely, and with the knowledge of counsel, so as not to include such debts. The opinion which I filed indicated that they were not included, and their omission from the decree is fully as potent as a special clause excluding them. The provision in the decree for a statement by the master of the account between complainants and defendant was made under the belief that, when the whole account was stated, if any single item was challenged by either party as improperly placed, either among Mr. Henry's private debts, or among those of the ditch companies, the matter could be separately inquired into by the court, and the error, if any there was, corrected, without a further reference to the master." 34 Fed. Rep. 258.

The master's report has been filed, and among the exceptions to it are several alleging that he erred in placing certain items of Mr. Henry's private indebtedness (or of the Colorado Loan & Trust Company, which stands, as Judge BREWER has already decided, "for all the purposes of this case," for T. C. Henry) among the debts and obligations of the canal companies, to be discharged, under the contract in the bonds of these companies, at par. The principal sum of the debts which it alleged were thus erroneously classified is \$81,500, and comprises the following items: (1) Note dated May 22, 1884, for face value of \$65,000, but on which \$50,000 only was advanced, and is, as both parties agree, to be treated as an obligation for the latter sum; (2) note of May 19, 1884, for \$5,000; (3) note of June 23, 1884, for \$25,000; (4) note of October 7, 1884, for \$1,500. All these notes, on their face, appear to be either personal obligations of Mr. Henry, or the Colorado Loan & Trust Company, which stands for Mr. Henry. In the opinion in the main case, (33 Fed. Rep. 132,) Judge BREWER says:

"Mr. Henry applied to defendant for a loan of \$250,000, some of which, he represented, was needed by him for his personal interests, but the major portion for the completion of these several canals. In order to secure this loan, he made an exhibit of his financial condition,—of the securities which he had to offer,—as well as the purposes for which the money was desired."

By reference to the exhibits here referred to in Judge BREWER's opinion,—and it is the statement of Mr. Henry himself,—we find exactly what portion of this \$250,000 loan was wanted by Mr. Henry for his private or personal uses, and what portion for the irrigating canal companies. In the application, Mr. Henry, after giving a statement of the affairs of the Citizens' Canal Company, says: "This property \* \* \* needs for present wants \$40,000." After giving a like statement for the Grand River Canal, he says: "This enterprise \* \* \* needs \$20,000 to supply its financial wants." A like exhibit of the affairs of the Uncompahgre Canal is followed by the statement that "this enterprise needs for its financial wants \$50,000." The exhibit of the condition and prospects of the Del Norte Land & Canal Company is followed by the statement that it "requires \$60,000." Having specified the exact amount wanted for the several canals, he then says:

"I want a loan of \$250,000 for the following purposes:

"Citizens' Canal Company,	-	-	-	-	-	\$40,000
Grand River Canal Company,	-	-	-	-	-	20,000
Uncompahgre Canal Company,	-	-	-	-	-	50,000
Del Norte Canal Company,	-	-	-	-	-	60,000
For general purposes in Colorado,	-	-	-	-	-	55,000
For general purposes in Kansas,	-	-	-	-	-	25,000
Total,	-	-	-	-	-	\$250,000 "

It will be observed that the amount wanted for general purposes in Colorado and general purposes in Kansas is \$80,000, the exact amount of the notes in controversy, less the note for \$1,500, which was given for money to release stocks pledged by Henry for his private debt, in order that the stock might be put up as a part of the pledge for the \$250,000 loan. This note was executed some months after the statement above mentioned was made, and of course was not embraced in it. Mr. Henry made another statement in writing of his own and the canal companies' debts, November 3, 1884, when negotiations were pending for the refunding arrangement. Touching this arrangement, Mr. Henry says:

"The statement before me is a copy of one prepared in Hartford under the direction of Mr. Batterson and Mr. Dennis, and based upon information which they had personally, and which was furnished them, from one source and another, at the time, which constituted the basis, in part, of the plan of funding the indebtedness of the several canal enterprises, providing for their wants before referred to, and also bearing upon my own personal resources."

The statement here referred to is in the form of a letter, beginning as follows:

"*Mr. Batterson:* By an examination of my liabilities and assets as you have above set forth, after eliminating the Pawnee Canal matter from both, it will appear that I have \$502,550 of private assets to pay \$275,000 of personal liabilities."

In this statement he included among his personal liabilities, described, a schedule of notes which includes the notes we are considering. Questioned about one of these statements, Mr. Henry says:

"*Question.* By whom was that statement, introduced by you in connection with your testimony in the main case, prepared? *Answer.* I do not recollect. *Q.* Didn't you testify with reference to that statement with great particularity, in your direct examination in the main case? *A.* I think I did. *Q.* And you do not now know by whom that statement was prepared? *A.* It was undoubtedly prepared at my instance. If you want to know who furnished it, and put it in testimony there, I did. What I was trying to avoid was having personally prepared the statement. I assume the responsibility of whatever appears in that evidence, as far as that is concerned."

The statement here referred to is headed "Statement of Indebtedness (personal) of T. C. Henry, of Denver, Colorado, to the Travelers' Insurance Company, October 11, 1884," and includes the indebtedness under consideration. In addition to these written statements, Mr. Henry testifies as follows:

"*Question.* Didn't I understand that the payments he [that is, Mr. Dennis, the defendant's agent, who came to Colorado to look after the disbursement of the \$250,000 loan] made on account of these ditch enterprises when he came out here were advances on account of this \$250,000 loan, so far as it was unpaid? *Answer.* No, sir; not to the ditch companies, because we had not received all that we were entitled to under the private accounts. *Q.* What do you mean by 'we'? *A.* I mean the Colorado Loan & Trust Company and myself. We borrowed \$70,000 or \$80,000 on our own account. *Q.* These securities you were proposing to pledge were not necessarily belonging to the particular company or enterprise to which you wished to devote this money, were they? *A.* Yes, sir; that was my understanding at the time. The idea was to make each company stand by itself. *Q.* But neither the North Poudre nor the State Land & Canal Company were at that time proposing to obtain funds. In other words, these were securities which you held of your own, that you were proposing to pledge on this \$250,000 loan? *A.* Or in behalf of my own individual part of it. I did not want to get that mixed up, but wanted each ditch to rely upon its own footing. *Q.* Before you pass on, let me ask you why you say that there was a \$65,000 note given for a \$50,000 loan for payment? *A.* It is a little difficult to explain that. It was agreed, in making up the items of the \$250,000 loan, what security was to be pledged as collateral, and, when it came to the \$50,000 for the personal use of myself, the Kansas property was to be used; and the first idea was that the property should be absolutely conveyed as collateral to my note, and afterwards it was decided to use the note in their assets as secured by the collateral, and for that reason the \$65,000 mortgage on the real estate was given as collateral, and appears as collateral for the \$50,000 advanced by the Travelers' Insurance Company. \* \* \* *Q.* The \$25,000, June 23d, note was a note given by you to the Travelers' Insurance Company upon the payment by the Travelers' Insurance Company of an indebtedness of \$25,000 to the City National Bank in this city; and such payment was made by the Travelers' Insurance Company for the purpose of releasing the Circle Railroad stock, was it not? *A.* At the time I applied for the \$250,000 loan, I expected that \$75,000 or \$80,000 would come to me personally, and it was agreed I should put up the Abilene farm as security for the part of that money which was to come to me, and also the stock of the Circle Railroad, which was my personal property, for \$25,000 besides, both of which sums, and both of which securities, were part of the sums and part of the securities agreed upon at the time the \$250,000 loan was made; and, in accordance with that understanding,—that agreement,—this \$25,000 note was made some time in June, and the stock placed to it as collateral, and the money obtained upon it by draft in favor of the City National Bank; and I presume it discharged so much of my indebtedness at that time to the bank, which they had been carrying for some time."

Pending the examination of the witness on this subject, Mr. Brockway, plaintiff's attorney, stated to the master:

"We will admit, for the purpose of this examination, that the \$25,000 went into the City National Bank, and paid trust company obligations."

The trust company and Mr. Henry are, for the purpose of this accounting, considered as one person. Mr. Henry testified that he took to Colorado capital to the amount of \$150,000. He further testified that he invested \$125,000 of that sum in the Denver Circle Railroad, and that he invested \$40,000 or \$50,000 in the exposition building. It will be observed that these two investments more than absorbed all the capital that he took with him to Colorado. In addition to the two enterprises

last mentioned, Mr. Henry was engaged in numerous and diversified pursuits and enterprises calling for the expenditure of large sums of money, as is shown by the following questions and answers:

*“Question.* You used your credit for the purpose of raising funds to build water-works at Silverton; to carry on a coal-mining enterprise in New Mexico, a gold or silver mining enterprise there; to build water-works at Albuquerque; to build the Pawnee Canal; to pay for stock and bonds of the Bushnell High-Line Canal, and for twenty other enterprises,—did you not? *Answer.* More than that, I guess. *Q.* Then why do you say, in answer to my question, that this money was borrowed from the City National Bank by the trust company in connection with these four canal enterprises? *A.* I have not pretended to say it was. I said, in connection with our own business affairs as well as the ditch companies.”

If the question at issue rested on Mr. Henry's own written statements and testimony, it would have to be decided against him; but, in addition to Mr. Henry's evidence, Mr. Dennis, the secretary of the defendant company, and other witnesses, testified on behalf of the defendant that these notes were the personal and private obligations of Mr. Henry, and were not included in the refunding contract. At the time of their execution, there was a memorandum, written in red ink across the notes, stating that they were the personal obligations of Mr. Henry. It is not shown that Mr. Henry had knowledge of this memorandum, but it is nevertheless an important item of evidence, as it shows the present attitude of the defendant in reference to these notes as not an after-thought on its part. The ditch company obligations were in the form of notes signed by the ditch companies, and made payable to the order of T. C. Henry, and by him indorsed. There was but one exception to this rule, and in that instance the ditch company and Mr. Henry were joint makers. The notes in controversy, on their face, are the personal obligations of Mr. Henry, or the Colorado Loan & Trust Company, which stands for him. It is obvious from Mr. Henry's own statements and testimony that, at the time he obtained the \$250,000 loan, and at the time the refunding contract was made, he owed many private debts in no manner connected with the four ditches, and that the demands upon him for payment of these debts were quite as pressing as they were for the debts growing out of the four ditches. Many of his enterprises were more or less speculative in their character, and undeveloped or unfinished, and likely to call for an outlay of money largely in excess of any receipts from them. It is clear from the evidence that at least \$81,500 of the \$250,000 loan was used to pay private debts which had no connection with the four ditches. But, if the \$50,000 note included in the \$81,500, which we have been considering, had in its inception been given for ditch indebtedness payable in bonds of the ditch companies at par, it was afterwards, by the written contract of March 30, 1887, converted into a money demand, and was, in pursuance of that contract, actually paid in money. That contract was entered into between Mr. Henry and the defendant more than 2 years after the making of the refunding contract, and 18 months after this suit was instituted. It contains several mutual covenants between the parties, by which Mr. Henry agreed, in

consideration of certain things to be done by the defendant, and which were done, to pay \$50,000, which was to be credited on the \$65,000 note; and it was stipulated "that the balance of said \$65,000 note is to remain open to litigation, at the option of the said party, to determine the amount due thereon." It is admitted that each party performed his covenants contained in this contract, and that the \$50,000 was paid and credited. It is not pretended that in the execution or the subsequent performance of this contract there was any fraud, accident, or mistake, or want of consideration. It is freely conceded that at the time the contract was made, and at the time the money was paid, the plaintiff had full knowledge of all the facts now known to him. For some unexplained, and to the court inexplicable, reason, the master set aside this contract, and required the defendant to pay back to the plaintiff the \$50,000 received under it, and to accept payment of that sum in bonds of the ditch companies. The defendant insists that another and sufficient answer to the plaintiff's contention that these notes represent sums paid by him on account of the ditches is found in the fact that he was, as he alleges in his bill, himself the contractor for the construction of these ditches, and was to take the stock and bonds of the ditch companies in payment. The defendant claims that, after he is charged with the stock and bonds he received or should have received under such contracts, there is no such sum due him from the companies as he claims. The court is satisfied to rest its decision of this exception on the other grounds mentioned, and therefore expresses no opinion on this point. The items going to make up this \$81,500 must, in stating the account, be treated as the private debts of Mr. Henry.

*Advances.* The contract between the parties is declared by the decree of the court to be that "the defendant agreed to take the bonds of the several ditch companies \* \* \* to be by them issued for its holding of old bonds theretofore issued by said companies, and for all advances which the defendant had made or should make on account of, or for the benefit of, the several ditch companies. \* \* \*" It is obvious that, whatever else this contract embraced, it contemplated the completion of the ditches. That is plainly implied from what is expressed. By the very letter of the contract established by the decree, the defendant is entitled to bonds for all advances it had made or should make on account of, or for the benefit of, the several ditch companies. In stating the contract, in his opinion Judge BREWER says:

"The company agreed to take new bonds for its holding of old bonds, and for all advances which it had made or should make on account of these ditch companies." 33 Fed. Rep. 143.

The ditches were incomplete. In their unfinished condition, they were of little value. To give value to them, and to the bonds that were to be issued based upon them as a security, they must be completed. Without that, the bonds would be comparatively worthless in the hands of any one. For the money advanced for the construction of these canals after as well as before the beginning of this suit, down to the date of the appointment of the receiver, the defendant is entitled, by the

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terms of the contract as established by the court, to be paid in bonds at par, and the account will be restated accordingly.

*Abilene Chattel Notes.* What are denominated in the record as the "Abilene Chattel Notes," amounting to \$13,104, were deposited by Mr. Henry with the defendant as collateral security for his private indebtedness. The pledge of these and other collaterals was in writing, and expressly states that they are to stand as security for any "past, present, or future indebtedness." The master charges the defendant with the face value of these collaterals, but gives no reason for so doing. The proof shows that \$3,341.81 has been collected on them. The notes were sent to Abilene for collection in due time, and the proof tends to show that all has been collected on them that can be; but, whether that be so or not, there is not a syllable of testimony to show that the defendant has been guilty of the slightest negligence in respect to these collaterals, or that it has done anything, or omitted to do anything, to render it liable for such portions of the collateral as it has not collected. And in this accounting it is chargeable only with the amount collected, namely, \$3,341.81.

*The Tribune Note.* By the laws of Colorado, judgments draw interest; and the master erred in not computing interest on the judgment on the \$25,000 note, known as the "Tribune Note," down to the date of its payment by the sale of the collateral, namely, December 5, 1887.

*Interest.* The defendant is entitled to have interest computed on the notes and demands he holds against Mr. Henry down to the date of the master's report. It is also entitled to have interest computed on its demand against the ditch companies, and for its advances to said companies, until it received, or should have received, bonds in payment; and the account will be restated accordingly.

*The Balance Claimed on the Sheep-Ranch and Phoenix Notes.* The balance claimed to be due on the sheep-ranch note of \$10,000, and the Phoenix note of \$3,500, is stated to have been settled in the first statement of accounts filed by the defendant. There is a conflict of evidence on the point, and I think the master, under all the circumstances, rightly held the defendant to the statement of its account as first made and filed.

*Colorado Delinquent Account.* The account known as the "Colorado Delinquent Account," to the amount of \$35,868.79, was settled and paid, as shown by an entry in the defendant's books, by two notes of Carter-Cotton of \$17,500 each, and by a payment of \$868.79 in cash. It is claimed that this is an erroneous entry, and that it was made by mistake; but the agent or clerk of the defendant who made the entry, which is very full, plain, and explicit, is not called to explain by whose direction or authority he made it, or that it was not made by the direction of some officer or agent of the defendant having authority to direct it. In the absence of such proof, it must be presumed to have been made by authority of the company. The verbal testimony on the question of this payment in the mode stated is conflicting; but, in view of the entry in the books, the master rightly held that this account had

been settled to the amount stated. The exceptions to the Hazleton item of \$2,720.13, and the Baker item of \$3,900, which belong to the Colorado delinquent account, are also overruled.

*Commissions.* The exceptions to the commissions allowed Mr. Henry are overruled. There is a conflict in the evidence relating to this item, and I will not disturb the finding of the master.

*Kansas Delinquent Account.* T. C. Henry & Co., of Abilene, Kan., as loan and collecting agents for the defendant, became indebted to the defendant for moneys received and collected, and not accounted for, in about the sum of \$77,000. To pay or to secure this,—and whether in payment or as collateral security is the question in dispute,—Henry turned over to the defendant notes and obligations due Henry & Co. to the amount of about \$80,000. It is quite obvious that the securities thus turned over were of much less value than the defendant's claim against Henry & Co. on account of their delinquencies. The plaintiff is unable to produce any writing to show that these securities were taken in absolute payment. He introduces a letter, written by himself, referring to the Abilene business, which, as I construe it, supports the defendant's contention. Writing from Denver to his partner at Abilene, he says:

"The Travelers [meaning the defendant] have all my property here, and I have no way to protect the Kansas office creditors, unless it is done in your deal. I do not care for the Travelers, and I want a list of the assets; and I want to be sure there is no slip about paying debts before the office is actually sold, and everything turned over to them. I have been caught once."

The Kansas office creditors—that is, the local creditors of the firm of T. C. Henry & Co.—were protected in the deal for the sale and purchase of the Kansas office, embracing abstracts, furniture, etc. The defendant paid therefor \$25,000, all of which went to satisfy the local or "Kansas office creditors;" but no provision was made in that "deal" for the delinquent account due the defendant. The transaction is witnessed by a written agreement which says nothing on the subject now under discussion. The officers and agents of the defendant company, including Mr. Carpenter, who was the partner of Mr. Henry in the Abilene business, and who, with Mr. Henry, constituted the firm T. C. Henry & Co., testified that they were taken as collateral; and I think the clear, and I might say the overwhelming, weight of the evidence supports that view. There are circumstances connected with that transaction, disclosed by the evidence, which satisfy me that these notes and obligations were taken as collateral, and not as payment of this indebtedness.

*Note of \$5,000.* On the question as to whether the note of \$5,000, dated June 24, 1884, was settled in the sale to Carter-Cotton of the stock of the North Poudre Land & Canal Company, there is no written evidence, and the oral testimony is conflicting; and, while I think there is a slight preponderance of evidence in favor of the defendant, that preponderance is not so clear and decided as to justify the court in setting aside the master's finding.

Counsel will prepare and submit to the court, for the signature of the judge, a decree in conformity to this finding. I take it for granted that the defendant desires to enter a prayer for appeal both from the original and present decree, and that the plaintiff desires to enter a prayer for appeal from so much of the present decree as sustains any exceptions to the master's report; and the conclusion of the decree will pray for these appeals, and note their allowance. The clerk will file this opinion in the record of the case, and embrace it in the transcript to the supreme court, if an appeal is taken.

### FIDELITY INS. & SAFE-DEPOSIT CO. v. SHENANDOAH IRON CO.

(Circuit Court, W. D. Virginia. May 14, 1890.)

#### 1. PRIORITY OF LABOR AND SUPPLY LIENS—MORTGAGE BONDS.

By the general principles of equity, claims for materials, supplies, and labor furnished to a mining and manufacturing company are not entitled to priority over the mortgage bonds thereof.

#### 2. DECISION OF STATE COURT—PRIORITY OF LIENS.

The decision of the court of appeals of Virginia, (*Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 9 S. E. Rep. 759,) declaring the acts of Virginia of March 21, 1877, and April 2, 1879, unconstitutional, so far as they attempted to give material and supply claims priority over mortgage bonds, furnishes the rule for this court, and an exception to a master's report which gives priority to such claims will be sustained.

#### 3. CONSTITUTIONAL LAW—OBJECT EXPRESSED IN TITLE OF ACT.

The act of April 2, 1879, entitled "An act to amend and re-enact the first and second sections of an act approved March 21, 1877, entitled 'An act to secure the payment of the wages or salaries of certain employes of railway, canal, steam-boat, and other transportation companies,'" is in violation of Const. Va. art. 5, § 15, which provides that "no law shall embrace more than one object, and that shall be expressed in its title," in so far as it attempts to give the claims of employes of mining and manufacturing companies a superior lien to that of the mortgage bondholders, because the object expressed in the title relates to transportation companies only.

#### 4. EXCEPTIONS TO MASTER'S REPORT—ALLEGATIONS.

Where a master's report had given priority to certain labor and supply claims under an unconstitutional statute, which was in contravention of the general rules of equity, it was not necessary, on exception thereto, to allege the unconstitutionality of the act.

#### 5. RECEIVERS' CERTIFICATES—CONSTRUCTION OF ORDER.

Under an order authorizing the issuance of receivers' certificates to pay taxes, "wages, and freights due and to become due," certificates given to secure a debt to a merchant, incurred by giving orders upon him to employes in payment of wages, were invalid.

#### 6. SAME—COSTS.

One who signs exceptions to a master's report, as trustee for numerous bondholders, is responsible for the costs, and an objection thereto for want of a party so chargeable is invalid.

#### 7. SAME—TIME OF FILING.

Under the rules of practice in equity promulgated by the supreme court in 1842, r. 88, exceptions to a master's report may be filed at any time within a month after the filing of the report.

In Equity. On exceptions to a master's report.

J. S. Clark and W. H. Travers, for mortgage bondholders.



*Barton & Boyd, W. B. Compton, E. S. Conrad, and J. H. Smoot, for other creditors.*

PAUL, J. On October 12, 1888, all parties in interest appearing by counsel and consenting thereto, it was ordered that the order entered on March 8, 1888, in the cause of *Seventh National Bank v. Shenandoah Iron Co.*, appointing G. E. Lipe as special master to report certain accounts, the master's report thereunder, the exceptions thereto, and also the vouchers, accounts, and reports filed in said cause, be held and taken, to all intents and purposes, as if filed in this cause, with leave to parties in interest to file exceptions to said special master's report, dated June 15, 1888, and filed October 12, 1888. On the same day, October 12, 1888, an order was entered in the suit of *Seventh National Bank v. Shenandoah Iron Co.* dismissing the same for want of equity; but the special master's report was, by consent of all parties in interest, filed in the cause now in hearing, to have the same effect as if it had been taken in this cause, and numerous exceptions were filed thereto. The most important of those exceptions were filed by the first mortgage bondholders, and are as follows, in substance: (1) That claims 1-9 are erroneously in class 4, because, being for hay and oats furnished the Shenandoah Iron Company before the appointment of the receivers, they are not entitled to priority over the first mortgage; (2) that claims 10-12, 14-17, \$31,481.70, are erroneously classed in class 4, because they are not entitled to priority over the first mortgage; (3) that claim 13 is erroneously in class 4, because, being for lumber furnished the Shenandoah Iron Company before the appointment of the receiver, it is not entitled to priority over the first mortgage; (4) that receivers' certificates 2-13 are erroneously in class 2, because exceptants insist that said receivers' certificates are not liens prior to their mortgage. There are a number of other exceptions, but the questions presented by them will all be answered in the determination of those above recited. Counsel for "other creditors" have, in argument, urged the following objections to the consideration of these exceptions:

*First.* "That they are not signed by any one who would be liable for costs under the provisions of equity rule 84; that no bondholder is known by name in the record; and that, in the event of the failure of the bondholders to maintain their exceptions, there is no one against whom costs could be recovered." It is true that the bondholders are not parties to the suit by name. They are represented by their trustee, the plaintiff in this suit, and any step taken in their name is virtually taken in the name of the trustee. They are really the parties in interest in the suit. They are the beneficiaries under the mortgage,—the *cestuis que trust*; and in filing exceptions, by counsel, the bondholders are only doing what the trustee might do, and the court sees no difficulty in entering a decree against the trustee for costs, in the event the bondholders fail to sustain their exceptions. It would be entirely impracticable to make all the bondholders parties defendant to the suit, or to have them file exceptions in their own names to the master's report. They are represented

by counsel throughout the proceedings. This objection the court considers purely technical, and cannot be sustained.

*Second.* "That the exceptions are not sufficiently specific, are too general in their terms, and do not point out the grounds of exception." Counsel argue that, as the counsel for the bondholders insist that the Virginia statute which gives priority to material, supply, and wage claims is unconstitutional, this objection should have been specifically stated in the exceptions, and that it is too late to raise the question in the argument of the cause. This objection to the form of the exceptions to a master's report was a question presented and passed upon by the supreme court of the United States in *Goddard v. Foster*, 1 Black, 506. In that case, Justice SWAYNE, speaking for the court, said:

"Before proceeding to consider the four remaining exceptions, we deem it proper to advert to an objection made to their form by counsel for the complainant. It is said that such an exception is in the nature of a special demurrer, and that these are not so full and specific that the court can consider them. Such is not the rule of this court. All that is necessary is that the exceptions should distinctly point out the findings and conclusions of the master which it seeks to reverse. Having done so, it brings up for examination all questions of fact and of law arising upon the report of the master relative to that subject."

Applying the doctrine as laid down in *Goddard v. Foster* to the exceptions to be considered in this case, the court is very clearly of the opinion that the exceptions are sufficiently full and specific. "They distinctly point out the findings and conclusions of the master which they wish to reverse."

*Third.* A third objection urged to the consideration of these exceptions is "that they were not taken at the proper time; that they should have been filed before the master before he had completed his report, so that, if there were errors in the report, the master could have had the opportunity to correct them." This was formerly the English chancery practice. The master made a draft of his report, notified counsel of his findings, gave them an opportunity to point out errors, and the master considered and corrected them. It was also the practice of the federal courts in chancery, prior to the adoption of the equity rules of practice. This was the practice when *Story v. Livingston*, 13 Pet. 359, was decided. This case has been strenuously urged upon the attention of the court as applicable to the exceptions under consideration. *Story v. Livingston* was decided in January, 1839. The rules of equity practice were promulgated by the supreme court on March 2, 1842, and since that time the practice has been different from that indicated in *Story v. Livingston*. So far from its now being required that exceptions shall be filed before the master during the time he is making up his report, one month is allowed after the report has been completed and returned to the clerk's office in which to file exceptions thereto. Rule 83 of rules of practice in equity provides:

"The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the

report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired."

This provision leaves no question as to the correctness of the practice pursued in this case. This view is sustained in the opinion of Judge GRESHAM in *Hatch v. Railroad Co.*, 15 Myer, Fed. Dec. 839, 9 Fed. Rep. 856-860.

The most important question presented for the determination of the court in this case is as to the priority of lien between certain supply and wage claims which existed against the Shenandoah Iron Company before the appointment of the receivers and the mortgage bondholders. The priority of these supply and labor claims, as reported by the master, rests upon the provisions of an act of the general assembly of Virginia, passed March 21, 1877, and amended by act of April 2, 1879. The first act is entitled "An act to secure the payment of wages or salaries to certain employes of railway, canal, steam-boat, and other corporations," and reads as follows:

"Be it enacted by the general assembly, that hereafter all conductors, brakemen, engine-drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics, or laborers, and all persons furnishing railroad iron, fuel, and all other supplies necessary for the operation of trains and engines employed in the service of any railroad, canal, or other transportation company, chartered under the laws of this state, or doing business within its limits, shall have a prior lien on the franchises, the gross earnings, and on all the real and personal property of said company which is used in operating the same, for and to the extent of the wages or salaries contracted to be paid them by said company."

The title and body of the act of April 2, 1879, read as follows:

"An act to amend and re-enact the first and second sections of an act approved March 21, 1877, entitled 'An act to secure the payment of wages or salaries to certain employes of railway, canal, steam-boat, and other transportation companies.'

"(1) Be it enacted by the general assembly, that hereafter all conductors, brakemen, engine-drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics, or laborers, and all persons furnishing railroad iron, engines, cars, fuel, and all other supplies necessary for the operation of any railway, canal, or other transportation company, or of any mining or manufacturing company, chartered under or by the laws of this state, or doing business within its limits, shall have a prior lien on the franchises, the gross earnings, and on all the real and personal property of said company which is used in operating the same, to the extent of the moneys due them by said company for such wages or supplies."

—And no mortgage, deed of trust, sale, conveyance, or hypothecation hereafter executed of said property shall defeat or take precedence over said lien; but it is expressly provided that the liens of the employes and officials aforesaid shall be prior to all other liens whatsoever, and shall be the first discharged. Section 2 provides the mode of securing the liens provided for in the first section.

It is contended by the bondholders that both the act of March 21, 1877, and the act amendatory thereof, are unconstitutional and invalid

as to material and supply claims against a corporation of the character of the Shenandoah Iron-Works; that they are also unconstitutional and invalid as to the provision which gives to labor claims a lien prior to that of the mortgage bonds. This invalidity arises from a failure of the original and amended acts to comply with section 15, art. 5, of the constitution of Virginia, which reads: "No law shall embrace more than one object, and that shall be expressed in its title." The supreme court of appeals of Virginia has recently decided these acts to be unconstitutional as to materials and supplies furnished a railroad company. *Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 9 S. E. Rep. 759. Judge LEWIS, P., after referring to numerous decisions in other states as to the requirement that the title shall embrace the subjects of the act, says:

"In the light of these principles, there can be no reasonable doubt, we think, that so much of the act, and the act amendatory thereof, as is relied on in the present case is repugnant to the constitution, and therefore void. The simple and single purpose indicated by the titles to the two acts is to secure the payment of wages or salaries to certain employes; and we have only to regard the plain and well-understood meaning of these terms to see that by no possibility can they be made to embrace the claims in question. The price of a locomotive is not wages or salary, and a person who builds and sells locomotives, cars, etc., is, presumably, not an employe, but an employer. Bouvier defines 'wages' to be 'a compensation given to a hired person for his or her services;' and 'salary' he defines 'a reward or recompense for services performed; \* \* \* the price of hiring of domestic servants and workmen;' though the term is usually applied, he says, to the reward paid to a public officer for the performance of his official duties. We do not see how argument can make plainer the invalidity of the act in the particular mentioned. The title is misleading and deceptive. It gave not the remotest intimation of the provisions of the act relied on here, which are foreign to the subject expressed in the title; and to sustain the act in its entirety would be, in effect, by judicial construction, to eliminate from the constitution one of its most important provisions, or, at all events, to seriously impair its usefulness. This the courts have no power to do. Our duty, in such a case, is to maintain the constitution inviolate, and to declare void so much of the act as is inconsistent therewith."

It is a well-settled principle that the decisions of the highest state courts, in the construction of the state constitution and laws, are to be adopted by the federal courts. This doctrine is established by numerous decisions. *Spear*, Fed. Jud. 645, 646; *Shelby v. Guy*, 11 Wheat. 361; *Jackson v. Chew*, 12 Wheat. 153; *Green v. Neal's Lessee*, 6 Pet. 291; *City of Richmond v. Smith*, 15 Wall. 429. The decision of the court of appeals of Virginia in the case cited controls in this cause. The reasons assigned in that case for holding the acts unconstitutional as to supply claims against a railway company apply with equal force to supplies furnished a mining or manufacturing company; and the court decides that the material and supply claims existing prior to the appointment of the receivers have no priority over the lien of the mortgage bonds.

The court has carefully examined the question as to the constitutionality of that provision of the amended act of April 2, 1879, which gives a lien to the employes of mining and manufacturing companies superior to that of the mortgage bonds. As we have seen, the original act made

no provision for the employes of such companies. The provisions of that act extend to no other employes than those of railroad, canal, and steam-boat companies. The title of the act uses the words "and other corporations," but these words must be construed as meaning "like corporations" with those already enumerated. The title to the amendatory act is "An act to amend and re-enact the first and second sections of an act approved March 21, 1877, entitled 'An act to secure the payment of the wages or salaries of certain employes of railway, canal, steam-boat, and other transportation companies.'" There is no reference in this title to the wages and salaries of employes of mining and manufacturing companies. The title refers exclusively to transportation companies. The provision in the body of the act giving a lien to the employes of mining and manufacturing companies is entirely foreign to the object declared in the title. It is in no manner germane to the legislation indicated by the title. A provision securing by lien the wages of farm laborers, or any other class of employes, would have been as appropriate as the provision inserted in regard to mining and manufacturing companies. The act is unconstitutional as to employes of mining and manufacturing companies, and the wage claims against the Shenandoah Iron Company existing prior to the appointment of receivers are not liens on the property of said company, and will have to be classed with the claims of general creditors. This conclusion disposes of the question as to the priority of labor claims over other claims due by the receivers. They have no such priority, and all proper claims against the receivers must be paid *pari passu*.

In this connection we will consider the exception filed by the bondholders to that part of the master's report which reports 14 receivers' certificates in favor of J. W. Rodgers. This exception must be sustained. The order of October 1, 1885, authorized the receivers to issue their certificates for a sum not to exceed \$50,000 "to pay interest due on the bonds of the defendant company October 1, 1885, taxes overdue, and wages and freights due and to become due, before the business of the said defendant company to be prosecuted by the said receivers will realize sufficient to pay the same, and to pay for necessary materials in the prosecution of the said business." Mr. Rodgers' claim was not for wages, and the receivers were not authorized to issue to him certificates for it. The character of this claim was thoroughly discussed and carefully considered in the case of *Seventh Nat. Bank v. Shenandoah Iron Co.*, 35 Fed. Rep. 436, and the same evidence considered then bears upon it now. It is simply a store-account debt against the Shenandoah Iron Company, existing by reason of orders given by the Shenandoah Iron Company to its employes on the store of Rodgers & Milner in payment of their wages. "The issue of the certificates is, however, confined strictly to the purposes expressed in the order, and these purposes cannot be extended by implication." High, Rec. § 398d. Receivers' certificates, being merely evidences of indebtedness, can have no higher character than the debts of which they are the representatives. The debts for which these certificates were issued belonged to the class of general claims, and the

certificates must take the same position. They cannot be allowed as claims against the receivers, and priority given them over the mortgage bonds.

The position taken by counsel, that the claims for materials, supplies, and labor furnished the defendant company before the appointment of receivers have, under the general principles of equity, a preference given them over the lien of the mortgage bonds, cannot be sustained. This doctrine has never been applied to mining or manufacturing companies. It is, owing to the *quasi* public character of such companies, confined to railroad corporations. This question was thoroughly and ably argued before this court in the case of *Seventh Nat. Bank v. Shenandoah Iron Co.*, 35 Fed. Rep. 438, 439. The court has found no reason to change its decision rendered in that case, and deems it unnecessary to repeat the views therein expressed. A decree will be entered in accordance with the opinion here expressed.

### KNOX *et al.* v. COLUMBIA LIBERTY IRON CO.

(Circuit Court, W. D. Virginia. July 19, 1889.)

#### 1. REHEARING—FINAL DECREE.

Where a decree declaring the lien of certain labor and supply claims to be superior to that of mortgage bondholders was founded upon Acts Va. March 21, 1877, and April 2, 1879, which were in contravention of the common law, and which have since been declared unconstitutional by the court of appeals of Virginia, (*Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 9 S. E. Rep. 759,) a rehearing will be granted, when it appears that no final decree has been entered.

#### 2. SAME—BILL OF REVIEW.

The existence of the above facts presents a question of error on the face of the record, and where a final decree has been entered the petition for rehearing will be treated as a bill of review.

#### 3. FINAL DECREE.

A decree of sale entered by consent of parties pending a reference to settle the receiver's accounts, while the priority of certain liens claimed were undetermined, and before any distribution was ordered among ante-receivership creditors, was not a final decree.

In Equity. On petition for rehearing.

G. R. Calvert and E. S. Conrad, for petitioners.

H. C. Allen and J. E. Roller, for labor, supply, and other creditors.

PAUL, J. The bill in this case was filed June 10, 1886, praying the appointment of a receiver who should continue and operate the business of the defendant, subject to a mortgage executed November 1, 1884, to secure the payment of certain bonds of the company which, the petitioners allege, were issued for the purchase price of the property in the bill mentioned. On June 10, 1886, receivers were appointed. On October 14, 1886, the cause was referred to a master to ascertain and report, in their order of priorities, the debts against said company. After a number of reports, exceptions thereto, and recommittals, the court, by de-

crees of September 8, 1887, and October 14, 1887, confirmed the master's reports filed August 13, 1887, and September 24, 1887, overruled the exceptions filed by the bondholders to said reports, and by consent of parties entered a decree of sale. In the master's reports, as confirmed, priority is given to certain labor and supply claims, contracted by the company before the appointment of the receivers, over the bonds secured by the mortgage. This priority was, in accordance with the provisions of two acts of the general assembly of Virginia, approved, respectively, March 21, 1877, and April 2, 1879. Since the entry of the decrees of September 8 and October 14, 1887, in this cause, the Virginia Statutes giving labor and supply claims a priority over the liens of the mortgage bondholders have, as to supply claims against railroad corporations, been declared by the court of appeals of Virginia to be unconstitutional, as in violation of article 5, § 15, of the constitution of Virginia. *Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 9 S. E. Rep. 759. And this court has also, after full argument, in *Fidelity Ins., etc., Co. v. Shenandoah Iron Co.*, ante, 372, decided the act of April 2, 1879, to be unconstitutional as to both labor and supply claims against mining corporations. It is in view of these decisions that these petitioners ask leave to file their petition to have this cause reheard, and the decrees of September 8 and October 14, 1887, reviewed and reversed.

Objection to the filing of the petition is made by counsel of the holders of labor and supply claims on the ground that the decree of sale entered October 14, 1887, under which decree a sale was made, and which sale has been confirmed, was a final decree, and that, under the provisions of rule 88, equity practice, a petition for a rehearing cannot be filed. If the decree of sale is to be regarded as a final decree, this position is correct. But is it a final decree? As clear a definition of a final decree as I have found is given in *Scott v. Hore*, 1 Hughes, (U. S.) 163-168. In that case, HUGHES, J. says:

"A final decree is one which fully adjudicates the questions of right and law involved in a cause, and proceeds to provide with reasonable completeness for the execution of such measures as may be necessary and proper for placing successful suitors in possession of the rights decreed to them."

In the cause in hearing, the legal rights of all the suitors have not been adjudicated. There are pending and undetermined at least two petitions of creditors who claim that their debts are, under the Virginia statute, of superior dignity to the lien of the mortgage bondholders; and there is nothing in the proceedings in this cause barring their right to assert their claims. The decree confirming the sale of the property refers the cause to a master to settle the accounts of Jacob Whissler, the receiver in the cause. No order for distribution of the proceeds has been made except as to the cash payment, out of which the receiver is directed to pay the costs of suit and sale, and a portion of the debts contracted during the receivership. No decree has been entered for distribution among the ante-receivership creditors. The fund is under the control of the court. The special receiver is directed to collect the deferred payments, and hold the fund subject to the future order of the court. No final

order can be entered for a distribution of the fund until the rights of all the claimants thereto are heard and determined. Under this condition of the record, the court is of opinion that no final decree has been entered in the cause, and that all the orders and decrees entered are interlocutory.

But, if it could be conceded that the decrees of September 8, and of October 14, 1887, are final decrees, the court is of opinion that the petition can be treated as, and in fact is, a bill of review for errors apparent on the face of the record, and might be filed as such. The recent decisions referred to as deciding that the statute giving labor and supply claims the priority over the lien of the mortgage bondholder is unconstitutional clearly present a question of error on the face of the record.

Another question arising upon the record, and one not heretofore argued before this court, is the question of the vendor's lien claimed by the mortgage bondholders upon the furnace property, and that the provisions of the Virginia statute, giving priority to labor and supply claims cannot impair the security given by a vendor's lien for purchase money. If the court should refuse to allow the filing of the paper offered as a petition for a rehearing, it could certainly be filed as a bill of review, and the same questions would come before the court that are now presented if considered as a petition to rehear. The limitation for filing a bill of review has been fixed at two years, by analogy to the time allowed for an appeal. *Enslinger v. Powers*, 108 U. S. 292, 2 Sup. Ct. Rep. 643; *Clark v. Killian*, 103 U. S. 766.

The proceedings in this case are all interlocutory. The lien of the labor and supply creditors exists, if at all, under a special statute at variance with the common law, and upon the validity of which the court must, directly or by implication, pass, in the final decree. Since the rendition of the decrees complained of, the highest state court has declared the statute upon which the lien rests, or out of which it arises, to be invalid because unconstitutional, and federal courts will judicially notice and accept such decision. *Town of South Ottawa v. Perkins*, 94 U. S. 264; *State Railroad Tax Cases*, 92 U. S. 575; *Randall v. Brigham*, 7 Wall. 523. In this stage of this case, the question of the constitutionality of the state statute being squarely raised in the paper, leave to file which is asked, whether treated as a simple petition to rehear, or as a bill of review, the court, being unable to find anything in the interlocutory proceedings heretofore had which should compel it, in the final decree to be hereafter rendered, to withhold the fund from those entitled, or to give it to those who are not entitled, will consider the constitutional question. The petition to rehear will be filed, and an order entered awarding process requiring the proper parties to answer it.



RAY v. HALLENBECK *et al.*

(Circuit Court, E. D. New York. April Term, 1890)

## 1. MORTGAGES—CONSIDERATION—RELATIONSHIP.

The relationship existing between father and daughter is sufficient to uphold a mortgage given by her to him as security for her deceased husband's debts, though they could not have been enforced as against her.

## 2. SAME—DELIVERY.

On foreclosure proceedings, testimony by the daughter that she handed the mortgage to her mother, who occupied rooms in her house with the father, and that she afterwards saw it in a bureau drawer in their room, shows that she intended the mortgage for the father; and, as it reached and was accepted by him, the transaction constitutes a delivery to the father.

## 3. SAME—PRIORITIES—RECORDING.

The mortgage, though unrecorded when the daughter made a voluntary conveyance of the premises to her second husband, who had, however, theretofore discharged an attachment against them, is entitled to priority over the conveyance, but subject to the amount paid on the attachment.

In Equity. On bill to foreclose.

*W. M. Safford*, for complainant.

*Joseph A. Burr*, for defendants.

WHEELER, J. This suit is brought to foreclose a mortgage of \$4,825 made by the defendant Annette M. Hallenbeck, daughter of the orator and wife of the other defendant, November 16, 1882, and recorded June 17, 1887, on a house and lot in Brooklyn conveyed to the other defendant April 23, 1883, by deeds recorded May 5, 1883. The defendants deny consideration for, and delivery of, the mortgage, and validity of it against the prior recorded conveyances. A former husband of Annette M. Hallenbeck owned the premises, and conveyed them to her. He owed the orator \$3,000 or \$4,000 in notes, and another debt of about \$1,200, and died leaving little personal estate. She was administratrix. The orator insists that she promised to pay his debt if he would not pursue the estate; that she has paid many small sums upon it; and that this mortgage was given for the balance, and he supposed recorded at the time, and soon after was delivered to him. The premises were attached in a suit upon her notes given for the other debt. She insists that the small sums were filial gifts for the comfort of her parents, and that the mortgage was suggested by the attachment as a security for their support, and was given for that purpose only. Letters from her, sent with money, show it was paid under what she deemed to be an obligation, rather than sent as a free gift. The orator's testimony, with these letters, and the fact of the making of the mortgage, overcome the answers, and make out satisfactorily that the debt of the former husband, and her situation in respect to it, were the consideration of the mortgage, which the attachment of the premises prompted at that time.

The counsel for the defendant argues that the mortgage would be mere security for a debt; that she would be under no obligation to pay the debts of her former husband; and that her promise to pay it, or note or bond given for them, would be without consideration and void, leaving

the mortgage without anything to be enforced for. This would be true in respect to the debts alone; but assets in her hands as administratrix, liable to be reached for the debts, might afford a good consideration for a promise to pay them as an original undertaking by her. *Templeton v. Bascom*, 33 Vt. 132. The personal assets were, however, too slight to afford any substantial consideration for an obligation for such a large debt; and whether the mortgaged premises could have been reached is not clear. The mortgage debt must be considered as without a sufficient consideration to support an action at law upon it. This does not show, however, that the mortgage is not good. A mortgagee has an estate in the mortgaged premises distinct from the right to enforce the debt otherwise. 2 Washb. Real Prop. bk. 1, c. 16, § 4; Trowbridge on Mortgages, 8 Mass. Rep. Supp. 554. This is shown by the fact that letting the debt become barred by a statute of limitations, or satisfying or suspending it by imprisonment of the debtor, has no effect upon the right to proceed upon the mortgage. *Burnell v. Martin*, 2 Doug. 417; *Davis v. Battine*, 2 Russ. & M. 76; *Tappan v. Evans*, 11 N. H. 811; *Richmond v. Aiken*, 25 Vt. 324. The consideration need only be sufficient to uphold the mortgage as a conveyance of this estate in order to make it valid between the parties to it, and others having no greater rights. This mortgage is made by indenture of bargain and sale containing the word "grant," and others of conveyance. The relation of blood between father and daughter would be a sufficient consideration for such a deed absolute of the mortgaged premises. 2 Bl. Comm. 296; 4 Kent, Comm. 464; 3 Washb. Real Prop. bk. 3, c. 5, § 3. This is elementary. No more would be necessary to uphold the conveyance upon condition than one absolute. The estate conveyed is the same. One may be defeated, the other not. This estate could be defeated by the payment of the "sum of money mentioned in the condition," not by defeating liability on the debt. As argued, the mortgage was security for the debt, and nothing more; but the debt was the one described in the mortgage, as described, and not what could be enforced at law otherwise. The consideration would uphold a conveyance of so much of the estate as she chose to and could convey. She chose to and did convey so much of it, as far as she could, as would be necessary to secure the debt set forth, if the mortgage was delivered.

The question of delivery does not seem difficult. She does not testify that she changed her mind after she had the mortgage made, intending it for her father's security and intended, after that, to keep it from him, but does testify that she gave it to her mother. In another part of her testimony, she states that all conversation about sending money was with her mother. Her father and mother occupied the same rooms in her house, and she says that she afterwards saw the mortgage in the bureau drawer in their room. If she actually gave the mortgage to her mother instead of to her father, these circumstances show that she intended it for him; and, as it reached and was accepted by him, the effect was the same.

The attachment was in force as a lien on the premises at the time of the orator's mortgage. The defendant John J. Hallenbeck paid it off,

at the sum of \$1,470.55, at the time of the conveyance to him. He paid nothing further at the time. The evidence shows expenditures by him for his wife, the other defendant, before marriage and since, but does not show any bargain by which he took the premises in payment of these debts, nor any other negotiation by which he became a purchaser of them. As to everything except the paying off of the attachment, the conveyance to him appears to have been purely voluntary. He was not in reality a purchaser. Such a conveyance would not postpone the interest covered by the prior unrecorded mortgage to itself. 4 Kent, Comm. 171. But, as the mortgage would not convey the interest covered by the attachment, he would seem to have acquired a right, to that extent, prior to the mortgage, by paying that off, and taking the conveyance. Except to this extent, he appears to hold the title conveyed to him for his wife, the other defendant, and to have no greater rights against the orator's mortgage than she has.

The orator, upon these considerations, seems entitled to a decree of foreclosure, except as to the amount of that lien. That may be lessened by the rents of the premises received by the defendant John J. Hallenbeck over and above the expenditures about them since his deed; and the amount due on the mortgage appears to have been lessened by some payments. An account of the sum due on each seems to be necessary. Let a decree be entered for an account of the amount due the orator on his mortgage, and of the amount due the defendant John J. Hallenbeck on the amount paid by him on account of the attachment lien, and for a foreclosure of the mortgage subject to a priority in his favor for the amount due him, with costs.

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RAGSDALE v. NORTHERN PAC. R. Co.

(Circuit Court, D. Minnesota. November 15, 1889.)

1. MASTER AND SERVANT—FELLOW-SERVANTS—TRAINMEN—CONDUCTOR AND FIREMAN.

In an action against a railroad company for injuries received by a fireman on a locomotive in a collision with another train, it is no defense that the negligence of the conductor of the latter train, in passing a station without stopping for orders, caused the collision, since he is the representative of the railroad in charge of the train, and not the fellow-servant of the employes on either train.

2. SAME—ENGINEER AND FIREMAN.

Nor is the engineer in charge of the engine on which plaintiff was fireman a fellow-servant of plaintiff, and that his negligence caused the collision is no defense to the action.

3. SAME.

The conductor is the superior of the fireman on the other train, within the meaning of Comp. St. Mont. § 697, providing that "the liability of a corporation to an employe acting under the orders of his superior shall be the same in the case of injury sustained by default or wrongful act of his superior, or to an employe not appointed or controlled by him, as if such servant or employe were a passenger."

At Law. On demurrer to answer.

*McDonald & Barnard* and *M. E. Clapp*, for plaintiff.

*John C. Bullitt, Jr.*, for defendant.

SHIRAS, J. In the amended complaint filed in this cause it is averred that on the 17th day of March, 1888, the plaintiff was in the employ of the defendant company as a locomotive fireman; that in the performance of his duty as such he was on that day required to go upon engine No. 181, which was pulling a train between Missoula and Arlee, upon the line of defendant's road, in the then territory of Montana; that, through the fault and negligence of the defendant, a collision occurred between the train on which plaintiff was employed and another train belonging to defendant, near the station called "Evaro;" that plaintiff, to avoid the danger of being crushed to death by the coming collision, jumped from the engine on which he was firing, and received injuries resulting in the amputation of his right leg. In the answer filed, it is averred that, by the rules of the company in force when the accident happened, it was the duty of all trains on defendant's road to stop at all night telegraph offices, and receive a clearance order before proceeding past such office, between the hours of 7 P. M. and 7 A. M.; that under the rule it was the duty of the persons operating train No. 1 to stop at said station of Evaro, and not to pass the same until the proper clearance order had been received; that, disregarding such rule, the persons operating said train No. 1 did not stop at said station, but proceeded on eastward until said train No. 1 met the engine on which plaintiff was riding, and came in collision therewith; that the collision was caused by the negligence of the persons operating train No. 1; that such persons were fellow-servants with the plaintiff, and for their negligence the defendant is not responsible. The demurrer to the answer presents the question whether the facts therein averred show that the defendant company is not liable for the injuries received by plaintiff.

If the solution of the problem thus presented was wholly dependent upon the determination of the question whether, under the rule of the common law, the plaintiff and the parties in charge of train No. 1, were fellow-servants, we would have presented the exact point which the supreme court stated, but did not decide, in the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184. In that case an engineer was injured in a collision between two trains, which resulted from the negligence of the conductor of each train. The supreme court held that the relation of fellow-servant did not exist between the engineer and the conductor of the train on which the engineer was employed, but did not pass upon the question whether the conductor of the other train was or was not a fellow-servant with the injured engineer. The conclusion reached in that case, to the effect that the engineer and conductor of the same train were not fellow-servants, is placed upon the ground that the conductor was charged with the duty of running the train; was in command of its movements; directed when it should stop and when it should proceed; had the general management thereof and control over the persons on the train; and must therefore be held to be the representative of the company, for whose negligence the latter would be responsible.

In the case at bar the answer avers that the collision was caused by the negligence of the parties in charge of train No. 1, whose duty it was to stop at the station, and not to proceed beyond the same until the proper clearance order had been obtained. If the plaintiff had been a brakeman or fireman on train No. 1, and had been injured in the collision, without fault on his own part, it is clear that, under the rule recognized in the *Ross Case*, he would have had a right of recovery against the company, because the answer avers that the collision was due to the negligence of the parties in command of that train, and who occupied the same relation to it that the conductor did in the *Ross Case*. Is a different conclusion to be reached by reason of the fact that the plaintiff was a fireman upon engine No. 181? The supreme court holds that the conductor, having the control and management of the running of the train, is to be deemed to be the representative of the company, and not a fellow-servant with the engineer and other employes on that train. So far as the running and management of the train under his control is concerned, does he cease to occupy such representative capacity under any circumstances? Suppose in the collision in question the fireman upon train No. 1 had been injured as well as the plaintiff, and both had brought suit to recover for the injuries received. Under the rule laid down in the *Ross Case*, the court would be required in the one case to instruct the jury that the conductor in charge of train No. 1 was; by reason of the nature of his employment in connection with the train, the representative of the company, for whose negligence the master would be liable. Upon what theory could the court in the next case charge the jury that in the running and management of this train the conductor was not the representative of the company, but was in fact a fellow-servant with the employes upon the other train?

The control of the train is placed in the hands of the conductor, in order that there should be some responsible person charged with the duty of properly moving the train; that is, of determining when the train shall stop, and when it shall proceed, with reference to meeting and passing other trains upon the road. This power of control over the movements of a given train is not conferred upon the conductor with sole reference to the safety of the train upon which he is acting as conductor. He is charged with the duty of so moving his own train as to secure not only its own safety, but also to aid in securing the safety of other trains which are moving upon the same portion of the line. In the management of his own train the conductor must ever bear in mind that there may be other trains upon the road, and to secure the safety of his own train, and also of other trains, he must, as the representative of the company, exercise due care to avoid collisions. It is unquestionably the duty of the company, in running its trains, to exercise due care to see that the movements thereof are so regulated that collisions shall be prevented. For that purpose the defendant company adopted the rule set up in the answer providing that between the hours of 7 P. M. and 7 A. M. no train must pass beyond a telegraph station until it had received the necessary clearance order. The conductor of train No. 1 was charged with the duty

of observing this rule, not only for the protection of his own train, but also for the protection of any other train coming towards the station from the opposite direction. The employes on train No. 1 had the right to rely upon the conductor for the proper observance of this duty, and, if he negligently disobeyed the rule, any employe suffering injury would, under the doctrine of the *Ross Case*, have a right of action against the company. The conductor was placed in control of the movements of the train, and, by reason of the power thus conferred upon him, he became the representative of the company in that particular. The employes upon the other train, which was properly handled, had the right to expect of the company that it would, through its representatives, so control the movements of its other trains that the track would be left clear for the passage of the train going westward. The company undertook to move train No. 1 eastward over the line between Missoula and Arlee at the same time that plaintiff's train was moving westward. Under such circumstances, it was certainly the duty of the company to supervise and control the movements of both trains, so as to prevent a collision; and if in the moving of train No. 1 the conductor was the representative of the company, it must follow that, for negligence on part of the representative of the company, the latter would be liable to any one injured thereby. The negligent moving of train No. 1 would cause danger to the employes of both trains alike, and the company owed the same duty to the crews on each train. It is difficult to perceive any good ground, therefore, for holding that if the company, through its representative, the conductor of train No. 1, was guilty of negligence in the moving of that train, thereby causing a collision, any employe injured thereby would not have a right of action against the company, irrespective of the question of which one of the colliding trains he happened to be on at the time of receiving the injuries.

On part of plaintiff it is further claimed that the statute of Montana, in force when the accident happened, modifies the common-law rule in regard to the liability for the acts of fellow-servants. The statute (section 697, Comp. St. 1888) is as follows:

"That in every case the liability of the corporation to a servant or employe, acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employe not appointed or controlled by him, as if such servant or employe were a passenger."

This statute does not go to the length of abrogating the general rule that the master is not liable to an employe for the consequences of the negligence of a co-employe, but it does enact, in effect, that a superior is not a co-employe with an inferior, and that one may be a superior as compared with another, even though the former does not control the latter. The enactment is based upon the known fact that, in carrying on the business of railroading, there are recognized grades among the numerous classes of employes, and, while they all are working for a common master and for an ultimate common result, they are practically not all co-servants. The present plaintiff was a fireman, and his duties were limited generally to attending to the furnace and other matters upon the engine.

He did not belong to that class of employes that were charged with the duty of controlling the movement of the trains. The answer expressly avers that the collision was caused by the negligence of the officials in command of the movement of train No. 1, and there is no fact averred which tends to show that as to them the plaintiff occupied any other position than that of an inferior, within the meaning of the statute of Montana. The act of negligence set up in the answer is that train No. 1 was moved past the telegraph station in violation of the rule of the company, and it is averred that this was done by those in command of such train. It will certainly not be claimed that a fireman upon the engine is an employe charged with the control of the moving of the trains, a duty primarily imposed upon the conductor, and it is certainly the fair inference that in the moving and running of trains the conductor is the superior of a fireman. In other words, the conductor or party charged with the control of the train is a superior, as compared with a fireman, within the meaning of the Montana statute. Under this section, the corporation is made liable to any one of its employes who, without negligence on his part, is injured by the default or wrongful act of a superior, even though the latter has no control over the former. Whether, therefore, the liability of the defendant corporation is to be determined under the common-law rule or under the statute of Montana, the facts set forth in the answer do not show that the act of negligence causing the collision and consequent injury to plaintiff was the act of a co-employe, but, on the contrary, it would appear therefrom that such act of negligence was the act of the representative of the corporation, who was also the superior of the plaintiff. This being the conclusion, it follows that the answer is insufficient, and the demurrer thereto is sustained.

SHIRAS, J. This cause has already been before the court on demurrer to the answer, and in the opinion then given it was held that, under the common-law rule and under the provisions of the statute of Montana, it could not be held that a fireman was a co-employe with the conductor of a train by whose negligence in controlling the movements of his train a collision was caused with the engine upon which the plaintiff was acting as fireman. By an amended answer now on file, it is averred that the collision was caused by the negligence of the engineer in charge of the engine upon which the plaintiff was acting as fireman, and that they were co-employes, and therefore the company is not liable. It is averred in the amended answer that the accident occurred on the 17th day of March, 1888; that on that day, and for some time prior thereto, the rules of the company provided that between the hours of seven in the evening and seven in the morning all trains should consider themselves held for orders at all night telegraph offices, and in accordance with said rule it was the duty of all trains on the defendant's line of railroad to stop at all night telegraph offices, and receive a clearance order, before proceeding past such office, between the hours named; that the rules of the defendant further provided that, in approaching stations whereat there are switches, all freight trains must move with great cau-

tion, and that the engineers of such trains, in passing such switches, should not run at a rate of speed greater than 10 miles per hour; that the station of Evaro was a night telegraph and switch station; that train No. 1 stopped a short distance west of said station; that one of the engines propelling the same was then detached, and passed upon a switch in order to get to the rear of the train; that it then passed to the main line east of and in the rear of train No. 1, where it was run into by the train on which plaintiff was acting as fireman; "that said train on which said plaintiff was employed, owing to the negligence and gross carelessness of the engineer thereof, one Lacey, approached said station at Evaro from the east, and ran by the same at a speed greatly in excess of 10 miles per hour; and did not stop at said station at Evaro, but on the contrary, in violation of the rules of defendant, was carelessly and negligently propelled and operated past said station by said Lacey, its engineer, and that it was so operated past said station of Evaro between the hours of seven in the afternoon and seven in the morning, to-wit, at 45 minutes past 9 o'clock on the night of March 17, 1888; that said collision was caused solely by the negligence of said engineer of the train on which said plaintiff was employed, and not by the negligence of defendant; that said engineer was a fellow-servant of said plaintiff, engaged in the same general employment, and that said plaintiff ought not to have or maintain any action against said defendant on account of the negligence of said engineer." In the original answer it was averred that the collision was caused by the negligence of those in charge of train No. 1; and in ruling upon the demurrer to that answer it was held that, under the doctrines announced by the supreme court in the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, the parties having control of the movements of train No. 1 could not be deemed to be fellow-servants with the employes upon engine No. 181. In the amended answer, now under consideration, it is averred that the collision resulted from negligence in the running of the train upon which plaintiff was employed, and thus the case is presented in an aspect more nearly resembling the facts of the *Ross Case*. In the amended answer it is charged that the collision resulted from the violation of two rules of the company, to-wit, running by the station without halting and obtaining the proper clearance order, and moving at a rate of speed greater than 10 miles per hour; and it is averred that the violation of these rules was due to the negligence of the engineer in charge of the engine upon which plaintiff was acting as fireman.

The principle recognized in the *Ross Case* by the supreme court is that one who is charged with the control of the movement of the train, who directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, or who, in other words, controls the movement of the train, is in no proper sense a fellow-servant with the fireman, the brakeman, or the engineer on such train. In that case a collision was caused by the negligence of the conductor in failing to communicate to the engineer an order which he had received, and the engineer was the person injured. The court held that the relation of



fellow-servants did not exist, and that the company was liable for the consequences of the negligence of the conductor. If, in the case now under consideration, it was averred that the collision was caused by the negligence of the conductor in controlling the movements of the train, there could be no question that it would be squarely within the rule recognized in the *Ross Case*, and that the claim of plaintiff to recover could not be defeated by the plea that the accident resulted from the negligence of a co-servant.

Does the fact that the collision in this case was caused by the negligence of the engineer change the relation of the parties? The solution of this question must be sought, not in the mere name applied to the one at fault, but in the relation he in fact occupied towards the company and the other train-men in the performance of the duty devolved upon him, and in the doing of which he was guilty of negligence. It is apparent to every one, having any knowledge of the operation of railway trains, that there are two persons thereon who divide between them the responsibility of the actual movement of the train. These persons are the conductor and the engineer. While the duties of these two persons are widely different yet practically by the combination of both are the movements of the trains controlled, and in the management thereof they each in their respective places represent the company, and they are not fellow-servants with the other employes upon the train who are not charged with the management of the train, and have no control over the same. The brakeman, the fireman, and the porters upon the train are not co-workers with the conductor and the engineer in the control and running of the train. They have no voice in determining the speed of the train, when it shall stop, when proceed, and other like matters. Touching all questions affecting the movements of the train, the relation of such employes towards the persons who have control over the movements of the train is that of inferior towards superior; the latter exercising absolute control, and the former owing the duty of obedience. According to the averments in the amended answer, two acts of negligence are charged upon the engineer, to-wit, not halting at the station at Evaro and remaining there until the proper clearance order was received, and in passing the station at too great a speed. It is clearly inferable from the answer that the control and management of the train in these particulars was a duty resting upon the engineer. He it was who should have brought the train to a halt at the station, and in fact he practically was the only one who could so control the train as to bring it to a stop before passing the station. So, also, he it was who controlled the speed at which the train was moving when it reached the station. Thus the amended answer charges that the person who had the actual control over the movements of the train, and whose duty it was to observe the rules of the company in the particulars named, was guilty of negligence in the performance thereof; and I can see no substantial ground for holding that the engineer, in his relation to such movements of the train as are wholly under his control, occupied any different relation to the other subordinate employes on the train than is occupied by

the conductor. If, under the rules of the company, the conductor had been primarily charged with the duty of causing the train to halt at Evaro station, and he had neglected such duty, and the plaintiff had consequently suffered the injuries complained of, then, under the rule in the *Ross Case*, the company would have been liable. The amended answer shows that the engineer was primarily charged with the duty of halting the train at Evaro station, and that he negligently failed in the performance of this duty. It seems to me that the same rule must be applied to the one case as to the other, and that the reason which sustains the liability of the company in case of the negligence of the conductor apply with equal force to the negligence of the engineer when such negligence occurred in a matter touching the actual movements of the train, and which was at the time wholly under the control of the engineer. In such matters the engineer represents the company, and for his negligence the company must respond. The demurrer is sustained.

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STEEL v. RATHBUN.

(Circuit Court, D. Oregon. May 23, 1890.)

PROMISSORY NOTE PAYABLE IN BLANK—SUBSEQUENT HOLDER—ACTION IN FEDERAL COURT.

A promissory note, payable "to the order of ———," which was made and delivered for a valuable consideration, is, in legal effect, payable to bearer; and one who buys it from a lawful owner and holder, and afterwards fills the blank by writing his own name therein as payee, which he may lawfully do, is a "subsequent holder," within the meaning of the phrase as it is used in the act of congress defining the jurisdiction of the circuit courts of the United States, and therefore not entitled to sue in this court upon such a note, the original holder and the maker both being citizens of Oregon.

(Syllabus by the Court.)

At Law.

*Watson, Hume & Watson*, for plaintiff.

*R. & E. B. Williams, Chas. H. Carey, and J. B. Thompson*, for defendant.

HANFORD, J. The complaint in this case alleges that the plaintiff is a citizen of the state of Washington, and the defendant is a citizen of the state of Oregon; that, on the 3d of February, 1883, for a valuable consideration, the defendant made and delivered to the Portland Savings Bank, a corporation of the state of Oregon, his promissory note for \$5,000, with interest at 10 per cent. per annum from date until paid, payable on demand, "to the order of ———," at the office of the Portland Savings Bank, in Portland, Oregon; that the defendant paid the interest on said note to said Portland Savings Bank up to and including March 4, 1886, and no other payments have been made; that on November 10, 1888, the bank sold and delivered the note, for a valuable consideration,

to D. P. Thompson, who afterwards, for a valuable consideration, sold and delivered it to the plaintiff, who is now the lawful owner and holder; that, at all times prior to the purchase of said note by plaintiff, there was no payee named in said note, but there was a blank space where the payee's name should appear, which blank has been filled by insertion of plaintiff's name; and that the amount remaining unpaid and now due on said note is \$6,854.33, for which sum, with interest and costs, and an attorney's fee of \$250, a judgment is prayed. To this complaint the defendant has interposed a demurrer, specifying as grounds that the court has no jurisdiction of the action, and other grounds not necessary to be considered, as I hold that the court has no jurisdiction of the action, and the demurrer must be sustained on that ground.

The act of congress to determine the jurisdiction of the circuit courts of the United States, approved March 3, 1887, as corrected by the act of August 13, 1888, contains this prohibitory clause:

"Nor shall any circuit or district court have cognizance of any suit \* \* \* to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, \* \* \* unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

The plaintiff here contends that the case, as stated, does not come within the exception made by this clause of the statute, because the note is not by its terms payable to bearer, and it was not a complete note or chose in action until the blank therein left by the maker to be filled by insertion of the name of some person who should become the only lawful payee had been so filled, and that the note in its present condition, as a complete and perfect instrument, has not been assigned or transferred at all, and that he is the original and only party on one side of the contract evidenced by the note, and the only person who at any time could have lawfully maintained a suit upon it. In support of plaintiff's theory, the case of *Thompson v. Rathbun*, 22 Pac. Rep. 837, is cited, in which the supreme court of the state of Oregon has decided that the intermediate holder of this very note could not, while he held and owned it, maintain a suit upon it, for the reason that between him and the defendant, the blank being yet unfilled, there was no privity. Counsel for plaintiff also cites the case of *Goldsmith v. Holmes*, 13 Sawy. 526, 36 Fed. Rep. 484, in which Judge DEADY decided that where a citizen of Oregon made a negotiable note payable to the order of another citizen of Oregon, who gave no consideration for it, but indorsed it for the maker's accommodation, and merely as a surety, and then delivered it to citizens of New York, who loaned money upon it to the maker, the lenders of the money were original parties to the contract, and entitled to sue upon it in a United States circuit court. I fully assent to the correctness of the decisions in each of these cases, but I deny that either has any bearing upon the case at bar. In the case last mentioned the plaintiffs in the action, although indorsees of the note, dealt directly with the maker, by advancing the money which was the consideration for which the note was given. They

were, therefore, in fact and law, the first owners of the note, and the immediate parties on one side to the transaction, just as the plaintiff here would be if there had been but a single transaction, in which he had advanced to the defendant directly a sum of money in consideration for the giving of the note in suit. But this case is different. The Portland Savings Bank gave value for the note, and held it as owner, and received payments upon it; and, if it had sued upon it without filling the blank, no objection to the action could have been successfully urged upon the ground that there was no privity between it and the defendant. The authorities all agree that a person who receives from the maker of a note payable to "—— or bearer," and who is *bona fide* owner and holder, can maintain a suit upon it without filling the blank. 1 Rand. Com. Paper, 254. Upon principle, the rights of a primary holder of a note payable "to the order of ——," should be measured by the same rule. Such a note, in the hands of a *bona fide* holder, is a valid contract for the payment of money; and a *bona fide* purchaser acquires a complete title by the mere delivery of it into his possession. It is, in legal effect, a note payable to bearer. 1 Daniel, Neg. Inst. § 145; 1 Rand. Com. Paper, 253, 290; *Rich v. Starbuck*, 51 Ind. 87; *Brummel v. Enders*, 18 Grat. 895; *Crutchley v. Clarence*, 2 Maule & S. 90.

This note was once delivered to and held by the Portland Savings Bank, and the obligation created by it has been partially met by payments of interest to the bank. It has been transferred and retransferred. The plaintiff is a "subsequent holder" of it in fact. There has been no transaction between him and the defendant directly. On the contrary, all his rights as against the defendant were acquired by a contract of purchase between him and another person, who, so far as the record discloses the facts, is an entire stranger to this action. If there had been no assignment or transfer of this note, it would still be held by the Portland Savings Bank, and no action upon it could be prosecuted in this court. Therefore, by the terms of the act of congress above cited, the present action is likewise barred in this court, and must be dismissed.

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GOODRICH, Clerk, etc., v. UNITED STATES.

(District Court, E. D. Arkansas, W. D. March 8, 1890.)

1. UNITED STATES COMMISSIONERS—COMPENSATION—DOCKET FEES.

Under the provision in the deficiency appropriation bill of August 4, 1886, (24 St. at Large, 274,) denying docket fees to commissioners, such docket fees cannot be allowed. Following *Crawford v. U. S.*, 40 Fed. Rep. 446.

2. SAME—ACKNOWLEDGMENTS TO RECOGNIZANCES.

Rev. St. U. S. § 847, which allows commissioners 25 cents for "taking an acknowledgment," applies to acknowledgments to recognizances. Following *McKinstry v. U. S.*, 40 Fed. Rep. 813.

3. SAME—SUBPENAS.

The commissioner may charge for issuing two subpoenas in the same case, where the witnesses reside in opposite directions, and have to be subpoenaed by different officers. Following *Jones v. U. S.*, 39 Fed. Rep. 410.

## 4. SAME—WARRANTS.

He may also charge for issuing several warrants in a case where there are several defendants.

## 5. SAME—HEARING.

Where a defendant is brought before a commissioner, and upon hearing the complaint read waives examination and gives bond, such proceedings constitute a hearing for which the commissioner is entitled to fees.

## 6. SAME—DRAWING RECOGNIZANCES—RETURNS.

Under Rev. St. U. S. § 847, which allows commissioners "for issuing any warrant or writ and for any other service the same compensation as is allowed to clerks for like services," a commissioner is entitled to fees for drawing recognizances and complaints and entering returns on writs in criminal cases. Following *Rand v. U. S.*, 36 Fed. Rep. 671.

## 7. CLERK OF COURT—COMPENSATION IN CRIMINAL CASES.

The clerk's fees for entering orders approving accounts of commissioners and the district attorney, for entering report of money paid into court and filing vouchers pursuant to a standing order of the court and Rev. St. U. S. § 798, for making transcripts required by 24 St. at Large, p. 507, § 10, when ordered by the district attorney, and for entering an order appointing an attorney to defend a poor person, are all chargeable to the United States.

## 8. SAME—ATTACHMENT FOR CONTEMPT.

An attachment against a witness for contempt, in not obeying a subpoena, is a criminal proceeding, in which the United States is plaintiff, and the cost of the proceeding, including a docket fee, is chargeable to the United States. Following *Erwin v. U. S.*, 37 Fed. Rep. 470.

## 9. SAME—DEPUTY AS JURY COMMISSIONER.

Where a deputy-clerk acts with the jury commissioner in drawing juries while the court is not in session, he is entitled to the same compensation allowed the jury commissioner for like services, where such compensation is shown to be a reasonable charge for the work performed. Following *Erwin v. U. S.*, 37 Fed. Rep. 470.

## 10. SAME—CLERK AND COMMISSIONER—PER DIEM.

A clerk who is also a commissioner may charge a *per diem* for his attendance at court, and a *per diem* for hearing a cause as commissioner on the same day. Following *Erwin v. U. S.*, 37 Fed. Rep. 470.

## 11. SAME—DISTRICT AND CIRCUIT COURTS—TRANSFER.

Fees earned by the clerk in the district court cannot be transferred by the comptroller to his account as clerk of the circuit court. Following *Goodrich v. U. S.*, 35 Fed. Rep. 193.

## 12. WRITS—WARRANT OF COMMITMENT—SEAL.

The warrant of commitment of a defendant under final judgment should be under the seal of the court. Following *Van Duzee v. U. S.*, 41 Fed. Rep. 571.

At Law.

*U. M. & G. B. Rose*, for plaintiff.

*Charles C. Waters*, for defendant.

**CALDWELL, J.** This is a suit brought by the plaintiff to recover fees alleged to be due him as clerk of the circuit and district courts, and as commissioner of the circuit court, which fees have been disallowed by the comptroller. There is no contention about the facts. The services charged for were performed. The only question is the legal right of the plaintiff to recover for the services.

**Commissioner's Fees.** The charge of the plaintiff for docket fees, as commissioner, must be disallowed. The act allowing that fee has been repealed. 24 U. S. St. 274; *McKinstry v. U. S.*, 40 Fed. Rep. 813; *Calvert v. U. S.*, 37 Fed. Rep. 762; *Crawford v. U. S.*, 40 Fed. Rep. 446. *Contra: McDermott v. U. S.*, Id. 217; *Phillips v. U. S.*, 33 Fed. Rep. 164; *Bell v. U. S.*, 35 Fed. Rep. 889; *Rand v. U. S.*, 36 Fed. Rep. 671; *Hoynes v. U. S.*, 38 Fed. Rep. 542.

A commissioner is entitled to 25 cents for each recognizance. *McKinstry v. U. S.*, 40 Fed. Rep. 813; *Heyncard v. U. S.*, 37 Fed. Rep. 764. *Contra: Crawford v. U. S.*, 40 Fed. Rep. 446; *Barber v. U. S.*, 35 Fed. Rep. 886; *Rand v. U. S.*, 36 Fed. Rep. 671.

He is entitled to charge for two subpoenas in the same case if they were necessary. This charge was disallowed by the comptroller on the ground that the names of all the witnesses should have been included in one subpoena, but that is sometimes impracticable. It not unfrequently occurs, as it did in this case, that witnesses reside in opposite directions, and have to be subpoenaed by different officers. *Jones v. U. S.*, 39 Fed. Rep. 410.

The fees charged for issuing more than one warrant, where there were several defendants, stand on the same footing, and are allowed.

A defendant was brought before the commissioner, the complaint read, and the defendant waived examination, and entered into bond to answer. The comptroller disallowed a *per diem* in the case, on the ground that no witness was sworn, and that there was therefore no trial. But there was a hearing and trial of the case that disposed of it. The commissioner's court was open, the defendant was arraigned, and such proceedings were had that he was bound over. This was a "hearing and deciding on" a criminal charge, for which the statute allows the commissioner five dollars. The fees for drawing recognizance and complaints, and entering returns on writs in criminal cases, are legitimate charges. *Rand v. U. S.*, 38 Fed. Rep. 666; *Crawford v. U. S.*, 40 Fed. Rep. 446; *Rand v. U. S.*, 36 Fed. Rep. 671; *Jones v. U. S.*, 39 Fed. Rep. 410. The commitments charged for were not "temporary," but were in cases where the defendants were held to answer, and were committed for want of bail.

*Clerk's Fees.* The fees for entering orders, approving accounts of commissioners and district attorney, are properly chargeable to the United States. *Rand v. U. S.*, *supra*; *Jones v. U. S.*, 39 Fed. Rep. 410; *Commissioners' Oath Fee Case*, 5 Lawr: Dec. 350; *Erwin v. U. S.*, 37 Fed. Rep. 470.

The charge for entering report of money paid into court, and filing vouchers, is proper. This service was performed in pursuance of a standing order of the court and section 798, Rev. St. U. S. *Goodrich v. U. S.*, 35 Fed. Rep. 193; *Jones v. U. S.*, 39 Fed. Rep. 410.

The fees for making transcripts required by section 10 of the act approved March 3, 1887, (24 U. S. St. 507,) when ordered by the district attorney, are chargeable to the United States. *In re Clerk's Charges*, 5 Fed. Rep. 440.

The warrant of commitment of a defendant under the final judgment and sentence of the court should be under the seal of the court. *Van Duzee v. U. S.*, 41 Fed. Rep. 571.

The clerk of this court is required to appoint a deputy for the court at Texarkana. The deputy at that place acts with the jury commissioner in drawing juries. For that service he has charged five dollars a day for three days, the exact sum allowed the jury commissioner for like serv-

ices, and which is shown to be a reasonable charge for the work performed. A similar charge has been allowed by the present comptroller, and I think rightly so. I can see no reason for requiring the deputy-clerk to perform this service for nothing. The court was not in session, and he drew no *per diem* while performing the service. *Erwin v. U. S.*, 37 Fed. Rep. 470.

The clerk is entitled to his mileage for attending court at Texarkana. Section 828, Rev. St.

The fee for entering order appointing attorney to defend a poor prisoner is chargeable to the United States.

Attachment against a witness for contempt of court, in not obeying a subpoena, is a criminal proceeding, in which the United States is plaintiff, and the costs of the proceeding, including a docket fee, is chargeable to the United States. *Erwin v. U. S.*, 37 Fed. Rep. 470.

A clerk, who is also a commissioner, may charge a *per diem* for his attendance on court, and a *per diem* for hearing a cause as commissioner on the same day. *Erwin v. U. S.*, *supra*.

In the settlement of plaintiff's accounts for the year 1887, the comptroller transferred from the district court account to the circuit court account the sum of \$535 in fees, which were earned in the district court. The result of this was to raise the clerk's account in the circuit court beyond the limit allowed by law, and it was done for that purpose. For the same purpose the comptroller deducted from the plaintiff's expense account in the circuit court the sum of \$156, thus bringing the plaintiff in debt to the United States on his circuit court account in the sum of \$645.20. By this method of stating the account, the plaintiff was wrongfully deprived of \$535 on his district court accounts, after satisfying all excess of emolument earned in the circuit court. That this could not be rightfully done has been decided. *Goodrich v. U. S.*, 35 Fed. Rep. 193; *Butler v. U. S.*, 23 Ct. Cl. 162.

Applying these principles to the accounts sued on, I find there is due the plaintiff from the United States the sum of \$788.15.

## UNITED STATES *ex rel.* SILVERMAN v. FISCUS, Sheriff.

(District Court, W. D. Pennsylvania. May 31, 1890.)

### INTOXICATING LIQUORS—INTERSTATE COMMERCE—ORIGINAL PACKAGES—COMMITMENT IN DEFAULT OF BAIL—HABEAS CORPUS.

Upon the return of a writ of *habeas corpus*, it appeared that under a criminal proceeding against the prisoner for a violation of a local statute prohibiting the sale of malt or brewed liquors, etc., in the borough of Leechburg, in Armstrong county, Pa., and also for a violation of the general license law of said state, restraining and regulating the sale of vinous, spirituous, malt, or brewed liquors, he was committed, in default of bail, to the jail of said county for trial. The prisoner alleged, and at the hearing on the *habeas corpus* undertook to show, that the liquors for the sale of which he had been arrested and committed had been imported by a brewing company of the state of Ohio from that state into the state of Pennsylvania, and that he, as the agent of said company, had sold the same in the orig-

inal and unbroken packages; and he claimed his discharge under the decisions of the supreme court in *Leisy v. Hardin*, 10 Sup. Ct. Rep. 681, and *Lyng v. People*, Id. 725. It was not alleged that the prisoner was unable to give bail, nor was any special reason shown why a court of the United States should interfere with the judicial proceeding in advance of the trial in the state court. *Held*, that it was not to be doubted that the state court would recognize the binding force of the said decisions of the supreme court, and give the prisoner the benefit of them; and, following the practice sanctioned by the supreme court in *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 734, and acted upon by that tribunal itself in *Ex parte Royall*, 117 U. S. 254, 6 Sup. Ct. Rep. 742, the court refused to discharge the prisoner in advance of his trial, and remanded him to the custody of the authorities of the state, without prejudice to his right to renew his application thereafter, should the circumstances render it proper for him to do so.

### *Habeas Corpus.*

*John F. Whitworth* and *Charles S. Fetterman*, for relator.  
*J. B. Neale* and *M. F. Leason*, for the Commonwealth.

ACHESON, J. The petition of Charles Silverman for a writ of *habeas corpus* showing the jurisdictional facts and probable cause, the court, under the authority of sections 751, 753, and 754 of the Revised Statutes of the United States, issued such writ, directed to the sheriff of Armstrong county, Pa., commanding him to produce the prisoner in this court, that the cause of his detention might be inquired into. The sheriff has made his return to the writ, and the case has been heard, and is now to be disposed of. It appears that a criminal proceeding was instituted against the prisoner before J. B. Kifer, Esq., a justice of the peace of Armstrong county, Pa., for a violation of a local state statute, approved March 27, 1866, prohibiting the sale of malt or brewed liquors, etc., in the borough of Leechburg, in said county; and for a violation, also, of the general license law of the state, approved May 13, 1867, to restrain and regulate the sale of vinous, spirituous, malt, or brewed liquors; and under said proceeding the prisoner, in default of bail, was committed by the justice to the jail of said county of Armstrong. The petitioner avers, and has undertaken to show the court, that at the time of the commission of the alleged offense for which he is held he was the agent at Leechburg, Pa., for the Cincinnati Brewing Company, of Hamilton, in the state of Ohio, and that said company consigned from said place in Ohio to themselves at Leechburg, Armstrong county, Pa., to his care as their agent, a quantity of beer in stamped original packages, which he thus received at Leechburg, and, as the agent of said company, sold, as the goods of said company, in said stamped original packages, in the same condition as received by him from the said company, unopened, unaltered, unchanged, and with the stamps unbroken, and that he was not interested in said liquor otherwise than as agent of said company.

The prisoner claims his discharge upon the ground that under the recent decisions of the supreme court of the United States in *Leisy v. Hardin*, 10 Sup. Ct. Rep. 681, and *Lyng v. People*, Id. 725, popularly known as the "Original Package Cases," he had the lawful right to make such sales, and that for so doing he is not amenable to the criminal laws of the state of Pennsylvania, for the alleged violation of which he has been



arrested and is under commitment. Undoubtedly, the courts of the United States have jurisdiction on *habeas corpus* to discharge from custody a person who is restrained of his liberty in violation of the constitution or a law of the United States, although he may be held under state process for an alleged offense against the laws of such state. This was distinctly held by the supreme court in *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 740. But it was further held in that case that the courts of the United States have a discretion whether they will discharge the prisoner in advance of his trial in the state court; and Mr. Justice HARLAN, speaking for the court, says:

"That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution."

The decision cited was made upon a writ of error to the circuit court of the United States for the eastern district of Virginia; but upon an original application to the supreme court for a writ of *habeas corpus*, in advance of the trial of the prisoner in the state court, the writ was denied. *Ex parte Royall*, 117 U. S. 254, 6 Sup. Ct. Rep. 742. Now, the question of the constitutionality of the laws of Pennsylvania here in question, as they affect interstate commerce, can be raised by the prisoner (Silverman) upon his trial in the state court, and his defense there made; and it is not to be doubted that that court will recognize the binding force upon all judicial tribunals, federal and state, of the decisions of the supreme court of the United States in the cases of *Leisy v. Hardin* and *Lyng v. People*, *supra*, and give to him the full benefit of those decisions. It is not alleged that Silverman is unable to give bail, and no special reason is shown why this court should interfere at this stage of the case with the judicial proceedings in Armstrong county; and following the practice sanctioned and acted upon by the supreme court in the cases of *Ex parte Royall*, *supra*, as the better practice, I must refuse to discharge the prisoner, and remand him to the custody of the sheriff of Armstrong county, but without prejudice to his right to renew his application to this court, or to make application to the circuit court, at some future time, should the circumstances render it proper to do so; and it is so ordered.

*In re* CHUNG TOY HO AND WONG CHOY SIN.

(Circuit, Court, D. Oregon. May 23, 1890.)

## CHINESE MERCHANTS—FAMILIES—IMMIGRATION—TREATY OF 1880.

The wife and children of a Chinese merchant, who is entitled, under article 2 of the treaty of 1880, and section 6 of the act of 1884, to come within and dwell in the United States, are entitled to come into the country with him or after him, as such wife and children, without the certificate prescribed in said section 6.

*(Syllabus by the Court.)**Habeas Corpus.**Mr. Paul R. Deady*, for petitioners.*Mr. Franklin P. Mayo*, for the United States.

DEADY, J. These two cases were heard together. The petitioners are the wife and child of Wong Ham, a well-known Chinese merchant, resident in Portland, Or., for some years past.

A short time since, he visited China, and returned here on the American bark *Coloma*, bringing with him the petitioners, who had never been in the United States. He, (Wong Ham,) being provided with the certificate required by section 6 of the act of July 5, 1884, (23 St. 116,) was allowed to land; but, the petitioners having no such certificate, their right to land was denied by the collector.

They then sued out writs of *habeas corpus*, directed to the master of the *Coloma*, who made return admitting the facts stated in the petition and the detention, and stating the cause thereof to be the refusal of the collector to allow the petitioners to land.

The district attorney was allowed to intervene on behalf of the United States, and the cases were heard on the facts stated in the respective petitions.

The action of the collector in refusing to allow the petitioners to land was based on a decision of the treasury department of August 19, 1889, (Treasury Decisions, 409,) in which it was said that the wife of a Chinese merchant who has never been in the United States cannot be allowed to enter the United States, with or without her husband, otherwise than upon the production of the certificate required by section 6 of the act of July 5, 1884.

By the treaty with China of November 17, 1880, (22 St. 13, art. 2,) it is provided, that—

“Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.”

By section 6 of the act of July 5, 1884, (23 St. 116,) professedly passed “to execute” the stipulations of this treaty, a certain certificate is required

for the admission into the United States of "every Chinese person," other than a laborer, who may be entitled by said treaty to such admission.

Then came the act of October 1, 1888, (25 St. 504,) by which the coming or return of Chinese laborers to the United States is absolutely forbidden.

The manifest purpose of this legislation is to exclude Chinese laborers from coming or returning to the United States. The other classes—"teacher, student, and merchant"—are not required to have certificates before they can be admitted into the country, because their admission is intended to be restrained or limited, but to prevent laborers from being admitted under the guise or in the character of such classes.

There is no limitation on the right of these classes to come within and dwell in the United States. The statute only requires that such a person shall furnish the prescribed evidence that he belongs to one of these favored classes, when he may come and go at pleasure.

The admission of the petitioners is not within the mischief that the exclusion act was intended to remedy. They are both females, the child being about eight years of age. It is common knowledge that Chinese women are not laborers. The station in life of the petitioners, being the wife and child of a merchant, also shows they do not belong to the laboring class.

The petitioners are not within the purview of the exclusion act of 1888, which is confined to laborers. Do they come within that of section 6 of the act of 1884, which requires "every Chinese person" other than a laborer to procure from his own government the certificate required by said section before he can be admitted into the United States?

Confessedly the petitioners are "Chinese persons," and are therefore within the letter of the statute. But in my judgment they are not the "persons" contemplated by congress in the passage of the act.

Chinese women are not teachers, students, or merchants; and therefore they cannot, as such, obtain the certificate necessary to show they belong to the favored class. But, as the wives and children of "teachers, students, and merchants," they do in fact belong to such class; and the proof of such relation with a person of this class, entitled to admission, is plenary evidence of such fact.

It ought not to be lightly, or without cogent reason, concluded that congress, in the passage of the act of 1884, professedly "to execute" the treaty of 1880, really intended to limit or restrain its operation in this respect. The treaty (article 2) declares that a Chinese merchant may bring his "body and household servants" with him into the country, and they "shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact that the domicile of the wife and children is that of the husband and

father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children; particularly when it is remembered that such concession is accompanied with a declaration to the effect that, in such entry and sojourn in the country, he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France.

There is nothing in the act of 1884 that indicates an intention on the part of congress to limit or restrain the privileges conceded to Chinese merchants by this article of the treaty. It only adds a rule or measure of evidence by which the fact of being such merchants may be conclusively established.

In *Re Tung Yeong*, 9 Sawy. 620, 19 Fed. Rep. 184, Judge HOFFMAN held that the minor children of Chinese merchants were entitled to admission into the country, either with the father or on being sent for by him, on the ground that they were not laborers, and said:

"It was not without satisfaction that I found there was no requirement of the law which would oblige me to deny to a parent the custody of his child, and to send the latter back across the ocean to the country from which he came."

It is true this decision was made in February, 1884, while the act requiring the production of a certificate from "every Chinese person" seeking to enter the United States was not passed until July 5, 1884, and therefore it is not authority on the question of whether the words "every Chinese person," in section 6 of the act, are limited to teachers, students, and merchants, and do not include their wives and children. But it is direct authority in favor of the conclusion that the children of a Chinese merchant, under article 2 of the treaty of 1880, are entitled to admission into the United States with their father or after him; and, if a child, why not his wife?

My conclusion is that under the treaty and statute, taken together, a Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either, unless the intention of congress to do so is clear and unmistakable.

The petitioners are illegally restrained of their liberty, and are entitled to be discharged from custody; and it is so ordered.

*In re LAIDLAW et al.* •

(Circuit Court, D. Oregon. May 13, 1890.)

## SHIPPING—TONNAGE DUTIES—PENALTIES—ENFORCEMENT.

A proceeding before a district judge, to procure a remission of a fine, penalty, or forfeiture, incurred under the customs revenue law, does not include the case of a tonnage tax, alleged to have been levied in excess of the lawful rate.

(Syllabus by the Court.)

At Law.

Mr. C. E. S. Wood, for petitioners.

Mr. Franklin P. Mays, for the United States.

DEADY, J. This is a petition by the consignee and agent of the British ship *Largo Law*, to have the facts ascertained and transmitted to the secretary of the treasury, so as to procure a remission or mitigation of a certain tonnage tax, amounting to \$793.50, imposed on said vessel by the collector of this port.

Briefly the case as stated in the petition is this:

In October, 1889, the *Largo Law* entered the port of San Diego, Cal., with a cargo from London, consisting partly of cement, of which 3,360 barrels were destined for this port. For the sake of convenience, as it is alleged, the duty on the whole of the cement was paid at San Diego, from which place the vessel then proceeded to this port with the cement on board destined here, where the collector imposed a tonnage tax on the vessel of 50 cents per ton, under section 4219, of the Revised Statutes, on the ground that she had on board goods,—cement “taken on in one district to be delivered in another district,”—which action of the collector was on November 3, 1889, affirmed by the commissioner of navigation.

Notice of the application was given to the collector and district attorney, the latter of whom appeared and filed a demurrer to the petition.

The petition appears to have been filed under section 5292 of the Revised Statutes. But that section has been superseded by section 17 of the act of June 22, 1874, (18 St. 186.) However, so far as this case is concerned, the sections are substantially the same.

Said section 17 provides:

“That whenever, for an alleged violation of the customs revenue laws, any person who shall be charged with having incurred any fine, penalty, forfeiture, \* \* \* shall present his petition to the judge of the district in which the alleged violation occurred, \* \* \* setting forth truly and particularly the facts and circumstances of the case, and praying for relief, such judge shall, if the case in his judgment requires, proceed to inquire, in a summary manner, into the circumstances of the case, at such reasonable time as may be fixed by him for that purpose, of which the district attorney and the collector shall be notified by the petitioner, in order that they may attend and show cause why the petition should be refused.”

The case made by the petition is not one for the remission or mitigation of a fine, penalty, or forfeiture incurred by the petitioner, or any one else. A fine, penalty, or forfeiture can only be incurred by the do-

ing or omitting of some act contrary to law. The *Largo* Law violated no provision of the customs revenue laws in coming to Portland with this cement.

It is true that section 4347 of the Revised Statutes forbids the transportation of merchandise from one port of the United States to another, in a vessel belonging in whole or part to a foreigner, under pain of forfeiture. But such section also provides that merchandise brought from a foreign port in such vessel, and not unladen, may be transported therein from one port to another port of the United States. No forfeiture of this cement could have occurred in this case, unless it was unladen at San Diego, and then taken on board again before coming to this port. It is claimed, I understand, that it was constructively unladen by being entered for the payment of duties thereon, and the payment of such duties. But it seems to me that would be a very strained interpretation of the term. So long as the cement remained on board of the vessel, as a matter of fact, it was not in my judgment unladen. The general object of the statute is to prevent vessels owned by foreigners from engaging in the coasting trade, and the special exception is, that such a vessel may carry its cargo, or any part of it, brought from a foreign port, from one district to another of the United States. However, no forfeiture was claimed in this case, and the petition does not seek relief against any such. Yet if the cement was unladen at San Diego, within the meaning of the statute, the same is liable to forfeiture.

The subject of tonnage tax is regulated by section 4219 of the Revised Statutes. Among other things, it provides, (as amended by Act Feb. 27, 1877, par. 140:) "Upon every vessel not of the United States, which shall be entered in one district from another district, having on board \* \* \* merchandise taken in one district to be delivered in another district, duties shall be paid at the rate of fifty cents per ton." As may be seen, this section only applies to vessels taking goods on board in one district to be carried to another, and therefore does not conflict with section 4347, which allows a vessel belonging to a subject of a foreign power to carry so much of its cargo as may have been brought from a foreign port, and not unladen, from one district to another of the United States.

Section 2931 of the Revised Statutes provides that the decision of the collector, as to the rate of tonnage to be paid on the entry of a vessel, shall be final, unless an appeal is taken to the secretary of the treasury in the manner provided, whose decision shall also be final, unless suit is brought to recover such duties. But now by section 3 of the act of July 5, 1884, (23 St. 118,) creating the bureau and commissioner of navigation, all questions arising under tonnage tax-laws are referred to said commissioner, and his decision declared to be final.

Section 2779 of the Revised Statutes provides that any vessel bringing merchandise into the United States from a foreign port, which is shown to be destined for other districts than the one in which she first arrives, may proceed with the same from district to district, and the duties on such of the merchandise only as shall be landed in any district shall be paid within such district.

Taking this legislation as a whole, it appears to me that the duties paid at San Diego on the cement destined to Portland were improperly paid, and that the collector should have required the payment of the duties thereon at this port, and that the vessel was not liable to the tonnage tax imposed on it.

Still, as has been said, the case is not one of a fine, penalty, or forfeiture incurred, but of an erroneous imposition of a tonnage tax. For this the statute gives the party a remedy by an appeal to the treasury department, on which the decision of the commissioner of navigation appears to be final.

The demurrer is sustained, and the petition dismissed.

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MARTINDALE v. CADWALADER.

(Circuit Court, E. D. Pennsylvania. October 7, 1889.)

CUSTOMS DUTIES—CONSTRUCTION OF LAWS—CLASSIFICATION—CRACKER BOXES.

The customary packages in which biscuit were imported were tin boxes on which it was not unusual to employ more or less ornamentation. The testimony was that crackers in ornamental boxes sold for more per pound than those in plain. *Held* that, if the ornamental boxes enhanced the value, and increased the facilities for the sale of the crackers contained therein, then they had a use independent of their employment in the importation of merchandise, and were dutiable at 100 per cent.

*Assumpsit* by Thomas Martindale against John Cadwalader, Collector.

This was a suit brought by the plaintiff to recover certain customs duties alleged to have been improperly exacted upon tin boxes in which crackers or biscuits were contained. The appraiser returned them as unusual coverings, designed for use otherwise than for the *bona fide* transportation of the goods into the United States, at 100 per cent. (section 7, Act March 3, 1883;) and the protest claimed that they were free as the usual and necessary coverings for that class of merchandise. Upon the trial it was shown that tin was the material generally used for the coverings of such articles in transportation, but that the boxes in question, being highly ornamented and embossed, were equal to about one-half of the value of the biscuits they contained, and after being emptied of their contents were sometimes used for household purposes.

*Edward L. Perkins*, for plaintiff.

*J. R. Read*, U. S. Dist. Atty., and *W. Wilkins Carr*, Asst. U. S. Dist. Atty., for defendant.

BUTLER, J., (*charging jury orally.*) The plaintiff in this cause imported a quantity of crackers into the United States contained in boxes such as the one exhibited to you, and described by the witnesses. The customs officers believed these boxes to be subject to duty under a provision of the seventh section of the act of 1883, and consequently, levied a duty upon them such as the statutes provide for, and collected this duty

from the plaintiff, he paying it under protest, and appealing. He now seeks to recover by this suit the duty so levied and collected. The seventh section of the statute embracing the subject of this controversy, after repealing certain provisions of statutes then in force authorizing the imposition of duties upon boxes and coverings used in the transportation of merchandise, proceeds to say: "Hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value" (this is important) "of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value" (that is, of the merchandise) "in determining the amount of duties for which they are liable." Congress intended, by this provision, not to exempt any part of the merchandise, or any part of the importations that were for sale as merchandise, from duty, but the coverings, the means simply whereby the merchandise was safely conveyed to this country. The preceding language would seem to make this plain, but to guard against possible misapprehension the statute further provides—

"That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods to the United States, the same shall be subject to a duty of one hundred per cent."

Nothing could be plainer than this. It was intended not to exempt any part of the merchandise, anything that could be dealt in as merchandise, bought and sold, from duty, but to exempt simply the coverings, the means of securing safety in transportation; and if a party in importing merchandise used a package or box or covering designed for some other use, as well as for the importation, and thus designed to evade the revenue laws of the United States, he should be subject to the high rate of duty on the box or covering provided for by this section. The evidence is that the larger proportion of this description of merchandise, crackers and biscuit, is brought here in tin boxes. A tin covering of some kind is said by the witnesses to be necessary for the preservation of the crackers and biscuit. They must be protected from the moisture of the sea atmosphere, and where they are brought in plain tin boxes, as is most usual, there is no question about the exemption from duty of the boxes. It is not unusual to employ fancy boxes, such as were used by the plaintiff. The question is whether these boxes were designed for any other use than that of importing the biscuits or crackers, —whether they were intended for any other use than covering and protecting the merchandise during transportation. If they were not, then they were not liable to taxation. If they were intended for any other purpose, then they were liable to the tax which was imposed by the collector. Were they intended for any other purpose? The witnesses say that, beyond their use in selling the crackers contained in them, they have no use independent of the transportation. But the question is whether or not they are of value and designed for a use in selling the crackers themselves. The testimony of the witnesses is that when the crackers are sold in these ornamental boxes they sell for two or three



cents per pound more than when sold in the plain ones. If that is so, is it not plain that these boxes have a use independent altogether of the protection of the crackers in their importation to this county? If they enhance the value of the crackers contained therein, and increase the facilities for selling, then that is a use independent of their employment in the importation of the merchandise. It is for you to pass upon the evidence, and I say nothing that is binding, but I do not hesitate to say that, in the judgment of the court, if the evidence is believed, and there is no contradiction, it being all from the plaintiff's witnesses and from the plaintiff himself, these boxes have a merchantable value outside their use in transporting the crackers, and that value is obtained in selling them.

The plaintiff requests the court to instruct the jury that if they find the boxes upon which the duties were imposed in this case had no other purpose or use than to enhance the salability of the goods contained therein, to find a verdict for the plaintiff, subject to the right of the court to enter judgment for the defendant *non obstante veredicto*, if the court shall be of opinion, as matter of law, that a package or covering designed to increase the salability of the article therein contained, but having no other commerical use, is dutiable within section 7 of the act of congress, entitled "An act," etc., passed March 3, 1883. This point is refused.

Verdict for defendant.

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### WINTERS v. CADWALADER.

(Circuit Court, E. D. Pennsylvania. October 8, 1889.)

#### 1. CUSTOMS DUTIES—CONSTRUCTION OF LAWS—COVERINGS OF MERCHANDISE

The purpose of section 7, Act March 3, 1883, (customs duties,) was to entitle importers of merchandise to relief from payment of duty upon the genuine means of preservation of merchandise in course of transportation, by removing the duty upon the box, wrappings, or coverings that were usual and necessary in inclosing, protecting, and carrying the goods, and imposing a duty amounting to a penalty on packages which were intended for a subsequent use.

#### 2. SAME—CLASSIFICATION—PICTURED BOXES—PENALTIES.

Cubical blocks, capable of being arranged in a series of pictures, were imported in a box which also contained pictures from which the pictures into which the blocks were arranged, were found and a similar picture on the top of the lid. Testimony was given that the picture was placed on the lid to save varnishing it. *Held*, in the opinion of the court, as the picture alone is used, and it differs in its use in no wise from the use of the other pictures contained in the box, the importer is not liable to the 100 per cent. penalty.

*Assumpsit* by Anton Winters against John Cadwalader, Collector.

This was a suit brought by the plaintiff to recover certain duties alleged by him to have been improperly exacted upon an importation of cubic picture blocks in boxes, upon the lids of which was pasted a picture into which the contents could be arranged. The appraiser returned

them as being for use other than the *bona fide* transportation of the goods, and assessed the duty at 100 per cent. The other five pictures into which the blocks could be arranged were upon separate sheets placed inside of the box, and the plaintiff testified that the reason why the sixth picture was pasted upon the lid of the box was merely to save the expense of varnishing, and did not affect the price of the article, but that when the contents were being used as toys the lid of the box was also used. The verdict was in favor of the plaintiff.

*Frank P. Prichard*, for plaintiff.

*J. R. Read*, U. S. Dist. Atty., and *W. Wilkins Carr*, Asst. U. S. Dist. Atty., for defendant.

**BUTLER, J.**, (*charging jury orally.*) The court need not repeat the general observations made in your presence in the preceding case. The defendant, the government of the United States, for the purpose of getting before you its views of the law, has asked the court to charge you as follows:

"(1) If you believe that the boxes in question in this suit, are of a material or form designed for use otherwise than for the *bona fide* transportation of the goods to the United States, your verdict should be for the defendant."

That is true.

"(2) If you believe from the evidence, and an inspection of the sample box, that there was a substantial, material, and valuable use which these boxes were designed to subserve, and which was otherwise than to preserve the blocks and carry them in security, then your verdict must be for the defendant."

That is substantially the same thing, and is true.

"(3) If you believe that the material, the form, and picture upon the lid of the box, was so substantially a part of the design of the box, as to materially affect its value and the value of its contents, and is so regarded both by the buyer and the seller, and is designed for that purpose, then your verdict should be for the defendant."

That is true, also.

"(4) Even if you believe that the box or covering involved in this suit, is the usual and necessary covering of such goods, yet if you also believe that the material and form of the box was designed for use otherwise than for the *bona fide* transportation of the goods, then your verdict should be for the defendant."

That is but a repetition of the same thought contained in the points already read, and is affirmed.

"(5) If you believe that these boxes or coverings are constructed upon a plan which facilitates and contemplates their use in connection with their contents, while such contents are being themselves used, then they are designed for a use other than for transportation to the United States merely, and your verdict should be for the defendant."

That is another form of stating the same thing.

"(6) If you believe that there is a use made of the boxes, disconnected from the transportation, then your verdict should be for the defendant."

That is but a repetition of the same thing, and is true.

"(7) If there is a use for which these boxes are designed otherwise than for transportation only, although the use for transportation was also designed, then your verdict should be for the defendant."

That is the same thing slightly varied, simply in verbiage.

"(8) Your verdict should be for the defendant."

The eighth point asks us to take the case from the jury, and direct a verdict for the defendant, and this we decline to do. The purpose of the seventh section of the act of 1883 was to entitle importers of merchandise to relief from payment of duty upon the means of preservation of the merchandise in course of transportation. It was to relieve them from duty upon the box, wrappings, or coverings that are usual and necessary in inclosing, protecting, and carrying the goods in course of transportation. It was intended for nothing more. It was not intended to relieve any part of the merchandise from taxation, but was intended to relieve this covering from liability to taxation. Wherever it is made to appear that the covering, boxes, wrappers, or bags are not honestly intended simply for that use, but for an additional or other use, or where it is shown that they are designed—that is, that they are applicable and intended, judging by their construction and subsequent use—for another additional use, then the law punishes the use of such wrapper or covering or box by subjecting it to a very high rate of duty, a duty amounting to a penalty, 100 per cent. This provision of the statute is entitled to a reasonable construction. It is not to be forced. Where it is shown with plainness that the covering is designed for another use than that of protecting the goods, securing them in the course of transportation, the importer who uses such covering is subjected to the penalty provided by this proviso to the seventh section. Unless that appears, the importer should not be subjected to the penalty.

The question here is whether or not, in this instance, it appears by the evidence that these boxes were designed for any other use than that of covering and protecting the merchandise in the course of transportation. The merchandise consisted of blocks and pictures. Was the box designed for any other purpose than covering, protecting, and conveying them? The pictures especially needed protection. You see what they are. They are laid out in the form in which you see them. The blocks might possibly be huddled into a box of any form, but the pictures require better care. The testimony is that it is the universal custom to transport them in boxes of this kind; and it does not seem to be questioned here, and probably is not open to question, that if the boxes were plain, (and they are plain except as respects the lid,) if they did not have one of the pictures pasted upon the lid, the government would have no case. If that was so, the duty would be improperly exacted, and should be returned. These blocks are designed to form six distinct pictures, and the pictures for which they are designed accompany the box; five of them are placed inside, and one on the lid. The testimony is that the picture placed upon the lid, being itself varnished, serves the purpose of varnishing the lid, but that if the picture was not placed there the lid itself would have to be varnished, so as to make it impervious to

the moisture of the sea atmosphere. Therefore the picture is pasted upon it. Is there evidence that these boxes are used for a purpose other than that of protection and conveyance in transportation? It is not contended that any part of the box is used but the lid. Is the lid used? The picture is used; and it is on the lid. If it was not on the lid, it would be inside the box; the child would take it out, and place it on the lid, or on the floor, a table, or anything else large enough to support it. Is it a justifiable conclusion that, because the manufacturer pastes a picture on the lid instead of putting it inside, and allowing the child, when he opens the box, to place the picture on the lid, that the box, or any part of it, is designed for any other purpose than of transportation? I do not hesitate to say to you that in the judgment of the court it is not. The question is one of fact, however, and is for you; but it seems to me to be so plain that I am not only justified in saying this, but called upon to say it. It is the picture that is used; it is not the lid of the box, any more than the lid of the box would be used if it was merely employed as a support for the paper by the child. The picture belongs in the set. If not on the outside of the box, it would be inside. Of what importance is it whether it is attached to the lid of the box, in so far as the use of the picture is concerned? The other pictures are used; they are all subject to the necessity of being placed upon a support. It is for you to say whether it would be just to conclude that this box, because one of the pictures is pasted upon the surface, to avoid the necessity of varnishing, is designed for other use than that of transportation. In the judgment of the court it is not, but the question is for you, and you will decide it. The provision of the statute is intended to punish a party who uses coverings for the double purpose of importation and a subsequent and other use, and must have a reasonable construction, not a forced one. It subjects importers to the payment of a penalty, and unless it is clear they have violated the law they should not be thus punished. The case differs altogether in its aspects from the case previously decided. *Martindale v. Cadwalader*, ante, 403.

Verdict for plaintiff.

### FROST *et al.* v. RINDSKOPF *et al.*

(Circuit Court, E. D. New York. April Term, 1890.)

#### 1. TRADE-MARKS—WHAT WILL BE PROTECTED—"WARREN HOSE SUPPORTER."

While the words "Warren Hose Supporter," when used alone, may not constitute a valid trade-mark, yet when used in connection with a cut of a hose supporter engaged with a stocking, and placed, as labels, on boxes containing hose supporters, they are sufficiently arbitrary to fairly denote the origin of the goods, and are entitled to protection as a trade-mark.

#### 2. PATENTS FOR INVENTIONS—EXPIRATION—RIGHTS OF PATENTEE.

While, after the expiration of a patent, any one has the right to manufacture the article, and to designate it by the name by which it has become known to the public, yet no one has the right to represent in any manner that his goods are actually manufactured by the patentee.

## 3. TRADE MARKS—INFRINGEMENT.

A trade-mark consisting of the words "Warren Hose Supporter," and a cut of a hose supporter engaged with a stocking, is infringed by another in all respects similar, except that the word "Warranted" is substituted for "Warren."

In Equity. On bill for injunction.

*Gilbert M. Plympton*, for orators.

*H. A. West*, for defendants.

WHEELER, J. This suit is brought against alleged imitators of a trade-mark consisting of the words "Warren Hose Supporter," and a cut of a hose supporter engaged with a stocking, used by the orators, under the firm name of the Warren Hose Supporter Company, on labels on boxes of hose supporters in selling them. The orators have dealt in these goods in connection with patent No. 135,899, dated February 18, 1873, and granted to Elisha Foote for grain bands and bag ties, and No. 159,291, dated February 2, 1875, and granted to Andrew Warren, for stocking and skirt holders. The cut of the supporter in the orators' trade-mark represents it as patented under the date of the Foote patent. Their goods have long been known as "Warren Hose Supporters." The defendants insist that this is not such a trade-mark as to be the subject of exclusive use; that the use of the representation of a patent is so deceptive as to preclude protection; and that they have the right to represent their goods to be the Warren Hose Supporters, and have done no more. Perhaps, as argued for the defendants, the words "Warren Hose Supporter" alone would not constitute a valid trade-mark; but, in connection with the cut, they appear to be more than merely descriptive, and sufficiently arbitrary to denote fairly the origin of the goods when used for that purpose. *McLean v. Fleming*, 96 U. S. 245; *Hostetter v. Adams*, 20 Blatchf. 326, 10 Fed. Rep. 838; *Stocking Co. v. Mack*, 21 Blatchf. 1, 12 Fed. Rep. 707.

That when the defendants make what are known as "Warren Hose Supporters" they have the right to designate them as such seems to be clear. *Fairbanks v. Jacobus*, 14 Blatchf. 337; *Sewing-Mach. Co. v. Frame*, 21 Blatchf. 431, 17 Fed. Rep. 623. But this does not include the right to represent in any manner that their goods came from others. This is shown by the reasoning of these cases, and by others on the same subject. *Singer Manuf'g Co. v. June Manuf'g Co.*, 41 Fed. Rep. 208; *Same v. Bent*, Id. 214. The defendants use the word "Warranted" in place of "Warren," with the cut of a hose supporter engaged with a stocking, similar to that of the orators' label. They suggest that they use that word to indicate that they have the right to sell these hose supporters. Such use of the word is hardly necessary for that purpose; and the want of a better excuse leaves room for an inference that it is used for its similarity to the corresponding word in the orators' libel, and the defendants have so placed numbers and words, indicating sizes and quantity, in similarity to those on the orators' labels, as to lead in the direction of the conclusion that methodical imitation of those labels was intended. *Manufacturing Co. v. Ludeling*, 23 Blatchf. 46, 22 Fed. Rep.

823. This amounts to more than showing forth what the wares are. It appears to be an intentional setting of the orators' mark to the defendants' wares to make them pass for the orators' wares. The Foote patent did not expire till lately, since this suit was begun. A part of the Warren Hose Supporter may have been a new use of the device covered by it. The supporter is not so clearly outside of it as to make the reference to it a fraud. As the case stands, and is now considered, the orators seem to be entitled to a decree making the preliminary injunction heretofore granted permanent, and to an account of profits. Let a decree making the temporary injunction permanent, and for an account of profits, with costs, be entered.

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PIRKL v. SMITH *et al.*

(Circuit Court, E. D. New York. April Term, 1890.)

1. PATENTS FOR INVENTIONS—DESIGN PATENT—WHAT CONSTITUTES INFRINGEMENT.

Under 24 U. S. St. at Large, c. 105, which gives the owner of a design patent an action for the sale as well as the manufacture of goods to which the design shall have been applied without his license, the owner is entitled to recover, on showing an unlicensed sale of goods after his patent went into effect, though they may have been manufactured before that time, and though the manufacturer may have been ignorant of the existence of the patent.

2. SAME—DAMAGES FOR INFRINGEMENT.

The statute further providing that any one who violates any of its provisions shall be liable to the owner of the patent "in the amount of \$250," and for the excess of profit above that amount, and that "the full amount of such liability" may be recovered by an action at law or on bill to restrain the infringement, the owner may recover the \$250, though he shows no measure of profits due to the design alone.

In Equity. On bill for injunction.

*William K. Olcott*, for complainant.

*Leavitt & Keith*, for defendants.

WHEELER, J. This suit is brought upon design patent No. 18,293, dated May 1, 1888, issued to the orator for a window-guard. The defendants admit that window-guards of this design were ordered of them in March, 1888, and delivered by them in July, 1888, but deny that they knew of the patent before the delivery, and such knowledge is not shown. A statute provides that for any person other than the owner of a patent for a design, without license, to apply the design, or any colorable imitation thereof, "to any article of manufacture for the purpose of sale, or to sell or expose for sale any article of manufacture to which such design or colorable imitation shall, without the license of the owner, have been applied, knowing that the same has been so applied," shall, during the term of the patent, be unlawful; and that any person violating these provisions, or either of them, "shall be liable in the amount of two hundred and fifty dollars," and for the excess of profit above

that amount, "the full amount of such liability" to be recovered "by action at law, or upon a bill in equity for an injunction to restrain such infringement." 24 St. 1887, c. 105. Whether the defendants applied the design to the guards before or not till after May 1, 1888, is not shown; and, as argued in their behalf, they may not have so applied it within the term of the patent, which began on that day, and cannot be held liable under this statute for that. But the sale of the guards was completed when they were delivered, which was in July, 1888, and clearly within the term of the patent. They knew that the design had been applied to the guards which they so sold, for they applied it; and they knew it was so applied without license, for they had no license, and must have known that. That they did not know of the patent is urged against liability on account of the sale; but the statute does not include knowledge of the patent among the things necessary to create this liability. It only requires that the design shall have been applied without license, and a sale, "knowing that it has been so applied." The defendants, unwittingly perhaps, appear to have brought themselves clearly within this branch of the statute.

The orator has shown no measure of profits due to the design alone, and asks for no profits beyond the \$250 given by the statute. Counsel for the defendants argues that this is a penalty, or forfeiture, which cannot be recovered in this form. That the profits could be recovered in this form, without the statute, is not questioned. The statute seems to give this amount as a measure of profits in cases where a less amount only can be proved, and not as a penalty above the actual profits. The profits as such, whether fixed in amount by statute or by finding, would be recoverable in the same manner in either case. *Newman v. Waite*, 43 Vt. 587; *Waite v. Dowley*, 94 U. S. 527. The statute itself removes all doubt about this by expressly providing for the recovery of the full amount of the liability upon a bill in equity for an injunction to restrain the infringement. This is such a bill. The statute seems to be intended to carry out the idea that the amount of the liability is merely a fixed measure of profits which may be decreed in equity as an incident to the jurisdiction for relief by injunction in the same behalf. *Root v. Railway Co.*, 105 U. S. 189. As the orator claims no profits beyond the \$250 given by the law, there is no question about the amount, and no occasion to send the case to a master. A decree for the orator for that amount of profits as an incident to a decree for an injunction appears to be required by that statute, as the case stands.

Counsel for the defendants further insists that the cross-examination of the orator shows an abandonment of the substantial part of this design to the public; and he asks leave to amend the answer, and make this defense, if that evidence will bear it out. But this testimony shows rather a preference of one style of guards of this design to another than any purpose to abandon the design itself. It would fall far short of making out this defense if set up. Let a decree be entered for an injunction, and \$250 profits, with costs.

ROOT v. SIOUX CITY CABLE RY. Co. *et al.*

(Circuit Court, N. D. Iowa. June 2, 1890.)

## PATENTS FOR INVENTIONS—COMBINATION—FORMER PATENT.

A second patent, which involves the same elements as are combined in a former patent to the same person, with such modifications and changes only as the use of the original form would suggest to any skilled mechanic, and as require no inventive skill, is void.

In Equity. Bill to restrain infringement of letters patent.

*Coburn & Thacher*, for complainant.

*C. L. Wright and Offield & Towle*, for defendants.

SHIRAS, J. On the 10th of February, 1880, there were issued to William Eppelsheimer letters patent No. 224,284, for "certain new and useful improvements in the construction of wire cable railroads." By assignment, the present complainant is now the owner of this patent, and brings the present bill against the defendant company on the ground that it is infringing the second claim of the patent, which is as follows: "The combination of the standards, A, with the bars, E, E, of the form herein shown, and knee-braces, F, F, as a means of supporting and connecting together the rail stringers, H, H." The defenses relied on are fourfold: That the second claim of the patent is void, in view of the condition of the art; that it is void for want of inventive novelty; that the patentee dedicated and abandoned the invention to the public by exhibiting the same, but not claiming it, in certain English patents procured by him before the date of the American patent; that the defendant does not infringe. An examination of the various patents antedating that sued on shows that at the date of its issuance many devices were in use or had been described for the accomplishment of the object sought in the combination described in the second claim of patent No. 224,284. In a patent issued to the same patentees under date of July 31, 1877, and numbered 193,757, is found, it seems to me, every element present in the combination described in claim 2 of the patent sued on in the present case, unless it may be the knee-braces, F, F. It is entirely clear that the devices described in No. 193,757 are intended to serve the same purpose as the combination found in the patent sued on, and the changes in the shape are only such as would naturally be expected to be developed from the use thereof in practice. If patent No. 193,757 had been issued to a person other than Eppelsheimer, I do not see any escape from the conclusion that claim 2 of the patent sued on would have to be held an infringement of the prior patent, and therefore void. With slight modifications and changes, not involving any inventive skill, it repeats the same devices shown in the patent No. 193,757, and for the same purposes. It cannot be permitted to an inventor to secure a second and later patent upon a former invention by making such improvements thereon as the use of the original form would suggest to any skilled mechanic, and which did not require the exercise of invention. Such



second patent must, under such circumstances, be held void, or otherwise a patentee could prolong his monopoly indefinitely, and it is not necessary to cite authorities in support of this proposition. The patent sued on being void for the reason stated, the bill of complainant based thereon is dismissed, at his costs.

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THE JOHN G. STEVENS.

THE R. S. CARTER.

LOUD *et al.* v. THE J. G. STEVENS and THE R. S. CARTER.

(Circuit Court, E. D. New York. November 29, 1889.)

**MARITIME LIENS—DAMAGES BY COLLISION—PRIORITY.**

On intervention by material-men in libel against vessels for damages from collision, the objection, that the preference given maritime liens created by collision over prior liens for repairs and supplies ought not to apply because the collision was caused partly by the fault of the vessel injured, and that such vessel should not be allowed to profit by its wrong to the detriment of innocent material-men, cannot be considered, where the only evidence that the injured vessel was at fault is the record of a judgment in another suit declaring her at fault, which is set up in an answer by intervenors, motion to file which has been denied.

In Admiralty. For former report, see 38 Fed. Rep. 515, 40 Fed. Rep. 331.

*George A. Black*, for libelants.

*Mark Ash*, for intervenors.

BLATCHFORD, Circuit Justice. The opinion delivered by me in this case on the 31st of October, 1889, (40 Fed. Rep. 331,) did not allude to one question raised in it, although the point was not overlooked. It has now been presented again by briefs on both sides.

It is insisted on behalf of the material-men that the rule that liens for damages are superior to liens for repairs and supplies should be modified in this particular case, on the ground that the collision for which the libelants are seeking damages was caused partly by the fault of the schooner *Flint*, owned by the libelants; that a wrong-doer suffering damage by a collision stands in a different position from an innocent party who suffers such damage; that the fault of the wrong-doer destroyed the security which the material-men had; and that the wrong-doer ought not to profit by his own wrong, to the detriment of the innocent material-men, who were not *in pari delicto* with him.

It is further urged that, if the material-men took the risk of the negligence of the owners of the tug, the owners of the *Flint* also took the risk of the negligence of those who were in charge of her; that, in that aspect,

the material-men and the owners of the Flint stand on an equal footing, and the material-men should be preferred and be prior in right, because they were prior in time; that, as to the cargo on board of the Flint, the owner of such cargo could not have recovered if the Flint had been wholly in fault, and that he ought to recover only a part of the damage to the cargo, if the Flint were partly in fault, the cargo being in either case free from fault; that the material-men were also free from fault; and that, in any event the owner of the cargo stands in the same relation as, and in no better position than, the material-men.

There are two conclusive answers to the propriety of the application of the views above suggested to the present case, even if they would be sound in any case. By the final decree of the district court, there was awarded to the libelants, for the damages sustained by the Flint, \$5,537.85, and for the damages sustained by the cargo carried by her, \$9,778.67. The interlocutory decree against the Carter was entered by default, and on a consent that her answer to the libel be stricken out, and that the libelants recover for the damages caused by the collision. The record does not show that any division of damages was made in this case by the district court, nor is there any competent evidence to show that any such division of damages has been made by any court, or that this court, or any court, has held that the Flint was in fault in the collision.

It appears by the record that in April, 1889, the three intervenors who claimed to recover for repairs and supplies made a motion in the district court for leave to file a joint answer to the libel. In that proposed answer it was set forth that, before the commencement of this suit, the libelants had brought a suit for the same cause of action in the district court of the United States for the southern district of New York, against the two tugs and the bark Doris Eckhoff; that in that suit the bark was duly attached, and her claimants appeared and answered; that the tugs were not attached in that suit, but their owners were made parties to it *in personam*, and appeared and answered; that that suit was heard upon pleadings and proofs, and the district court for the southern district of New York made a decree in it, in October, 1887, adjudging that the Flint had been guilty of fault causing the collision, and that by reason thereof the libelants could recover only half of their damages; that such adjudication was binding upon the libelants in the present suit; and that, for that reason, they should be postponed, in the payment of any damages which they might recover against the proceeds of the sale of the tugs, to the claims of the intervenors. The prayer of the proposed answer was that the intervenors might be awarded such preference. The opinion of Judge Brown, in the district court for the southern district of New York, holding that the libelants were entitled to recover one-half of their damages against the bark and the owners of the two tugs, is reported as the case of *The Doris Eckhoff*, 32 Fed. Rep. 555. But it appears by the record in this case that the motion for leave to file such proposed answer was denied by

the district court, on the ground that the facts set forth in it, if taken to be true, were not sufficient in law to give a preference to the claims of the intervenors over the claim of the libelants. There is no evidence in the record that the Flint was in fault. The allegation, in the proposed answer, of her fault cannot be taken as true, because the answer was not allowed to be filed, and therefore its allegations cannot be taken to have been admitted to be true. The record of the case in the southern district of New York is not made part of the record in this case. The decision in the case in the southern district of New York appears to have been made in October, 1887, and the interlocutory decree before referred to, adjudging that the answer to the libel be stricken out, and that the libelants recover for the damages caused by the collision, was entered on consent, in October, 1888. As neither the district court nor this court has passed upon the question of the fault of the Flint, and the decision of the district court for the southern district of New York is not presented in such a way as to operate as *res adjudicata*, the point raised by the intervenors is not open for consideration.

Another answer is this: A division of damages would not leave anything for the intervenors. It does not appear by the record exactly what is the amount in the registry of the court to be distributed. The statement in the final decree of the district court is that the amount due to the libelants exceeds the amount in the registry. It is stated in the brief of the counsel for the libelants that that amount is only about \$2,000. This is less than one-half of the damages sustained by the owners of the Flint, and also less than one-half of the damages suffered by the owners of the cargo which she carried. It is unnecessary, therefore, to consider on its merits the question raised.

The intervenors ask that, if the point above made by them is not sustained, no costs of appeal be allowed against them, as the question was an entirely new one in this court, and the appeal was taken to settle a conflict between courts having co-ordinate jurisdiction. But I see no sufficient ground for not awarding costs.

A decree will be entered, awarding priority to the libelants in respect of their claim for damages, with costs against the intervenors personally.

THE ITALIA.<sup>1</sup>

## THE GELLERT.

## HAMBURG-AMERICAN PACKET CO. v. THE ITALIA

(District Court, E. D. New York. June 2, 1890.)

## SALVAGE—COMPENSATION—TOWING SHIP WITH BROKEN SHAFT.

Where the steam-ship *I.* became disabled at sea by the breaking of her tunnel shaft, and in such condition was towed for 750 miles, to the port of New York, by the steam-ship *G.*, both vessels being of large value, and having valuable cargoes and many passengers on board, it was held that the *G.* should recover \$25,000 as salvage award for her services.

In Admiralty. Action to recover salvage.

The steam-ship *Italia*, bound from Hamburg to New York, broke her tunnel shaft while laboring in a heavy sea. The shaft was temporarily repaired, and the vessel continued slowly on her course at a speed of about three knots per hour. The weather at this time was favorable. The *Italia's* sails were of no practical use, and her shaft was liable to break again at any time, especially if the weather should become bad. She ran 234 miles in this condition; when she was overtaken by the steam-ship *Gellert*, also bound from Hamburg to New York. She was then about 750 miles from New York, and 320 miles from Halifax. In response to her distress signals, the *Gellert* came to her assistance, made fast to her by hawsers, and towed her to the port of New York; the service occupying about four days. The weather during the towing was at times stormy, and after the arrival of the vessels at New York the path over which they had come was swept by a succession of gales. The *Italia* was at no time completely disabled, but used her own steam-power and sails during the whole of the towage. Her value, with her cargo and freight, was \$473,421.88. She was carrying 220 passengers. The *Gellert* was worth \$400,000, and she had on board at the time of the service 461 passengers.

*Wheeler, Cortis & Godkin*, for libelant.

*Wing, Shoudy & Putnam*, for claimant.

BENEDICT, J. I am of the opinion that the facts presented show the rendition of an important salvage service to a vessel of large value, by which she was relieved from a position of peril. Upon the evidence, I am of the opinion that \$25,000 is a proper salvage reward for the services rendered. The salvage award is therefore fixed at that sum.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

## UNITED STATES v. NORSCH.

(Circuit Court, E. D. Missouri, E. D. June 12, 1890.)

## 1. FEDERAL COURTS—JURISDICTION—CANCELING DECREE OF NATURALIZATION.

The United States can sue in a federal court for the cancellation of a certificate or decree of naturalization, which has been obtained by fraud in a state court.

## 2. SAME—FRAUD—PLEADING.

A bill by the United States in the federal court, to cancel the decree of naturalization of a state court, which merely alleges that defendant was admitted to become a citizen on his own application, without the examination of witnesses, and without inquiry by the court as to his qualifications; that defendant knew the facts stated in the decree were false; and that the decree was obtained by fraud practiced on the court,—is demurrable, though it shows the decree to have been erroneous, since defendant would not be guilty of fraud merely because he applied for naturalization, knowing that he was not entitled to it. Facts must be shown by the bill from which the court may judge whether the decree was fraudulently obtained, and the court imposed upon.

In Equity.

Geo. D. Reynolds, U. S. Dist. Atty.

William C. Marshall, for defendant.

THAYER, J. The right of the United States to sue for the cancellation of a certificate of decree of naturalization that has been obtained by fraud is probably co-extensive with the right now accorded the United States to sue for the cancellation of patents that have been fraudulently procured. *U. S. v. Telephone Co.*, 128 U. S. 315, 9 Sup. Ct. Rep. 90. As no controversy has arisen on this point, I shall assume that the attorney general had the right to file the present bill, even in the absence of any express legislative enactment authorizing such a proceeding. It is contended, however, that the federal courts have no power to nullify decrees of naturalization granted by state courts, although they were obtained by fraud; and, as this contention presents a question that is fundamental in all suits of this character, it will be first considered. I do not understand the claim to be that a decree of naturalization stands upon any different footing than judgments and decrees rendered in other judicial proceedings. It seems to be conceded, and I entertain no doubt, that fraud, when practiced upon a court in the trial of an application for naturalization, will vitiate an order admitting the applicant to citizenship, and that any court before whom such proceedings take place may, on the ground of fraud, mistake, or irregularity, vacate its own orders or decrees in that behalf made, provided such court is one having an inherent power to correct or annul its judgments or decrees, by petition, bill of review, or other similar and equivalent method of procedure. The question chiefly mooted, concerns the right of the federal courts to annul the judgments of state courts, or, what amounts to the same thing, to enjoin a person from exercising a right secured to him by the final judgment, order, or decree of a state court, made in a case over which it has jurisdiction. Fortunately there are what seem to me to be controlling adjudications on this question. In the case of *Gaines v. Fuentes*, 92 U. S. 10, it was held that the United States circuit court had jurisdiction of an

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original bill to annul a will as a muniment of title, and to restrain the enforcement of a decree of a state court whereby the will had been established, upon the ground that such decree was obtained by false and insufficient testimony. This decision proceeded upon the ground that, as the suit was essentially a proceeding in equity to impeach a decree on the ground of fraud, and as the courts of the state could entertain such a bill, similar authority was vested in the federal courts, although the decree to be affected by the proceeding was a decree of a state court. In the subsequent case of *Barrow v. Hunton*, 99 U. S. 82, it was also held that an original bill in equity, brought to set aside a decree on the ground of fraud, may be maintained in the courts of the United States, though the judgment assailed is that of a state tribunal. It was further held, however, in that case, that an attack upon a judgment of a state court cannot be entertained by a federal court, where the proceeding is merely tantamount to a motion to set a judgment aside for irregularity, or to a writ of error, or to a petition or bill of review. Proceedings of the latter character, as a matter of course, are only maintainable in the court where the record remains. Proceedings to nullify judgments of state courts, or to enjoin parties from asserting any rights thereunder, have also been entertained by several circuit courts of the United States. Thus in *Amory v. Amory*, 12 Amer. Law Reg. N. S. 585, Judge DRUMMOND, sitting in the circuit court for the district of Wisconsin, entertained a bill to enjoin parties from asserting any rights under a decree of divorce granted in the state of New York, the bill showing that the decree had been fraudulently obtained in the state court. See, also, decisions to the same effect in *Smith v. Schwed*, 9 Fed. Rep. 483, and *Sahlgard v. Kennedy*, 1 McCrary, 291, 2 Fed. Rep. 295. In view of these authorities, I conclude that it is no objection to an original bill filed in a federal court to enjoin a party from asserting rights under a judgment or decree, on the ground of fraud practiced in procuring it, that the judgment or decree in question was rendered by a state court. It follows, of course, that it is no objection to this proceeding that the order of naturalization was entered in the St. Louis court of criminal correction, instead of a court of the United States. On the contrary, the fact that that court has no equity jurisdiction, no power to entertain a bill of review, and probably no power to set aside an order of naturalization on motion, rather strengthens the right of the government to sue in this court, if in point of fact the fraud complained of is of that character that will ordinarily suffice to invalidate a judgment.

This leads to the second important inquiry involved in the case, whether the matters averred in the bill are sufficient to sustain it, treating it as an original proceeding to impeach a judgment on the ground of fraud. The gist of the complaint seems to be that an alien, not at the time entitled to naturalization under any provision of the laws of the United States, was nevertheless admitted on his own application to become a citizen, by a court having jurisdiction of naturalization proceedings, without the examination of any witnesses in support of the application, and without any inquiry whatever by the court before whom the

proceeding took place as to the qualifications of the applicant for citizenship. As the bill avers that no witnesses were examined, and no testimony was offered or heard, it affirmatively appears that the decree of naturalization was not obtained by means of false or perjured testimony given in the course of the hearing, even if proof of that kind, without evidence of other fraudulent acts, would be sufficient to annul the order of naturalization, on an original bill filed for that purpose. It is true that the bill charges in one paragraph that defendant knew that the recitals contained in the decree of naturalization to him granted were false, and that the decree had been procured by "imposition and fraud practiced on the court." It is also true that the bill in another paragraph charges that defendant procured the decree in question, "contriving and conniving to work a fraud upon \* \* \* the court," and that he accepted the decree knowing that "the court had been imposed upon," and had granted the decree "through mistake of the true facts," etc. But these averments do not aid the bill in any material respect, because in no place is the defendant, or any one acting in his behalf, accused of any fraudulent acts or conduct calculated to impose upon or deceive the court before whom the proceeding was pending. It will not do, in a bill of this character, to show merely that the judgment assailed is erroneous, and ought not to have been entered; neither will it suffice to charge generally that it was fraudulently procured, or that the court was imposed upon. A state of facts must be disclosed by the bill from which the court can see that the conclusions stated by the pleader, to the effect that the judgment was fraudulently procured, etc., are properly drawn.

It is apparent, I think, from the whole scope and tenor of the complaint, that it was drawn upon the theory that the defendant was guilty of a fraud in presenting himself before the court as a candidate for naturalization, knowing, as he is alleged to have known, that he was not then entitled, under any provisions of the laws of the United States, to become a citizen. If the bill discloses any fraud committed by the defendant, it is a fraud of that description, and none other. But as I have recently had occasion to rule, in the course of the trial of indictments for naturalization frauds in the district court, a person does not commit a fraud, in a legal sense, by merely applying to a court of justice for relief, or for the grant of some privilege, even though the applicant believes that under the law, rightly administered, he is not entitled to the relief sought or to the privilege claimed. Whatever a person's own opinion may be touching his right to relief in a given case, he is entitled to take the judgment of a court having jurisdiction to hear and determine the cause, and in so doing he commits no fraud. A litigant in such case only crosses the line dividing legal frauds from conduct that is merely reprehensible from a moral stand-point, when he resorts to false testimony, or to some trick or artifice, with a view of deceiving the court, and thereby obtaining a judgment to which he is not entitled. The present bill neither shows that the decree sought to be avoided was procured by false testimony given on behalf of the applicant on the hearing of the application for naturalization, or by means of any other fraudu-

lent device. It shows, indeed, that the decree was and is erroneous, and that it was likewise irregular, in that there was no such judicial inquiry into the case as the act of congress contemplates shall be had in such cases; but these are defects in the decree which can neither be remedied by a bill of this character, nor by this court. The demurrer is accordingly sustained.

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RORABACK v. PENNSYLVANIA Co.

HERMAN v. SAME.

(Circuit Court, D. Connecticut. May 16, 1890.)

REMOVAL OF CAUSES—PREJUDICE—JURISDICTIONAL AMOUNT.

Act Cong. March 3, 1887, (24 U. S. St. 552,) amending Act Cong. March 3, 1875, provides, in section 1, that circuit courts of the United States shall have original cognizance, concurrent with the state courts, of all civil suits in certain cases, among which are suits between citizens of different states, when the matter in dispute exceeds \$3,000. Section 2 provides that any suit of which the circuit courts are given original jurisdiction by the preceding section may be removed by defendant from the state to the circuit court; and further declares: "And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between" citizens of different states, defendant, being a non-resident, may remove the suit to the circuit court of the United States, at any time before trial, "when it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such state court." *Held*, that the prejudice and local influence clause in section 2 is to be read in connection with section 1, and does not give the circuit court jurisdiction on such grounds unless the amount in dispute exceeds \$3,000.

Motion to Remand Cause from the circuit court of the United States to the state court.

Act Cong. March 3, 1887, (24 U. S. St. 552,) amending Act Cong. March 3, 1875, provides, in section 1, that "circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the constitution or laws of the United States, \* \* \* or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. \* \* \*" The second section provides that "any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, \* \* \* of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. \* \* \* And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being a citizen of another state,



may remove such suit to the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court. \* \* \*

*L. E. Stanton*, for plaintiff.

*Daniel Davenport and William N. O'Hara*, for defendant.

WALLACE, J. The question in these cases is whether, under the local prejudice clause of the act of March 3, 1887, the matter in dispute must exceed in amount the sum of \$2,000 to entitle the defendant to remove the suit from a state court. This question has been considered in several of the circuits, with a diversity of opinion as to the true construction of the clause. My own views accord with those expressed by Mr. Justice HARLAN in *Malone v. Railroad Co.*, 35 Fed. Rep. 625, and it is unnecessary to reiterate his reasons for the conclusion reached. I think it was the intention of congress to place the right of removal for local prejudice upon the jurisdictional basis of all other removable controversies, discriminating in favor of the defendant only as to the time of making the application, and permitting a single defendant to remove. The motion to remand is granted.

### WILSON v. UNION SAV. ASS'N *et al.*

(Circuit Court, E. D. Missouri, E. D. March 10, 1890.)

#### 1. RAILROAD AID BONDS—DELIVERY—NON-PERFORMANCE OF CONDITIONS.

Township bonds issued in aid of a railroad company were, with the assent of the company, deposited by the township trustee in a bank, and a receipt taken binding the bank to surrender them upon the joint order of the trustee and a contractor to whom they were to be paid for construction work. It was agreed between the trustee and the contractor that the bonds were not to be delivered to the latter till he had paid all debts for labor and supplies on the work in the township. These payments the contractor failed to make. *Held*, on a bill by his assignee to compel the delivery of the bonds, that the assignor had failed to comply with the conditions precedent on which he was to receive them, and that the assignee had no title.

#### 2. SAME—LEGALITY OF ISSUE—CANCELLATION.

The bonds were in excess of the amount which the township was authorized to issue, and were obtained from the state treasurer on a false certificate by the township trustee that the conditions on which they were issued had been complied with. The railway company was cognizant of the fraud, and receipted to the treasurer for the bonds, but never had actual possession of them, though it assented to their delivery to the contractor by the township trustee in payment for construction work. *Held*, that this did not constitute a negotiation of the bonds to an innocent purchaser; and, as the conditions on which they were issued had not been complied with, the consideration had failed, and the township was entitled to a decree for their surrender and cancellation.

#### In Equity.

This is a controversy as to the right of possession of 22 bonds, of the denomination of \$500 each, issued by Oswego township, of the state of Kansas, which, at the date of the filing of the bill, were in the actual

custody of the Union Savings Association of St. Louis, Mo. Wilson claims them as purchaser and assignee under Edward Burgess. His contention is, in brief, that the bonds were duly issued by the township of Oswego in aid of the building of the Memphis, Carthage & Northwestern Railroad, and were delivered to the railroad company about December 1, 1872; that the bonds were thereupon placed by the railroad company in the joint custody of Burgess, who was the contractor for building its road through Oswego township, and C. Montague as trustee for the railroad company, upon the understanding that they should be turned over to Burgess, in payment for work done, on the completion by him of certain work then in progress, up to the amount and value of said bonds; and that Burgess and Montague lodged them for safe-keeping in the mean time with the Union Savings Association, taking therefor its receipt, by the terms of which they could only be obtained on the joint order of the depositors. He claims that Burgess subsequently did the work, on the completion whereof his right to the bonds became absolute, but that Montague has ever since wrongfully refused to join in an order whereby the bonds could be obtained from the association. On the other hand, Oswego township denies, both in its answer and cross-bill which has been filed, that the bonds in question were ever by it delivered to the Memphis, Carthage & Northwestern Railroad Company, or that the railroad company ever delivered them to Burgess and Montague under the circumstances stated in the bill, or that they were ever deposited with the Union Savings Association in the manner and for the purpose alleged. The contention on the part of the township is that the bonds in question are part of an issue of 160 bonds that were originally executed in the name of the township without consideration, and without authority of law; that the whole issue was fraudulently delivered to one Joseph Nelson, at the time township trustee, who fraudulently procured them to be registered by the auditor of the state of Kansas, and then took them to St. Louis, Mo., and deposited the 22 bonds now in controversy with the Union Savings Association, taking therefor a receipt by which they were to be surrendered by the association on the joint order of Edward Burgess and himself as township trustee; that the agreement between Burgess and Nelson was that Burgess should have the 22 bonds so deposited when the Memphis, Carthage & Northwestern Railroad was completed through the township of Oswego and into the city of Oswego, and a depot had been there constructed, and when Burgess, and those engaged with him in the work of construction, had paid all debts contracted for labor and supplies; that the delivery of the bonds by the township to Nelson, its trustee, was on the express condition that they should not be delivered to Burgess until he had complied with the terms last mentioned; that the receipt so given by the association to the order of Burgess and Nelson, trustee, was subsequently surrendered, and a similar one executed by the association in favor of Burgess and C. Montague, trustee, when the latter had succeeded Nelson as township trustee; that the Memphis, Carthage & Northwestern Railroad was not constructed by Burgess

through Oswego township, as contemplated, when the bonds were deposited, and the receipt taken therefor, nor was a depot built, nor did Burgess ever pay the labor and supply claims by him contracted, and hence never became entitled to the bonds under the terms of his agreement with Nelson as township trustee, even if the bonds were lawfully executed. The controversy is thus seen to be between Wilson, assignee of Burgess, on the one hand, and the township of Oswego on the other. The township, by its cross-bill, prays that the bonds may be surrendered to it for cancellation. The Union Savings Association disclaims any interest in the controversy except as a mere stakeholder.

*M. & J. R. Kincaly and Bacon & Woodward, for complainant.*

*John O'Day and E. D. Kenna, for Oswego Township.*

*Hitchcock, Madill & Finkelnburg, for Union Sav. Ass'n.*

THAYER, J., (*after stating the facts as above.*) Before considering the questions of law that have been discussed by counsel, it will be necessary to settle some disputed questions of fact. There is a controversy under the pleadings as to whether the 22 bonds that form the subject-matter of contention were ever delivered by Oswego township to the Memphis, Carthage & Northwestern Railroad Company, and a further controversy as to the terms of the agreement under which the 22 bonds were originally deposited with the Union Savings Association, on December 2, 1872, and as to whether C. Montague, who succeeded Nelson as township trustee, acted as trustee or agent for the Memphis, Carthage & Northwestern Railroad Company when the second receipt for the bonds in question was executed by the Union Savings Association, on December 17, 1873. These seem to be material questions of fact, that should be disposed of *in limine*; and the court will dispose of the same by stating concisely the facts in relation to the several transactions that seem to be established by a preponderance of evidence.

After the whole number of bonds issued by Oswego township in favor of the Memphis, Carthage & Northwestern Railroad Company, to-wit, 160, had been deposited with the state treasurer of Kansas, and a receipt therefor had been signed by L. P. Cunningham as president of the Memphis, Carthage & Northwestern Railroad Company, the whole issue passed into the actual custody of Joseph Nelson, township trustee, and was by him taken to the city of St. Louis, Mo., on or about December 1, 1872. The testimony fails to show that the railroad company, though it receipted for the bonds on the books of the state treasurer, ever in fact had actual possession of any of them before they were taken to St. Louis, Mo. At the latter place, 24 bonds, Nos. 1 to 22, inclusive, and Nos. 49 and 50, were undoubtedly delivered to the president of the Memphis, Carthage & Northwestern Railroad Company, for the use of the company, with the consent of Burgess and Nelson, the township trustee. At the same time, 50 other bonds, Nos. 51 to 100, both inclusive, were undoubtedly paid to Burgess on account of construction work theretofore done for the railroad company, with the latter company's consent, and for its account. Sixty other bonds, Nos.

101 to 160, both inclusive, were deposited by Nelson, trustee, in the Union Savings Association, as a special deposit, for purposes and under conditions unnecessary to be here stated. The remaining 26 bonds, Nos. 23 to 48, both inclusive, of which the 22 bonds now in question formed a part, were also left by Nelson in the custody of the Union Savings Association, and a receipt was issued, by which the association bound itself to surrender the bonds on the joint order of Burgess and Nelson, as trustee. I am satisfied that, at the time this latter deposit was made, the November estimate of construction work done on the line of the Memphis, Carthage & Northwestern Railroad had not been received; that it was known that such estimate would show considerable construction work done in Oswego township by citizens of that township who had been employed by Burgess, or at least who claimed to have been so employed; that Burgess promised to pay such subcontractors the amount so shown to be due when the estimate was received, or shortly thereafter; and that it was agreed by and between Burgess and Nelson, and other citizens of the township who appear to have been present, (the Memphis, Carthage & Northwestern Railroad Company assenting thereto,) that, when Burgess had made the payment, the 26 bonds, including those in controversy, should then be delivered to him, and become his property. The foregoing seems to be the most satisfactory conclusion deducible from all the circumstances and evidence in the case. As the transaction occurred nearly 18 years ago, and as no written statement of the purpose for which the bonds were deposited appears to have been prepared, and as the interests of the parties are now at variance, there is, as might be expected, considerable conflicting oral testimony. The court also concludes that C. Montague did not intend or assume to act as trustee or agent of the Memphis, Carthage & Northwestern Railroad Company, when he accepted the receipt for the 22 bonds of date December 17, 1873. The fact seems to be that that receipt was a mere substitute for the previous receipt of December 2, 1872, drawn to the order of Burgess and Nelson, trustee, Montague having in the mean time succeeded Nelson as township trustee, and that such second receipt did not, and was not intended to, work any change in the conditions on which the bonds were held.

In view of the above findings, it seems obvious that complainant cannot recover the bonds on the title set forth in the bill, or on any other title disclosed by the evidence. The bonds were not, as alleged, placed in the joint custody of Burgess, and an agent or trustee of the railroad company, to be delivered to Burgess on the completion of certain construction work in an amount and value equal to the face of the bonds, which work has since been done; but they were placed by the township trustee with the savings association, under an agreement between Burgess and the trustee that the latter would surrender them to Burgess when he had made a certain payment on account of certain construction work done in the township. There is no testimony in the case, nor is it pretended, that Burgess ever made the payment which was to be a condition precedent to the delivery of the bonds. Nor did he claim

the bonds for years after they were so deposited, although it is evident that, if he or his assignee is now entitled to them, his right thereto became absolute more than 10 years before this suit was filed. It is suggested by counsel for complainant that whatever engagement the township trustee may have entered into with Burgess for the surrender of the bonds was in excess of the trustee's authority as a township officer, and hence that the contract was voidable at the election of Burgess. This may be true, but, in the opinion of the court, it is unnecessary to decide whether it is or is not a correct view of the trustee's authority. On the assumption that the contract was voidable, and that Burgess and his assignee have elected to ignore it, then complainant is utterly without right to the possession of the bonds. On the assumption that the agreement was voidable, the bonds are in the possession of the township trustee, or his bailee, the Union Savings Association, and are held precisely as they were when the township trustee received them from the hands of the state treasurer of Kansas. At that stage of the transaction, it will not be claimed that Burgess could have interposed, and replevied them from the hands of the township trustee. His right to the possession of the bonds obviously arose out of transactions that occurred in the city of St. Louis. But at the latter place the 22 bonds in controversy do not appear to have been at any time in the actual possession of the Memphis, Carthage & Northwestern Railroad Company, with whom Burgess had contracted to receive bonds in payment for work, nor does the railroad company appear to have then and there delivered the bonds to Burgess; nor does Burgess appear at that time to have given the railroad company an absolute credit as for so many bonds. On the contrary, there was a qualified arrangement entered into, which was assented to by Burgess, the township trustee, and the railroad company, to the effect that a delivery should be made on some future occasion, when Burgess had made a certain payment, which, as it now appears, he has not made. I accordingly conclude that the complainant's bill must be dismissed.

The next question to be considered is whether the township is entitled to affirmative relief on its cross-bill. It prays that the bonds may be ordered to be surrendered up for cancellation because, as it contends, they are not valid obligations against the township. That the bonds were originally issued without authority of law, on the testimony in this case, admits of no controversy. They appear to have been authorized by a vote of the citizens of the township at an election held on December 20, 1871. The total issue authorized amounted to \$80,000, and the annual interest thereon to the sum of \$8,000. The township had previously issued bonds to the amount of \$100,000, bearing 10 per cent. interest, in aid of the Missouri, Kansas & Texas Railroad Company, which issue was outstanding and unpaid. The laws of Kansas then in force provided that the amount of bonds that might be voted by any township in aid of railway construction "should not be above such an amount as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest on

the amount of bonds issued." Chapter 90, Laws Kan. 1870, § 1. The assessed value of all property in Oswego township for the year 1871, appears to have been only \$159,994. A tax of 1 per cent. thereon would accordingly realize only \$1,599, wherewith to pay bonded interest to the amount of \$18,000. But, even if the township had had authority to issue bonds to the amount of \$80,000 to the Memphis, Carthage & Northwestern Railroad Company, the evidence shows beyond contradiction that the railroad company never fulfilled the terms of the subscription, and never became entitled to the bonds, either under the terms of the subscription, or under the laws of the state of Kansas. The bonds were not deliverable to the railroad company until it had constructed its road through the township to the city of Oswego, and had located and built a depot and side track in the city of Oswego. These conditions it never fulfilled. Nevertheless the township trustee and township clerk executed 160 bonds to the amount of \$80,000, and deposited them with the state treasurer on October 25, 1872. On the 27th of November, 1872, the township trustee certified to the state treasurer that "the conditions of the subscription \* \* \* had been fully complied with;" and on the strength of such certificate the state treasurer surrendered the bonds into the actual possession of the township trustee, taking therefor, the receipt of the railroad company. The certificate so made by the township trustee was confessedly false and fraudulent; and the president of the railroad company, who signed the receipt for the bonds, although he did not at the time obtain actual possession of any of them, was obviously cognizant of the fraud, and an active party thereto.

Notwithstanding these facts, counsel in this case have argued at some length the question whether the bonds now in controversy might not be enforced against the township, in a suit by an innocent purchaser for value, because of certain recitals that the bonds appear to contain. This, however, appears to be an immaterial question, for the reason that no one, so far as the record discloses, can enforce payment of the 22 bonds now in controversy on the pretense that he is an innocent purchaser of the same for value. The township never delivered the particular bonds in dispute to the railroad company, and the company never had the actual possession of them. But, even if the fact that the railroad company receipted for the bonds to the state treasurer could be held to be tantamount to a delivery of them by the township to the railroad company, as complainant's counsel seems to contend, yet the evidence fails to show that the railroad company ever delivered the bonds to Burgess, or that he ever had actual possession of them, or that he released any claim against the railroad company, or parted with anything of value in consideration of such delivery. His rights against the railroad company under his contract, for aught that the testimony in this case shows, remained the same after the 22 bonds were deposited in the savings association that they were before such deposit. There is no well-established fact in the case, therefore, that will entitle Burgess to claim that he is an innocent purchaser of the bonds; and the same remark may be made with reference to complainant, who has merely succeeded to the rights of Burgess, whatever they may be.

A man who buys negotiable securities, as the complainant appears to have done, from a person who is not able to deliver them, because they are at the time in the actual possession of some third party, certainly acquires no greater right or better title than his vendor possessed.

As the 22 bonds in controversy were obviously issued without authority of law, and as they have never been negotiated in such manner as to furnish any person or corporation with a pretense for attempting to enforce them against the township as an innocent purchaser for value, a decree will be entered on the cross-bill directing their surrender to the proper officers of the township for cancellation.

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KEITHSBURG BRIDGE Co. *et al.* v. McKAY, Treasurer, *et al.*

(Circuit Court, S. D. Iowa, C. D. May 22, 1890.)

1. TAXATION—BRIDGE COMPANIES—VOID ASSESSMENT.

The assessment of a tax against a bridge company, owning a bridge across the Mississippi river from Iowa to Illinois, by the county auditor, (after the assessment lists for that year have passed from the assessor,) under Code Iowa, § 841, giving the county auditor power to correct the assessment or tax books, where such assessment is made as on personal property, when the only property owned by the company is part of its bridge and the approach thereto, is void, since Code Iowa, § 808, makes railroad bridges across the Mississippi river taxable as realty.

SAME—CANCELLATION.

In such case, where the bridge company is a non-resident of Iowa, the circuit court of the United States has jurisdiction to enjoin collection of the tax, and cancel it.

In Equity. Bill to restrain collection of tax, and to cancel same, as void and illegal.

*Anthony C. Daly*, for complainants.

*E. B. Tucker* and *Arthur Springer*, for defendants.

SHIRAS, J. The bill in this cause was filed for the purpose of restraining the collection of a tax standing against the Keithsburg Bridge Company in Louisa county, Iowa, and for the cancellation of the same upon the records, so as to remove the cloud cast thereby upon complainant's property, upon the ground that such alleged tax is wholly void. The case was submitted to the court upon the following agreed statement of facts:

"It is agreed, for purposes of trial in the above intervening matter:

"*First.* That the Keithsburg Bridge Company was, and is, and has always been since its organization in 1882, a corporation, resident, and a citizen of the state of Illinois; that E. L. Dudley was duly appointed receiver of the Central Iowa Railway by order of this court, in this cause, and that as such receiver, in the year A. D. 1887, and during the whole of said year, he was in the possession and control of the Keithsburg bridge, across the Mississippi river from a point on the Iowa shore in the township of Eliot and county of Louisa, Iowa, to the town of Keithsburg, on the Illinois shore, and of all of its appurtenances and approaches, and he was obligated to pay the valid taxes on said bridge property; that the defendants are citizens and residents of Iowa,

and of the southern district of Iowa, and were such citizens and residents at the time of the commencement of this suit and intervening bill.

"*Second.* That the said bridge company owned in said Louisa county, Iowa, only this, viz., the Keithsburg bridge across the Mississippi river, and the approaches thereto; that there are several hundred feet of the said bridge in Iowa, and several hundred feet of the approaches to said bridge in Iowa,—the bridge approaches being railway track, consisting of earth, ballast, piling, ties, steel rails, and timbers.

"*Third.* That the said bridge company did not own, in A. D. 1887, any personal property in Iowa, unless the said bridge across the Mississippi river, and the approaches thereto, are personal property.

"*Fourth.* That the said bridge company did not own any corporation stocks in A. D. 1887.

"*Fifth.* That no assessment was made against the bridge company for 1887, in Iowa, by the township assessor, or by the township board of equalization.

"*Sixth.* That in June, A. D. 1887, when the board of supervisors of Louisa county, Iowa, was in session as the county board of equalization, the county auditor was by the said board directed to assess the said Keithsburg Bridge Company, and the said auditor did so accordingly assess the said bridge company then and there, and at a later day of said June session the record of said board was written up and approved, and the following is a true copy of the record of the said board at the said June, 1887, meeting, so far as it relates to the matter in hand: 'In the matter of the assessment of the property of the Keithsburg Bridge Company which the assessor of Eliot township, of Louisa county, Iowa, has omitted to place upon the books of his township, it is ordered that the auditor of this county place said property upon the assessment books of Eliot township, and the tax-books of the county, at the assessed valuation of one hundred and eighty thousand dollars, (\$180,000.00.) and that he extend such general and local taxes against said valuation as may be levied in Eliot township by the board of supervisors at their September, 1887, session, and each year thereafter.'

"*Seventh.* That the said auditor of said county of Louisa assessed the said Keithsburg Bridge Company, and the following is a true copy of the assessment made, and as entered upon the tax-books of said Louisa county:

	CORPORATION STOCKS.	TOTAL PERSONAL PROPERTY.	TOTAL VALUE OF ALL PROPERTY.
Keithsburg Bridge Co.,	\$180,000.00.	\$180,000.00.	\$180,000.00.

"*Eighth.* That neither the board of supervisors, as county board of equalization or otherwise, nor the county auditor, gave any notice to any one to the effect that the auditor was about to assess, or to any other effect; in fact, no notice whatever was given.

"*Ninth.* That neither the bridge company, nor the receiver, nor the railway company had any actual knowledge that any assessment was to be made of said bridge property; nor did they, or any of them, take any steps whatever to have said property assessed or taxed.

"*Tenth.* That the bridge company did not know that such assessment was made, neither did the receiver nor the railway company, until March, A. D. 1888.

"*Eleventh.* That the tax or assessment so made called for the payment of forty-nine hundred and five dollars, (\$4,905.00.)

"*Twelfth.* That the Iowa law permits the payment of one-half of tax before April 1st, and payment of balance may be deferred to last day of September.

"*Thirteenth.* That the said receiver, in accordance with contract between said bridge company and said railway company, paid to said treasurer of said



county on the 31st day of March, 1888, one-half of said tax, viz., twenty-four hundred fifty-two dollars and fifty cents, (\$2,452.50;) and the said receiver and the said bridge company filed with and presented to the said board of supervisors a petition praying the cancellation of the said tax and assessment, and the refunding of the sum paid thereon, and the board of supervisors denied the prayer, and rejected the claim.

"*Fourteenth.* That no other assessment was made to the Keithsburg Bridge Company for the year 1887 in Louisa county, Iowa, than as stated in this agreement as aforesaid.

"And this agreement is made to save the taking of testimony, and is to be used in lieu thereof.

[Signed]

"E. B. TUCKER,

"ARTHUR SPRINGER,

"Attys. for Defts., the Board of Supervisors of  
Louisa County, and McKay, Treasurer.

"ANTHONY C. DALY, for Complainants."

From this statement of facts it appears that the bridge company owned in Iowa no property other than that portion of its bridge lying within the limits of the state, including the approaches thereto. Under the provisions of the Code of Iowa, railroad bridges across the Mississippi river are taxable as realty belonging to the bridge company. Code Iowa, § 808. It is admitted that the bridge owned no corporate stocks, and its own shares could not be taxed to itself. The assessment, therefore, against the company, made by the county auditor, of \$180,000 of personal property, had no foundation in fact to rest upon. It is not a mistake in the valuation of property; that is, an overassessment. It appears that the board of supervisors of the county, at its June session in 1887, discovered that there was no assessment made against the Keithsburg Bridge Company. Thereupon the county auditor was directed to make an assessment thereof. The assessment was made as already stated, and is to be deemed to be the act of the auditor under the power granted to him by section 841,<sup>1</sup> of the Code of Iowa. The difficulty is that the agreed statement of facts shows that there was no such property belonging to the bridge company as was assessed against it. It is admitted that this assessment was made in fact after the lists had passed from the assessor, and through the township board of equalization. No notice of the making thereof was in any manner actually given to complainant. Unless a court of equity can entertain jurisdiction to give relief, it follows that the complainant is assessed with a tax based upon an assessment made in form against it upon the assumption that it had personal property of the character named which in fact it never owned, and for which it could not be properly taxed. I entertain no doubt that, under the facts shown in the stipulation signed by the parties, the case is one in which the interposition of the court can be invoked; otherwise, the party has had a tax assessed against him without any opportunity, actual or constructive, to question its correctness. A party cannot be subjected to a tax without his day in court, as the phrase is; that is, some time

<sup>1</sup> Section 841 gives the county auditor power to correct any error in the assessment or tax book.

and tribunal must be open to him wherein he may be heard for the protection of his rights. If such opportunity is not afforded otherwise, then he may appeal to the proper court for his protection. There is nothing in the facts that should stay the action of the court in his behalf. The property of the complainant, to-wit, the bridge and its approaches, so far as the same are within the boundaries of the state of Iowa, was property open to the knowledge of the county officials. It was not concealed nor hidden. The assessor neglected to assess it at the proper time. If the auditor had properly assessed the bridge, with notice, actual or constructive, to the complainant, such assessment would have been valid; but instead of so doing the auditor made an assessment against complainant of property not owned by it, and now it is insisted that the latter should be allowed to stand as the equivalent of the assessment that ought to have been made, but which was not made. This cannot be done. The result is that the assessment in question, and the tax based thereon, must be held wholly void, and the bridge company is entitled to a decree for the cancellation thereof, and the removal of the cloud caused thereby upon its property. The question of the right to recover back the portion of the tax paid by the Iowa Central Railway Company is not presented in the pleadings, and is not considered or determined by the court.

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WEST *v.* DUNCAN *et al.*

(*Circuit Court, S. D. Mississippi, S. D. August 20, 1889.*)

1. **TAXATION—SUIT TO SET ASIDE TAX-DEED—PARTIES.**

In a suit in Mississippi to set aside a deed from the tax collector, of land sold for non-payment of taxes, on the ground that complainant, within 12 months after the deed was filed for record, tendered to the purchaser all taxes, damages, interest, and costs, and because the tax collector failed before the sale to publish a list of the delinquent land as required by law, and further on the ground that, at the time of the sale, complainant had sufficient personal property, which it was the collector's duty to first exhaust, the collector is not a proper party.

2. **SAME.**

Where the suit is also to set aside a subsequent deed from the purchaser at the tax sale, such purchaser is a necessary party.

3. **SAME—TAX-SALE.**

It is not necessary in Mississippi that the tax collector, before selling land for delinquent taxes, shall first exhaust the personal property of the delinquent.

4. **SAME—VALIDITY OF SALE—PRESUMPTIONS.**

Section 22 of the charter of Pass Christian, in Mississippi, as amended by the act of 1886, providing that in sales for taxes all presumptions of law shall be in favor of everything having been done by the officer, previous to and in making the sale, to communicate a good title to the purchaser, and the sale and title acquired shall only be set aside on satisfactory proof that the taxes for which the land was sold were actually paid before the sale, does not prevent the owner of land sold for taxes from suing to set the tax-deed aside on the ground that the tax collector failed to publish a list of the delinquent land as required by law.

5. **SAME—REDEMPTION—RECORDING TAX-DEED.**

Such charter provides that within three days after the sale the tax collector shall execute and deliver to the purchaser a deed conveying the land to him, and providing for its redemption by the owner at any time within 12 months from the day of sale. Tax-deeds are required to be filed for record with the clerk or other officer,

and to remain there during the time limited for redemption. *Held* that, where the purchaser fails to file his deed until four months after the sale, the time limited for redemption begins to run from the date the deed is filed, and not the date of sale.

In Equity. Bill to set aside a tax-deed.

*Roberts & Thomas*, for complainant.

*E. J. Bowers*, for defendants.

HILL, J. The questions now presented for decision arise upon the demurrer of the defendants to the bill of complainant, which bill, in substance, alleges that complainant is the true and lawful owner of the real estate described in the bill, and is situate in the town of Pass Christian, within the jurisdiction of this court; that the defendant Duncan sets up a pretended title and claim thereto based upon a deed of conveyance executed to him by John H. Lang, of the defendants to this bill; that Lang claimed title to said land under a deed of conveyance executed to him by W. A. Terrall as tax collector for said town of Pass Christian, but was not filed for record until the 3d day of December, 1888. The bill further avers that, within less than 12 months after the filing of said deed for record, complainant tendered to said Duncan all taxes, damages, interest, etc., and the amount paid by him, to the said Lang, to redeem said real estate, but which was refused by him. The bill further alleges that the pretended sale of said real estate for taxes due thereon was illegal and void for the alleged reason that said tax collector failed to have a list of the property upon which the taxes had not been paid published in the only newspaper then published in the town of Pass Christian at the time, and for the length of time, required by the amended charter of said town, and under which authority said sale is claimed to have been made, and for the additional reason that complainant had more than a sufficiency of personal property in said town to have paid said taxes, which said collector did not seize and sell, which it was his duty to have done, before selling said real estate; that said pretended deeds of said tax collector to said Lang, and said Lang to said Duncan, are illegal and void, and cast a cloud on complainant's title, which the bill prays may be so declared, canceled, and set aside.

The demurrer of said tax collector and said Lang sets up as grounds therefor that they are not proper parties to this suit, and pray to be dismissed with their costs. I am of opinion that said Terrall is not a proper party to this suit, and that as to him the demurrer must be sustained, and the bill dismissed, but that, as the bill seeks to cancel and set aside the tax-deed to Lang, and his deed to Duncan, that he is a proper, if not a necessary, party, and that the demurrer as to him must be overruled, which brings us to the consideration of the demurrer of the defendant Duncan.

The grounds of demurrer alleged are (1) that the bill on its face shows that complainant has no title to the real estate, described in the bill; (2) that this bill on its face shows that defendant Duncan has a good and valid title to the real estate described in the bill.

The only grounds that need be considered alleged in the bill for the

relief sought are, first, that complainant had sufficient personal property in the town of Pass Christian to pay all the taxes of said real estate, and which should have first been exhausted before selling said real estate for any taxes due thereon. The charter of said town leaves it discretionary with the collector as to whether he will sell the delinquent tax-payers' personal property found within the town, or sell the real estate, so that this ground for relief is not maintainable; and, if this were not so, under the ruling of the supreme court of this state a like result would follow.

The second ground is that the tax collector did not give the notice required by the charter that the tax had not been paid on this property. That the notice was not given is admitted by its demurrer, but it is insisted on the part of the defendant Duncan that this defect is cured by the provision of section 22 of the charter of said town, as amended by the act of 1886. This section provides that—

"In cases of sales of property within the incorporate limits of said town for taxes levied and collected by authority of said town, all presumptions of the law shall be in favor of everything having been done previous to, and in the making of, said sale, by the officers, to communicate a good and valid title to the purchaser; and said sale, and the title acquired thereunder, shall only be set aside and held for naught upon proof, satisfactorily made to the proper court trying the title, that the taxes for which said property was sold had actually been paid off and discharged to the proper officer before the sale took place."

The constitution, both of this state and of the United States, provides that no man shall be deprived of his property except by due process of law. To divest a man of the title to his land for non-payment of taxes, there must be a lawful assessment of the value of the property, if based on its value, by some man, or body of men, duly authorized by law to make the same; (2) there must have been a tax duly levied by said body of men, duly and legally authorized by law to levy the same; and (3) there must have been default in paying the tax, and a sale and conveyance thereof made by some person authorized by law to make the same. Anything less than this would not be by due process of law, and therefore void under this provision of the constitutions of both the state and United States. The statute relied upon provides as matter of evidence that the presumption shall be that all was done that was required to be done, by the respective officers, in making the assessment, levy, and sale; but this, like almost all other presumptions, may be rebutted by sufficient evidence, the burden of making which is thrown upon those disputing the validity of the title. The tax collector was not authorized by law to make the sale without giving the notice required, and which the demurrer admits he did not do. I am satisfied that this section of the charter does not contain the curative properties claimed for it. The legislature has passed acts providing that, unless suits are brought within certain periods, one of five and another of three years, to invalidate tax-titles, thereafter no irregularity in the proceedings necessary to vest the title in the purchaser under the tax-sale shall be admitted to defeat such title, which is intended to cure such defects. The curative effect

of these statutes can only be applied to cases in which the act done, or omitted to be done, could have been authorized by the legislature in the first instance, and not to cases incurable under the constitution of the state or United States. These statutes of the state give to the tax-payer or owner of the property ample opportunity to bring his action to set aside the voidable title of the purchaser at the tax-sale for any want of compliance with the law, and for which the sale may be avoided. The literal reading of this provision of the charter cuts off this opportunity; and, if such is the proper construction of the provision, it would be repugnant to the constitution, and void. But it is presumable that it was only intended to have the effect claimed after an opportunity was given to have the validity or invalidity of the title established by judicial proceeding. Without further consideration of this question, I must hold that the bill on its face shows sufficient ground for setting aside and canceling the tax-title, as prayed for, for want of the notice of the non-payment of the taxes as required by the charter.

The third and last ground alleged in the bill for setting aside the tax-title is "that the deed was not filed with the clerk for registration" as required by the charter. All other tax-title deeds are required to be filed with the clerk of the court, or some officer of the city, or other municipal corporation, and there to remain during the time limited for redemption by the tax-payer, or those holding under him. In the charter in this case, it is provided that within the three days after the sale the tax-collector shall execute and deliver to the purchaser a deed conveying to him the land, upon payment of all taxes, damages, costs, and expenses, as stated in the charter, and giving to the tax-payer or owner the right to redeem the property within one year from the day of sale by paying to the purchaser at the tax-sale all taxes, costs, damages, interest, and expenses paid by him, either in the purchase or afterwards, growing out of the non-payment of the taxes. The purpose of this provision of the charter evidently was that the tax-payer, by going to the clerk's office and examining the records of the registration of deeds, might know whether or not the land or property had been sold, and, if sold, who was the purchaser, so that he could redeem the same on the terms provided in the charter. The bill alleges that the deed of the tax-collector was not filed for record until the 3d day of December, 1888, though executed and delivered to the purchaser on the 2d day of August, 1887, and the complainant had no notice of said sale and conveyance until after the registration of said deed, and that, within less than a year after the registration of said deed, he offered to redeem said real estate by tendering said taxes, damages, interest, etc., which was refused, by said Duncan; all of which the demurrer admits. I am satisfied that, under a proper construction of the charter, the failure of Lang, the purchaser of the property, to file his deed with the clerk for registration, has been such a neglect upon his part in complying with the requirements of the statute as to render the deed voidable under complainant's bill; but, under the charter, Duncan, who stands in the shoes of Lang, will be entitled to all the taxes, damages, interest, and costs he has paid,

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either at the time of his purchase from Lang, or since resulting from the non-payment of the taxes on said lands. This is no hardship upon him, as he must be presumed to know that said deed had not been recorded as required by said charter. The result is that the demurrer will be overruled, and the defendants Lang and Duncan allowed 30 days in which to answer the bill as to this term.

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LEE v. SIMPSON.

(Circuit Court, D. South Carolina. June 11, 1890.)

**TAXATION OF COSTS—PRINTING.**

Though there may have been agreements of counsel on both sides in relation thereto, costs for printing the bill, answer, and evidence in a suit in the circuit court of the United States cannot be taxed, since there is no rule of court on the subject, and nothing is said about such costs in Rev. St. U. S. § 823, providing the fees which may be taxed.

**In Equity.**

*Carey & Youmans*, for complainant.

*Smythe & Lee* and *Wells & Orr*, for defendant.

SIMONTON, J. The costs of this case have been taxed by the clerk. His taxation has been brought up for review. Only two items are questioned,—one awarding a certain sum to the special master. The lawfulness of this charge is not disputed. The amount only is criticised. The other item is a charge for \$121 for printing the record and testimony. When the bill was filed, and the preliminary injunction granted, the bill and the order were printed under a suggestion of the court. When the answer was filed, it was also printed, at the suggestion of the defendant's attorneys, who naturally wanted their answer in print, as the bill had been printed. When all the testimony was in, it was prepared for the printer; counsel on both sides and the clerk of this court conferring about what parts and how much of it should be printed. When their conclusion was reached, the clerk, who had superintended the other printing, ordered and superintended this. The testimony and record were for the convenience of and were used by both parties in the cause. Nothing was said, so far as it appears, about paying the expense of the printing. The clerk was under the impression that each party would bear an equal share of this expense. How this impression was derived he cannot say positively, except that both parties seemed to concur in the necessity for printing, and united in preparing the matter to be printed, and both used the printed matter during all the proceedings. So when the bill for printing came in, some time before the cause was heard, he sent it to each party, making requisition for one-half from each. The complainant promptly paid his half. The defendant refused to pay any part of this expense, unless he lost the

case. Even were there an allegation of a verbal understanding or agreement between counsel in the matter, the court could not notice it. The stipulations or agreements of counsel must be in writing. Nor would the court undertake, in a taxation of costs, to enforce an agreement, written or verbal, between attorneys, unless the cost of printing can be taxed against the losing party, on whom the decree has fixed the costs. We have no rule on the subject. There being no rule, and the fee-bill (section 823, Rev. St.)<sup>1</sup> being silent, this charge cannot be taxed. *Spaulding v. Tucker*, 4 Fish. Pat. Cas. 633. Let this item of printing be eliminated, and in other respects the taxation be confirmed.

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STATE OF MISSOURI *ex rel.* HAZARD v. SPIVA *et al.*

HAZARD v. SPIVA.

(Circuit Court, E. D. Missouri, E. D.)

1. TAXATION—COLLECTION—DEMAND.

Under Rev. St. Mo. 1889, § 7608, which provides that no seizure of personal property for taxes on real estate "shall be made until the collector has made demand for the payment of the tax, either in person or by deputy, to the party liable to pay the same, or by leaving a written or printed notice at his place of abode \* \* \* with some member of the family," a demand upon an agent in charge of the taxed property is insufficient to justify a seizure, though the owner is a non-resident, and it is impossible to make demand on him in either of the statutory modes.

2. REPLEVIN—PROCESS—TAXATION.

A tax-book authenticated by the seal of the court, under which a tax collector is authorized by statute to seize and sell property to enforce the collection of taxes, is process, within the meaning of Rev. St. Mo. 1889, § 7479, which limits the right to bring an action of replevin to cases where the property "has not been seized under any process, execution, or attachment against the property of the plaintiff."

3. SAME.

Where property is held by the collector under the authority of such book, the fact that he seized such property without first making proper demand for the taxes does not authorize the owner against whom the tax was levied to maintain replevin therefor.

At Law. On demurrer to plea.

The first of these suits was an action on the official bond of H. S. Spiva, as collector of the revenue for Madison county, Mo., to recover damages for an unlawful levy made September 15, 1889, on certain personal property of Hazard's, to enforce payment of certain taxes assessed against Hazard on real estate for the year 1888. The laws of Missouri provide, in substance, that no levy shall be made under a tax-bill until a demand for the payment of the same shall have been made by the collector or his deputy, of the party liable therefor, or by leaving a written or printed demand at his place of abode with some member of the family over 15 years of age. Rev. St. Mo. 1889, § 7608. The complaint is that the levy was made without such demand, and was

<sup>1</sup>This section provides the fees which shall be taxable as costs.

therefore unlawful. The defendants interposed a special plea to the effect that Hazard was a non-resident of the state, owning extensive lead mines, smelting furnaces, machinery, stores, etc., in Madison county, and that such property is, and for years has been, in actual charge and control of an agent of Hazard's, and that a demand for the payment of the tax-bill, such as the statute requires, was made of such agent, it being impossible to make a demand on Hazard himself in either of the ways pointed out by the statute. To such plea there was a demurrer. The second suit (No. 3,104) was an ordinary action of replevin brought by Hazard to recover possession of 2,000 pigs of lead, which were levied upon by the collector on January 20, 1890, for taxes of 1889 assessed against Hazard. It is claimed that such levy was unlawful for want of a proper statutory demand, and there was a plea as in the first suit that a sufficient demand was made on Hazard's agent. To this plea there was a demurrer.

*Lee & Ellis and George R. Lockwood*, for plaintiff.

The substantial questions in this case are: (1) Can a collector of taxes in this state, under section 6754, Amended Acts 1883, p. 143, seize and sell personal property to satisfy a tax-bill against the owner, without in person or by deputy having made a demand of the owner for the payment of the tax, or leaving a written or printed notice for that purpose, at the place of abode of the owner, with some member of his family over the age of 15 years? (2) If a seizure of property, under said section, is made, will replevin lie therefore; that is, is it seized under any process, execution, or attachment against the property of such owner, plaintiff in replevin?

1. The answer to the first question must depend chiefly upon the language of the statute, as the exact point raised has never been decided, so far as we know, by the courts of this state. Turning to the statute, (formerly § 6754, Rev. St. 1879,) we find that the conditions precedent to a seizure of property by the collector are a demand of the person liable to pay the tax, or by leaving notice thereof at his place of abode with some member of his family over 15 years of age. It is apparent from the answer demurred to that the tax was not personally demanded of Mr. Hazard by the collector or his deputy, nor was notice to pay the same left at his place of abode with a member of the family over the age of 15 years. To which of these demands is that set up in the answer equivalent; and, if equivalent to either, why that, rather than the alternative? And where is the authority for saying that there can be any demand equivalent to those prescribed by the statute? If the demand set up is said to be equivalent to a personal demand, we say that the statute prescribes a method of demanding the tax when a personal demand cannot be made, and the demand alleged is not that prescribed in such case. On the other hand, if the demand set up is said to be equivalent to notice left with a member of the family, we say that the statute does not provide for any equivalent to such notice, except personal demand. If a personal demand for taxes is not made, then notice may be served as a summons may be, and, if the demand set up would not be a good return of service of a summons, it is not good as a demand, under section 6754; and who would think of pretending that the facts set up in the defense demurred to would be a good return by a sheriff of service of a summons. The seizure and sale of a person's property, without a trial or judicial determination of the liability of the owner for the debt for which his property is taken, is certainly a high governmental power, and therefore there must be a distinct authority of law for the seizure; and every condition precedent thereto, though apparently trivial, must be complied with.



*Railway Co. v. Apperson*, 97 Mo. 300, 10 S. W. Rep. 478, recognizes and strictly enforces this doctrine, citing as authority therefor: *Blackw. Tax-Titles*, (2d Ed.) 255; *Dill. Mun. Corp.* (2d Ed.) 610; *Cooley, Tax'n*, (2d Ed.) 324, 348, and many Missouri decisions. In *Town of Warrensburg v. Miller*, 77 Mo. 56, the doctrine now under consideration is rigidly applied, and the court says, (page 60,) citing *Cooley*: "Whatever the statute provides for in this regard the collector must have, and he is a trespasser if he proceeds to compulsory action without it." See, also, *Howard v. Heck*, 88 Mo. 456. But this question is almost put beyond argument by the decision of the St. Louis court of appeals in *State v. Sargent*, 12 Mo. App. 237, where the court, in speaking of section 6754, says: "Nor does the law allow the collector to seize personally for taxes without notice to the party liable, given in person, or by leaving a copy with his family at his residence, which in case of non-residents seems impossible." This declaration by the court of appeals, the language of the statute, and the principles of law governing the exercise of the authority asserted by defendant, as established by the leading text-writers and the decisions of the supreme court of Missouri, make it clear, we think, that defendant was a trespasser when he seized the property involved in this suit.

2. The next question to be considered is whether this property was seized under any process, execution, or attachment against the property of the plaintiff; or, in other words, is the tax-book a process against the property of those whose property is listed? The constitution of Missouri, in section 38 of article 6, entitled "Judicial Department," provides that all writs and process shall run in the name of the state of Missouri; and the statutes (section 4037, Rev. St. 1879) say that all writs and process issued out of any court of record shall run in the name of the state of Missouri, and shall be tested by the clerk, and sealed with the seal of such court; and section 4038 provides that all writs and process issued by any judge or justice of the peace, or other officer authorized to issue the same, shall run in the name of the state of Missouri, and be subscribed by the officer issuing the same. *Bouvier* speaks of "process" as "the method taken by law to compel a compliance with the original writ or commands of court." *Wharton's Law Lexicon*, tit. "Process," says: "It is largely taken for all the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end." *Abbott's Law Dictionary* says of "process" that it is "strictly the mandate of the court to the officer, commanding him to do certain things or perform certain services within his official cognizance." *Tomlin's Law Dictionary* says of "process"—"*First*. It is largely taken for all the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end. *Secondly*. That is termed the process by which a man is called into any temporal court, because it is the beginning or principal part thereof, by which the rest is directed; or, taken strictly, it is the proceeding after the original, before the judgment." *Anderson's Dictionary of the Law* says of "process": "Something issuing out of a court or from a judge; a writ of any nature." "At common law, the means of compelling the defendant to appear in court." By Code Iowa, 1851, (or section 4455, Rev. St. 1888,) the petition in replevin must state that the property replevied was not taken on the order or judgment of a court, nor on execution or attachment; but in *Morford v. Unger*, (1859,) 8 Iowa, 82, replevin was maintained for property taken "by virtue of a precept or warrant" affixed to a tax-list. In *Gilmer v. Bird*, 15 Fla. 410, it was decided that a notice given, under the Code, by an attorney, of the institution of a suit, in the form of a summons, but not issuing out of a court, was not process, within the meaning of that provision of the constitution of Florida which provided that the style of all process shall be "The State of Florida," citing Baron COMYN, who says: "'Process,' in a large acceptance, comprehends the whole proceeding after the original, and before the

judgment; but generally it imports the writs which issue out of any court to bring the party to answer or for doing execution, and all process out of the king's courts ought to be in the name of the king." In this case it was also decided that the term "process," in the provision of the constitution just referred to, and in that one which said that no person should be deprived of life, liberty, or property without due process of law, did not mean the same thing, and that, therefore, notice by the attorney, as given, was "due process of law," though the notice was not "process." In *Curry v. Hinman*, 11 Ill. 420, it was held that "the copy of the judgment certified to a collector, on which lands are authorized to be sold for taxes, is not 'process,' within the meaning of the seventh section of the fourth article of the constitution, and need not run in the name of 'The People.'" On page 425, the court says: "Whether the court or the legislature, either of which may make a copy of the order indispensable to a valid sale, chooses to designate it by the name of 'process,' it is not thereby made 'process,' within the meaning of the constitution. Either might, with the same propriety, have called them by any other name, but still they would be but copies of the order, decree, or judgment. The meaning of this constitution does not change with a name." Speaking of the order issued in this case, the court, on page 426, further says: "The truth is that it has not one single attribute of an execution at law, or of any other proceeding or process which used to run in the name of the king, and it would never have occurred to any lawyer that it could be process, if the legislature had not so called it. But for this legislative christening, he would almost as soon have thought of calling it an indictment. \* \* \* With equal, if not more, propriety, might it be contended that the assessment list with which the collector is furnished under the thirty-first section is process, and should have this constitutional head to make it valid; for under it he is not only required to sell property, but he must levy upon and seize it." From the language of our constitution, the place where it is found, and the interpretations given such language by the courts, from the statutes, and from the definitions of the word "process," we see that that word, as used in the constitution and statutes, means a judicial writ, containing a command in the name of the sovereign power. How the tax-book, given to the collector, can be tortured into a writ of this kind, it is impossible to conceive, as it has not a single feature resembling those of process, if the common-law or constitutional meaning is given to that term. Therefore, though property seized under section 6754 is taken by "due process of law," it is not seized under process, execution, or attachment; and in this case it is clear that the defendant was guilty of a trespass in seizing plaintiff's property, and the demurrer to his answer should be sustained.

*George D. Reynolds and R. A. Anthony*, for defendant.

THAYER, J., (*after stating the facts.*) It will be observed that the question whether the demand made on Hazard's agent was sufficient to authorize a levy is common to both cases, and will be first noticed. That a demand is necessary prior to a levy, and that a levy made without a precedent demand is a wrongful act, under the language of the statute, admits of little doubt. The provisions of the statute, (section 7608,) that "no seizure \* \* \* for taxes shall be made until after the first day of October of each year," and that "no such seizure \* \* \* shall be made until the collector has made demand for the payment of the tax, either in person or by deputy, to the party liable to pay the same, or by leaving a written or printed notice at his place of abode for that

purpose, with some member of the family over 15 years of age," are each mandatory provisions, and are not merely directory.

If a collector neglects to perform a duty which the law expressly devolves on him as a condition precedent to making a levy, I can conceive of no good reason why he should not be held liable for whatever damage is occasioned by his neglect of official duty. The legislature has also prescribed the precise form of demand. It must be a demand made in person, by the collector or his deputy, on the person liable for the tax, or by notice left at his place of abode with some member of his family over 15 years of age; and I know of no rule of law that would authorize the court to say that some other form of demand, such as a demand on the plaintiff's general agent or business manager, will suffice. This provision also seems to be mandatory. If the statute merely required a demand to be made, without prescribing the form of demand, or the person upon whom it was to be made, the demand alleged in the plea might be adjudged sufficient. *King v. Whitcomb*, 1 Metc. 328. The general rule is that all provisions of law regulating the assessment of taxes, and proceedings for the seizure and distraint of property for the payment of taxes, should be strictly pursued, and the rule has been frequently approved in this state. *Town of Warrensburg v. Miller*, 77 Mo. 59; *Railroad Co. v. Apperson*, 97 Mo. 306, 10 S. W. Rep. 478, —and cases cited. The act of April 28, 1877, (Laws 1877, p. 381,) appears to have been the first act adopted in this state permitting personal property to be seized for a tax-bill against realty, and was in that respect a radical change in the law regulating the collection of taxes. It may be that the legislature failed, through oversight, to provide a feasible method of making a demand for the payment of taxes, of non-resident tax-payers. On the other hand, it might with as much reason be said that the legislature intended to leave taxes assessed against non-residents, to be collected by suit brought in the ordinary form, when a personal demand was not practicable, inasmuch as taxes assessed against non-residents are usually upon real estate, and are well secured by a lien upon the realty. Speculations of this sort, however, do not aid materially in reaching a decision, as courts are now authorized to make laws, or to remedy defects in legislative enactments, when such defects exist. The statute does not, in terms or by necessary intendment, authorize a levy, unless there has been a personal demand on the tax-payer, or a notice left at his place of abode with a member of his family. I conclude, therefore, that a demand made in any other form will not suffice. *Vide State v. Sargent*, 12 Mo. App. 237.

2. In view of the fact that in this state a plaintiff in replevin, in order to obtain the writ, must make oath that the property sought to be recovered "has not been seized under any process, execution, or attachment against the property of the plaintiff," (Rev. St. Mo. 1889, § 7479,) a question arises whether replevin is, under any circumstances, a proper remedy for a tax-payer whose property, as it is claimed, has been wrongfully seized under a tax-bill issued against him? This is a question of local law, and, if the supreme court of the state had heretofore

considered the question, its decision would be binding on this court. I do not find, however, that the question last mentioned has ever been considered and determined by the state courts. It was not considered in *Mourer v. Helferstine*, 80 Mo. 23, or in *Henry v. Bell*, 75 Mo. 195, or in *Rubey v. Shain*, 54 Mo. 207, to which my attention was particularly directed on the hearing of the demurrers. The point discussed and determined in those cases, was whether the assessments involved were so far regular as to protect the collector from all liability for seizures made thereunder. Whether replevin is a proper remedy to test the validity of an assessment, or the validity of a seizure made under a tax-bill, is a question not authoritatively determined by either of those cases, or by any of the cases cited by counsel. Regarding the question as open for consideration, I have reached the conclusion that in this state replevin is not a proper remedy, when the person invoking such remedy is himself the person against whom the tax-bill issued under which the seizure complained of was made. The tax-book under which collectors are authorized to act is required to be authenticated by the seal of the county court and the signature of its clerk before it is delivered to the collector. The revenue law gives to the book so authenticated the force and effect of an execution, by providing in substance, that after the collector receives it and has made demand, he may thereunder distrain and sell property in like manner and with like effect as under a writ of execution. In my judgment, a book of that description, authenticated by the seal of a court, and under which a public officer is authorized by statute to seize and sell property, may be aptly termed "process," within the meaning of the replevin act, whether regard be had to the technical meaning of the word or its ordinary use. I know of no reason why a strict construction should be placed on the word "process," as used in the replevin act, so that it will only comprehend writs issued by courts of law or equity, in the exercise of their ordinary jurisdiction.

Looking at the question from the stand-point of public policy, it appears to be quite as important that a tax-payer should not be allowed to replevy property seized for taxes, as that a defendant in an execution or attachment should be denied that remedy. If tax-payers were allowed to replevy property distrained for taxes, it is obvious that the collection of the public revenues might at any time and under numerous pretenses, be seriously impeded. Nor is it necessary for the protection of the tax-payer that a remedy by writ of replevin should be accorded to him. The law is well settled in this state that a tax-payer may enjoin the collection of an illegal tax. *Rubey v. Shain*, *supra*; *State v. Saline Co.*, 51 Mo. 352; *Ranney v. Bader*, 67 Mo. 479; *Mourer v. Helferstine*, 80 Mo. 27. And if as, in the case at bar, the seizure is claimed to be unlawful, not by reason of any defect in the assessment, but because of some neglect of duty on the part of the collector, it seems clear that the tax-payer might obtain adequate relief for such wrong, by a suit against the collector for damages, if the neglect of duty would, under ordinary circumstances and but for the replevin act, enable the tax-payer to maintain replevin.

It was urged by plaintiff's counsel that the failure of the collector to make a proper demand prior to the levy, entitles the plaintiff to maintain replevin, although it be conceded that a tax-book, duly authenticated as provided by law, is legal process. The court, however, is not able to concur in that view. The test of plaintiff's right to maintain replevin is whether the property in controversy was actually held by the defendant at the time suit was brought under process issued against the plaintiff. If it was, and the plea in this case so avers, he cannot maintain replevin, but must resort to some other remedy for the injury sustained. The statute, in general terms, denies the right to replevin property that has been seized, and is held by an officer, under any process, execution, or attachment against the plaintiff. There are no exceptions to the rule mentioned, and no provisions of the statute appear to warrant the inference that replevin may be resorted to, if the mode of serving the process pursued by the officer was faulty or irregular. The construction contended for would practically create an important exception to the rule, not found in the statute, and one that would impair its efficacy. It would, in its practical operation, enable a litigant, against whom process for the collection of a debt has been issued, to test, by means of a replevin suit, the regularity of every act done by a ministerial officer in the execution of such process. This, in my judgment, was a result not contemplated by the legislature. On the contrary, its purpose seems to have been to withhold from a person whose property has been seized under process for the collection of a debt, the power to interfere with the execution of such process by a writ of replevin. My conclusion is that the demurrer to the plea in the suit for damages should be sustained, but that the plea in the replevin suit states a good defense, and that the demurrer should be overruled, for the reason that it shows that the property, when the writ of replevin was sued out, was held under legal process issued against the plaintiff.

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FARVE v. LOUISVILLE & N. R. Co.

(Circuit Court, S. D. Mississippi, S. D. March 7, 1890.)

1. RAILROAD COMPANIES—RUNNING OF TRAINS.

A railroad company has a right to run its trains at any speed deemed proper when they are not passing through an incorporated city or town, or crossing a public street or highway; and the engineer, in such case, is not bound to look out for persons on the track.

2. SAME—INJURIES TO PERSONS ON TRACK.

Where a person, knowing that a fast train is due, gets on the track, and is struck by the train, he is guilty of such contributory negligence as will prevent his recovery for the injuries sustained.

At Law.

Action by John B. Farve, use, etc., against the Louisville & Nashville Railroad Company, for personal injuries.

B. Deblieux, for plaintiff.

G. B. Clark, for defendant.

HILL, J., (*charging jury*.) The issue which you are called upon to determine is as to whether or not the injuries to the person of Victor Farve were caused by the willful, reckless, and careless conduct of the conductor, engineer, and fireman operating the engine and train of the defendant company, as alleged in the plaintiff's declaration, and to which allegations the defendant company has interposed two defenses—*First*, a plea of not guilty, which is a denial of the alleged trespasses and wrongs; and, *secondly*, that, if any such wrongs were committed, that said Victor Farve, by his own wrong and negligent conduct, contributed to such injuries. To entitle the plaintiff to a verdict in his favor, the burden is upon him to satisfy your minds reasonably, by the proof, that the alleged injuries were caused by the running of the engine and train as alleged in the declaration. If you are satisfied of this fact by the proof, and if there were no proofs to rebut it, or other proof of the nature of the accident, then the fact of the injury, under the law of the state, would be *prima facie* evidence of a want of skill and care on the part of the employes of defendant in operating the engine and train, and would entitle the plaintiff to a verdict. This rule of evidence is based on the fact that such accidents usually occur when there are no witnesses to it except the employes operating the engine and train, and therefore it is reasonable that the defendant corporation should by its employes, who are presumed to have witnessed the accident, explain how it occurred. But, when there are witnesses on both sides to the accident, then the reason for the rule ceases, and the rule with it, and the case is decided upon the evidence, as in other cases. Victor Farve, who received the injury, having testified to the way in which the injuries were received, this *prima facie* rule of evidence does not apply in this case, and the burden is on the plaintiff to reasonably satisfy you, from the proof, that the injuries were caused by the willful negligence and wrong of defendant's employes, as alleged in his declaration.

There is no proof that the place where the accident happened, was in an incorporated city or town, or on a crossing of a public street or road. Therefore the defendant, by its agents and employes, had a right to its railroad track, and to run its trains thereon, without any obstruction thereto, at any speed deemed proper; and Victor Farve, when he went on the railroad track, did so at his own risk, and must suffer the consequences. The proof of Victor Farve, his father, and the other proof on his part, is that the fast train was expected in a short time, and Victor Farve hurried to get to his cows, to drive them off the track or to his home, and that he did get on the railroad track, heard the approach, attempted to get off, slipped, and fell outside of the track, between the ends of the cross-ties, and received the injury. The getting on the track of the railroad, when he was looking for the fast train to pass, was an

act of recklessness and carelessness which constituted contributive negligence on his part, and deprives the plaintiff of a right of recovery in this action. The engineer and other employes engaged in running the train were not required to look and see whether there was any one on the track except at a public crossing, or in an incorporated city or town, or at a depot station, or to give a signal of the approach of the train except at such crossing, station, town, or city. There is no proof that the engineer, fireman, or conductor saw Victor Farve, but the proof is that they did not see him, before or at the time of the accident. If the engineer had seen Victor Farve on the track, and had reason to believe that he could not get off the track in time to save himself, it would have been his duty to do all he reasonably could to avoid the accident. Therefore, you are instructed that the testimony on the part of the plaintiff, and not contradicted by any other proof in the cause, does not entitle him to a verdict in his favor, and that you will return your verdict in favor of the defendant.

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ROLKER *et al.* v. ERHARDT, Collector.

(*Circuit Court, S. D. New York. April 21, 1890.*)

CUSTOMS DUTIES—CONSTRUCTION OF LAWS—CLASSIFICATION—FLOWERING BULBS.

Crocus, gladiolus, hyacinth, narcissus, tulip, and other bulbs, which are not medicinal and not edible, are in a crude state, and not advanced in value or condition by refining, grinding, or by other process of manufacture, and are used for the purpose of producing flowers, are not free of duty under the provision for "bulbs and bulbous roots," \* \* \* any of the foregoing of which are not edible and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially enumerated or provided for in this act," contained in the free-list of the tariff act of March 3, 1883, (22 U. S. St. 488; Tariff Index, New, par. 696,) but are dutiable at the rate of 20 per cent. *ad valorem* under the provision for "bulbs and bulbous roots, not medicinal, and not specially enumerated or provided for in this act," contained in Schedule N of the same tariff act, (Id. par. 405.)

(*Syllabus by the Court.*)

At Law. Action to recover back duties.

During the year 1889 the plaintiffs imported from England, France, and Holland, into the port of New York, certain crocus, gladiolus, hyacinth, narcissus, tulip, and other flowering bulbs. These bulbs were classified for duty under the provision for "bulbs and bulbous roots, not medicinal, and not specially enumerated or provided for in this act," contained in Schedule N of the tariff act of March 3, 1883, (22 U. S. St. 488; Tariff Index, New, par. 405,) and, pursuant to this provision, duties were exacted thereon, at the rate of 20 per centum *ad valorem*, by the defendant, as collector of customs at that port. Against this classification and this exaction the plaintiffs duly protested, claiming that these bulbs were free of duty as "bulbs which were not edible, and were in a crude state, and not advanced in value or condition by refining or grinding, or other process of manufacture" under the provision for "bulbs and bulbous

roots, \* \* \* any of the foregoing of which are not edible, and are in a crude state, and not advanced in value or condition by refining or grinding, or other process of manufacture, and not specially enumerated or provided for in this act," contained in the free-list of the same tariff act, (Tariff Index, New, par. 636;) or under the provision for "plants, trees, shrubs, and vines of all kinds, not otherwise provided for, and seeds of all kinds except medicinal seeds not specially enumerated or provided for in the act," contained in this free-list, (Id. par. 760.) Thereafter the plaintiffs, as provided by law, having made appeals, duly brought this suit to recover the aforesaid duties.

Upon the trial it appeared that the bulbs in suit were spheroidal bodies that had been grown in the ground from the crocus, gladiolus, hyacinth, narcissus, and other flowering plants; that they had the principle of life in them, were not medicinal, were not edible, were in a crude state, and were not advanced in value or condition by refining, grinding, or other process of manufacture; or, in other words, were in the same state and condition as when taken from the ground, except that they had been dried and cleaned; that they were imported solely for the purpose of producing flowers; that bulbs of the same kinds and in the same state or condition as these, at and prior to March 3, 1883, were and since have been used in this country solely for that purpose; that there were, at and prior to the date just mentioned, and since have been, imported into this country certain other flowering bulbs, such as those of the *colchicum autumnale* and the *scilla*, that were used for medicinal purposes as well as for flowering purposes; that the bulbs of the *colchicum autumnale*, when imported for medicinal purposes, were in a dried, sliced, lifeless state or condition; that the bulbs of the *scilla*, when imported for medicinal purposes, were in a similar state or condition; that the bulbs of the *colchicum autumnale* and of the *scilla*, when imported for flowering purposes, were in the same state or condition as the bulbs in suit; that there were, at and prior to the date just mentioned, and since have been, both grown in and imported into this country certain bulbs, such as those of the onion, the leek, the garlic, and other allium plants, that were flowering bulbs and edible; that there were, at and prior to the date just mentioned, and since have been, both grown in and imported into this country certain other bulbs that, although eaten in Siberia, Kamschatka, China, or other countries, were not eaten in this country, but were used here for producing flowers or foliage. Both sides having rested, the defendant's counsel moved the court to direct the jury to find a verdict in his favor on the grounds, (1) that the bulbs in suit were the "bulbs not medicinal" provided for in Schedule N of the tariff act in question, (Id. par. 405,) as decided by the defendant as said collector, and (2) that the plaintiffs had not proven facts sufficient to entitle them to recover; and argued substantially in support of this motion that these bulbs were neither plants, trees, shrubs, vines, nor seeds, as the common and well-known meaning of these words indisputably showed, and therefore were not free of duty under the provision for such articles contained in the free-list of this tariff act, (Id. par. 760;) that this tariff act evi-



dently provided for three classes of bulbs and bulbous roots: (a) Bulbs and bulbous roots, both medicinal and non-medicinal, not edible, and usually or necessarily before their use subjected to some process of grinding, refining, or manufacturing which, if in a crude state, and not advanced in value or condition by any of such processes, were free of duty, (Free-List, Id. par. 636,) but which, if so advanced, were dutiable at 10 per centum *ad valorem*, (Schedule A, Id. par. 94;) (b) bulbs and bulbous roots, not medicinal, not edible, and not before their use subjected to any such processes, which were dutiable at 20 per centum *ad valorem*, (Schedule N, Id. par. 405;) and (c) bulbs and bulbous roots, edible, and generally eaten, such as onions, leeks, garlic, and other like products of the allium and other plants, which, though perhaps botanically bulbs or bulbous roots, have always been known among the people of this country as vegetables, and were dutiable as such at the rate of 10 per centum *ad valorem* (Schedule G, Id. par. 286;) that the provision for class b, bulbs and bulbous roots not medicinal, and not edible, contained in Schedule N, (Id. par. 405,) was more specific than the general provision for bulbs and bulbous roots both medicinal and non-medicinal, and not edible, of class a, contained in the free-list, (Id. par. 636;) and the bulbs in suit, therefore, were properly classified for duty, (*Arthur v. Lahey*, 96 U. S. 112;) that the defendant's construction of these apparently conflicting provisions for bulbs and bulbous roots rendered them harmonious and consistent; that, if any other construction of them were adopted by the court, there were no bulbs and bulbous roots provided for by Schedule N, (Id. par. 405,) and the court must conclude that congress had idly legislated that provision; but that, as was well settled, a meaning, if possible, must be given to every word found in a provision of a statute; and that, to give a meaning to every word of this provision, the defendant's construction must be adopted, and a verdict directed for him.

The plaintiff's counsel, after abandoning all claims to recover under the provision for plants, etc., contained in the free-list, (Id. par. 760,) then moved the court, upon the case as presented, to direct the jury to find a verdict in their favor, and, in support of this motion, and in opposition to that of the defendant's, argued substantially that Schedule N (Id. par. 405) provided for edible bulbs and bulbous roots, such as onions, leeks, garlic, etc.; that the free-list (Id. par. 760) provided for bulbs and bulbous roots not advanced in value or condition, etc.; that the bulbs in suit, being bulbs of the last-mentioned description, were specially provided for, and were free of duty.

*Edward Hartley* and *I. Augustus Stanwood*, for plaintiffs.

*Edward Mitchell*, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (*orally*.) It is somewhat difficult to determine from all these sections exactly in which one these articles are to be found. They are plainly covered by the language of paragraph 405, "bulbs and bulbous roots, not medicinal, and not specially enumerated" elsewhere. The question is, which is the more specific enumeration, the

one therein contained, or the one in paragraph 636, "bulbs and bulbous roots not edible, but in a crude state, and not advanced by refining or grinding, or by other process of manufacture?" In common speech whatever is medicinal is fairly to be considered as non-edible; but it does not necessarily follow that whatever is non-edible must be medicinal. I incline therefore to the opinion that paragraph 405 is of these two the more specific, and shall therefore direct a verdict for the defendant.

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DODGE *et al.* v. HEDDEN, Collector.

(Circuit Court, S. D. New York. October 30, 1899.)

1. CUSTOMS DUTIES—CONSTRUCTION OF LAWS—TRADE USAGE.

The trade usage which is to determine the meaning of a word or words in the tariff must be a well-known and general one.

2. SAME—EVIDENCE—BIAS OF WITNESSES.

In weighing the testimony of witnesses as to trade usage, the jury should consider the extent to which any of the witnesses may have an interest in the result of the litigation which might color their evidence.

3. SAME—CLASSIFICATION—OIL OF PETIT GRAIN—OIL NEROLI.

Oil of petit grain, distilled from the leaves, twigs, and immature fruit of the orange tree, was found by the jury to have been generally known and recognized in trade and commerce in 1883 as one of the subdivisions of oil neroli, (mentioned in the free-list.)

(*Syllabus by the Court.*)

At Law. Action to recover duties.

Plaintiff imported at the port of New York quantities of an essential oil called "oil of petit grain." This oil was distilled from the leaves, twigs, and immature fruit of the orange tree. The collector assessed it for duty at 25 per cent., under the provision in Schedule A of the tariff act of March 3, 1883, for "all preparations known as 'essential oils,' not specially enumerated or provided for in this act." The importer claimed it to be free of duty under the provision in the free-list of the same act for "oil neroli or orange flowers." There was a conflict of testimony as to whether this latter term in trade and commerce included oil of petit grain.

*Arnoux, Ritch & Woodford* and *Stephen G. Clarke*, for plaintiff.

*Edward Mitchell*, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*charging jury.*) If there were no evidence in this case, if we had nothing here but the tariff act, and the meaning which the dictionary gives to the word "neroli," namely, that it is the essential oil obtained from the flowers of the bitter orange, I should have to instruct you to find a verdict for the defendant, because it appears that the article imported by the plaintiff is not distilled from orange flowers. There is evidence, however, which was introduced under a general prin-

ciple of interpretation of all these tariff acts, to-wit, that inasmuch as they deal with trade and commerce, it is supposed that their framers, when they used words and phrases, used the same with the meaning which traders and commercial men give to them. For that reason testimony was introduced touching the trade meaning of the words "oil neroli," and also touching the trade designation and recognition of the article here imported. The question, therefore, which comes to you to be determined as a question of fact, is whether prior to March 3, 1883, oil such as was imported by this plaintiff (that is, oil made not from the flowers, but from the leaves, twigs, and immature fruit of the orange tree, generally described as "petit grain") was generally regarded and recognized in trade and commerce in this country as "oil neroli." That is the question of fact to be determined by you. In determining that question there are certain suggestions which should be made to you. In the first place, we start with the presumption that the collector knew what his duty was, and did it; in other words, we start with the presumption that the collector's determination was a correct one. That is a presumption which the plaintiff must overcome by affirmative proof. As the law expresses it, he has the burden of proof to show that the government's agent made a mistake in assessing duty upon this particular article. He must overcome that presumption by affirmative proof. He must satisfy you by a fair preponderance of evidence that the collector was wrong. If he does not so satisfy you, or if he even brings the scales just even, and leaves you in such a frame of mind that you are unable to decide whether he has shown the collector to be wrong or not, then he has not borne the burden of proof which the law lays upon him, and has not made out his case. In weighing the testimony of witnesses in all cases, it is, of course, proper for the jury to take into consideration whatever interest it may appear from the evidence that they may have in the result of the litigation in which they are testifying, with a view to determine what probable or possible bias may be operating upon the mind of a witness to (unintentionally, perhaps) color his evidence. That is a matter appropriate for the jury always to take into consideration. Lastly, the trade usage which is to be determinative of the question must be a general one. It is not determined by finding out how an article is occasionally called by individual firms, or how it may be designated in some few particular localities, or even by some single branch of the trade, if that branch is only one of the many branches of the trade which deal in the article, and the other branches of the trade do not know it by the same designation. Of course, congress, in providing these tariff acts, considers the country at large and trade at large; and, in order to determine whether an article is or is not within a trade designation, you must be satisfied that the trade usage with regard to the use of the term and the classification of the article is a well-known and general usage. With these suggestions the question is submitted to you to determine what the fact is; and, if you find that the article imported here is petit grain, made from the leaves, twigs, and immature fruit of the orange tree, and was generally regarded and recognized in the trade and commerce of this

country as oil neroli, then your verdict must be for the plaintiff; otherwise your verdict must be for the defendant.

The jury found a verdict for the plaintiff.

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UNITED STATES *v.* MORSMAN.

(District Court, E. D. Missouri, E. D. May 31, 1890.)

1. INTERSTATE COMMERCE—EXPRESS COMPANIES.

Express companies, independently organized as corporations for the transaction of the express business on their own account, are not subject to the provisions of the interstate commerce act.

2. SAME—INDICTMENT.

An indictment which charges that an express company is "a corporation and common carrier engaged in the transportation of property by railroad from one state to other states," but which does not show that such company is a mere adjunct or bureau of a railroad company or combination of railroad companies, does not bring such express company within the purview of said act.

At Law. On demurrer to indictment.

Indictment of Herman A. Morsman for alleged violation of the interstate commerce act as the agent of the Pacific Express Company.

*George D. Reynolds*, Dist. Atty., for plaintiff.

*A. C. Davis* and *W. W. Morsman*, for defendant.

THAYER, J. In the *Case of the Express Companies*, 1 Int. St. Com. R. 349, the commission decided, after a very full and careful review of the provisions of the interstate commerce law, that express companies, independently organized as corporations or joint-stock companies for the transaction of the express business on their own account, are not subject to the provisions of the interstate commerce law, but that when a railroad company, by itself or in combination with other railway companies, engages in the express business, and transacts such business by means of its ordinary transportation staff, it must conform to the provisions of the interstate commerce law in the management of that special department of its business, as well as in the management of its ordinary freight traffic. The reasons assigned for such decision by the commission, if not entirely conclusive, are at least satisfactory; and it is quite probable that since the decision in question all independent organizations engaged in the express business have acted on the assumption that their business is not subject to the provisions of the act. This is a sufficient reason for following the decision, unless it is clearly erroneous.

Many provisions of the act, as pointed out by the commission, clearly indicate that, in framing the act, congress only had in view those common carriers, ordinarily termed "railway companies," that are engaged in the transportation business over lines of railroad by them owned or operated. At the time the act was passed, the express business of the

country had grown to large proportions, was a business of a distinctive character, was carried on by numerous corporations and joint-stock companies under various arrangements with railway companies, and had been recognized as a distinct business in previous congressional enactments. Nevertheless, express companies are not mentioned in any of the provisions of the interstate commerce act. It is highly improbable that congress would have failed to mention this very important class of carriers in some manner, if it had been its intention to subject them to the provisions of the act. It is also a matter of such notoriety that the courts may properly take notice of the fact, that the grievances of which the public complained before the interstate commerce law was passed were charged almost exclusively to the account of the railway companies of the country; and congress may fairly be presumed, for that reason, to have had that class of carriers in mind, rather than express companies, when the law was enacted. At the time the act was passed, the method of doing business and fixing rates in vogue among the latter class of carriers had occasioned very little, if any, public criticism. It is also apparent that express companies are not strictly within the provisions of the first section of the act, defining who shall be subject to its provisions, because they are not engaged in the transportation of freight "wholly by railroad." A very large part of the capital of express companies is invested in teams, and vehicles for transportation other than railway cars, and a very considerable part of the transportation service performed by such carriers, for which they presumptively demand and receive compensation, is done otherwise than by railroad. They make a practice of collecting and delivering property by teams in all cities and villages of any considerable size, which railroad companies, in this country at least, do not do, unless they are themselves engaged in the express business. Without going more into detail, inasmuch as the subject has been fully canvassed by the commission, it will suffice to say that I concur in the view that the interstate commerce law only applies to common carriers engaged in operating lines of railway, or railway and water lines combined, and that it does not apply to "express companies," properly so termed; that is to say, to independent organizations that carry on the express or parcel business in the usual manner, and which do not operate railway lines. The sufficiency of the indictment, therefore, must be tested in accordance with that construction of the law.

It will not be denied, I apprehend, that if the express business of the country is not subject to the provisions of the act except when it is carried on in a particular manner,—that is to say, by a railway company, or a combination of railway companies, as a branch or department of their general freight traffic,—then an indictment like the one at bar, against a person alleged to be an agent of an express company, for violations of the interstate commerce law in transacting the companies' business, ought to contain proper averments showing that the particular business with respect to which complaint is made, is subject to the provisions of the law; otherwise an offense is not charged with that degree of certainty requisite in a criminal proceeding. In the indictment now un-

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der consideration the defendant is brought within the purview of the act, if at all, by an averment "that the Pacific Express Company, at the date of the commission of the various acts complained of, was a corporation and a common carrier engaged in the transportation of property by railroad from one state of the United States to other states of the United States, especially from the city of St. Louis, in the state of Missouri, to Litchfield, in the state of Illinois, and that the defendant was the general agent of the Pacific Express Company at said city of St. Louis." But this averment shows that the words "Pacific Express Company" are not merely a name under which a railway company, or a combination of railway companies, transact a certain part of their business. The averment is that the company is a corporation, and that implies that it is a distinct legal entity, having stockholders, a board of directors, or trustees, and other officers; in short, that it is an independent organization, engaged in business on its own account. The name of the corporation, as well as other averments of the indictment, also imply that the company in question is doing an express or parcel business, according to the usual method in vogue of carrying on that business, and that the defendant, its agent, was engaged in that line of traffic, for and in behalf of his principal, as distinguished from an ordinary railway freight traffic business, at the time of committing the supposed offenses described in the indictment. There is nothing in the bill that has the slightest tendency to establish that the Pacific Express Company is a mere adjunct or bureau of a railway company or combination of railway companies. All of the averments tend to show that it is an independent concern, engaged in the express business for its own profit, and for that reason is not subject to the provisions of the interstate commerce act as construed by the commission.

It was contended on the hearing of the demurrer that the case was brought within the act, so far as is necessary by averment in an indictment, merely by the allegation that the Pacific Express Company is "a common carrier" engaged in interstate "transportation of property by railroad," because that is, in substance, the description of carriers declared by the act to be subject to its provisions. It will be observed, however, that the first section of the act describes those subject to its provisions as "common carriers engaged in the transportation of property wholly by railroad," etc., and in the present case it is not even averred that the Pacific Express Company was engaged in transporting property wholly by railroad. Therefore the language of the first section of the act, if that would suffice to bring the case within the statute, is not employed. But for other reasons I conclude that the contention is not tenable. It might be said of any express company, and the allegation could probably be supported by proof, that it is engaged in interstate transportation of property by railroad, and that it is also a common carrier; but this would not necessarily bring it within the act, because, from the provisions of the law considered as a whole, congress does not appear to have intended to subject "express companies," properly so termed, to the provisions of the law. When complaint is made by way of indict-

ment of a violation of the act, growing out of the manner in which an express business has been conducted, it is essential, conceding that such business may, under certain circumstances, when transacted by railway companies, be subject to the regulations of the act, to show by proper averment that the circumstances exist, bringing the particular case within the purview of the law. For the reasons indicated, that is to say, because the indictment does not show that the Pacific Express Company is subject to the interstate commerce act, the demurrer is sustained.

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DANIELS v. MORGAN.

(Circuit Court, D. Massachusetts. May 29, 1890.)

PATENTS FOR INVENTIONS—WHO ENTITLED TO—EVIDENCE.

On application of two claimants for letters patent for the same invention, it appeared that complainant had the plan of the invention in mind for some years, and was the first to embody it in a drawing; that afterwards two drawings were made by respondent containing modifications of the proposed machine, and finally a machine was constructed and put in successful operation by him. Complainant testified that he showed respondent a plan of the work, and respondent told him to go ahead and make a drawing in accordance with it. In regard to the same drawing, respondent testified that it was made by his direction, and in accordance with his suggestions. At the time respondent was superintendent, and complainant an employe under him, in a manufacturing company, the work of which suggested the invention. *Held*, that complainant was entitled to the patent.

In Equity.

*Maynadier & Beach*, for complainant.

*George S. Boutwell*, for defendant.

CARPENTER, J. This is a bill in equity, brought under section 4915 of the Revised Statutes, and prays a decree which shall authorize the issue of letters patent to the complainant for his alleged invention of a new and improved apparatus for coiling wire rod as it comes from the rolls of a rolling-mill. He describes his invention, in the seventh claim of his application, as follows:

"The combination, with a rod-coiling receptacle or reel, of a spider or lifting plate mounted on a central shaft, which is supported and reciprocatively movable within the reel-supporting shaft, and provided with means for elevating said central shaft and plate, substantially as and for the purpose set forth."

For the apparatus here in dispute application for letters patent was made by the respondent June 24, 1886, and by the complainant June 26, 1886; and, after proceedings in interference, a patent was issued to the respondent, numbered 416,940, under date of December 10, 1889. I am satisfied on the evidence, and it is indeed practically admitted, that the invention in question, which need not, for the present purpose, be more particularly described, was first embodied in a complete, material form in a drawing which is produced by the complainant, and marked

"Exhibit Daniels Drawing, 1." This drawing was made in March or April, 1879. Subsequently, two other drawings were made, containing modifications of the proposed machine, but not affecting the invention here in controversy; and finally, in 1886, a machine was constructed by the respondent, and put in successful operation. The question, as presented in the opinions of the successive tribunals of the patent-office which have passed on this question, was as to which of the parties is entitled to priority in the invention of the device which was embodied in the three drawings to which I have referred. On reading the whole testimony in the case, I have come to the conclusion that the evidence on behalf of each party, if it will support any conclusion, can support only the conclusion that the party on whose behalf it was presented is the sole and only inventor, and that the other party never at any time made the invention, in the sense of the patent law. The only question, in short, raised by the testimony, as I regard it, is the question who was the author of the drawings. At the time the drawings were made, the respondent was the general superintendent of the works of the Washburn & Moen Manufacturing Company of Worcester, and the complainant was in the employ of the same company in a capacity subordinate to the respondent. The drawings were made by the complainant. As to the first of them he testifies:

"I went to Mr. Morgan, and showed him my plan of a discharging platform. He told me to go ahead, and make a drawing of a reel having a platform in accordance with my plan."

As to the same drawing, the respondent testifies:

"In the spring—I think, in March, 1879—I gave directions to Mr. F. H. Daniels to make drawings for a reel with a lifting platform, operated by a hydraulic cylinder and piston. \* \* \* Such drawings were made under my direction, supervision, and chiefly in accordance with my design." "I ordered it made, and gave instructions in its design and details." "Mr. Daniels suggested the combination of the two hydraulic lifting cylinders, to be supplied through one pipe and valve; and \* \* \* I adopted his suggestion, which was the only part of the details which was not suggested and designed by myself."

Turning now to the testimony as to what had preceded the preparation of this drawing, it appears on the one hand that the complainant, in January and February, 1878, had in mind a plan for a reel with a discharging device consisting of a spider or fork actuated from an overhead track, and that he made a sketch of this plan, which is not produced; that in July, 1878, he "devised an automatic reel, having a discharging platform," operated by foot-power, and made sketches of the proposed apparatus, which have disappeared, and as to the construction of which there is no satisfactory evidence except his own statement; that in November, 1878, and thence to February, 1879, he made three sketches, which are produced, and which show a reel with a platform elevated by a lever actuated by hydraulic power, and also a platform and reel with concentric shafts, and devised in one case to raise the platform, and in the other case to lower the reel, so that the coil of wire may be removed. On the



side of the respondent, it appears that in October, 1878, Daniel C. Stover showed to the respondent a model of a discharging device which he had invented, "consisting of a disk attached to a shaft extending through the axis of the reel, which could be pushed forward by the action of a cam, effecting the discharge of the coil," and that the respondent thereupon said to Stover that he could use that discharging device in connection with a reel which he had invented, and of which he showed a model.

It appears to me that the above recitals are all well supported by the evidence, and can admit of no doubt; and they are, so far as I can see, the only facts having any material bearing on the authorship of the first complete drawing of this invention. The complainant, on the issue here tendered, assumes the burden of proof, and must, I think, as the evidence stands, maintain by a clear and undoubted preponderance of proof that he is the sole author of that drawing. I am entirely satisfied that he has maintained this proposition. He had long before had under consideration a device for discharging the coil from the reel, and had eight months before made the sketches which show the substance of the invention which was there embodied. On the other hand, the respondent, before the making of the drawings, according to his own statement, had done nothing, except to entertain the casual thought that the disk attached to a shaft concentric with that of the reel might be used to discharge the coil. I have no doubt that the origin of the first drawing was precisely as described by complainant in his answer to interrogatory 27 as above quoted. The respondent insists that an inference contrary to the truth of the complainant's claim is to be drawn from the fact that on several specified occasions he neglected to set up the claim that he was the inventor of the device in question. I shall not go over the testimony on these points, and shall only say that I see no evidence that there was any time when either the complainant or the respondent, if conscious that he was the inventor, would have felt called on to assert his rights. It does not appear that either of them ever claimed to be the inventor until he applied for a patent, except so far as there was a constant tacit claim and admission between the two men in accordance with what both knew to be the fact; and, even in their own minds, I am by no means satisfied that there was a concurrence of thought on this question. The respondent's counsel, speaking in his brief of the final drawing made by the complainant, and from which the machine was built, uses this language:

"The drawing was made while Morgan was in charge of the works, and, by a necessary presumption of law, it was made under his direction; and, in the absence of a contemporaneous claim on the part of Daniels, the conclusion must be accepted that, if the drawing represented new and patentable devices, those devices were the property of Morgan."

It is not difficult to suppose that the respondent has held the same view of the relative rights of himself and those who were, like himself, but subordinate to himself, servants of the company. If he did hold that opinion, seeing that the drawing which showed the invention was prepared by his order, and that the draughtsman made no claim as to the

authorship, he would doubtless feel that the invention was his own, and that he might lawfully so affirm both in his application for a patent and in his subsequent testimony. A decree will be made, authorizing the issue of a patent to the complainant as prayed.

*KOCH et al. v. BOLZ et al.*

(Circuit Court, S. D. New York. March 31, 1890.)

**PATENTS FOR INVENTIONS—NOVELTY—ALBUM CLASPS.**

A patent for an album clasp consisted of flat or lever springs, instead of spiral springs, which had formerly been used, to make the clasp, by extending and contracting, adapt itself to any book. All the parts, except the difference in the kind of springs used, were used in the clasps embracing the spiral springs. *Held* that, since the use of flat springs to do the work of tension and pressure had long been known, the patent, if it could be sustained at all, should be limited to the exact details of the combination as described in the specification, and could not be infringed by the use of a similar spring for a similar purpose, with a difference in the manner of applying it.

In Equity. Bill for infringement of letters patent.

*J. Solis Ritterband*, (*Edmund Wetmore*, of counsel,) for complainants.

*Gilbert M. Plympton*, for defendants.

**WALLACE, J.** The only novelty in the improved "album clasp," which is the subject of the complainants' patent, consists in the employment of flat or lever springs, in the place of spiral springs which had previously been used, to make the clasps extend and contract, to adapt it to books of different thicknesses. The springs are located within the case or box of the extensible clasp, just as the spiral springs were, and act as the spiral springs did, by tension and pressure, to do the same work. The prior patent to Muller & Hipart describes all the parts in combination with spiral springs. It is said that by using flat springs the case can be made thinner, and consequently more artistic in appearance, than when spiral springs are used; and this seems to be true, unless the latter are so thin in diameter as to somewhat impair their efficiency. Inasmuch as lever or flat springs and spiral springs were well-known equivalents for one another, to do the work of tension and pressure,—so well known as to be a matter of which the court should take judicial notice,—in various mechanisms in which two devices are to be held in elastic relations to each other, it is very doubtful whether there is any patentable novelty in the clasp of the patent. If there is, it must be in the peculiar details of construction and arrangement by which the springs are made to co-operate with the other parts.

In the specification the patentees state as follows:

"Within the box, *e*, there are suitable springs acting against these toes, *i*. We prefer and use the volute springs, *f*, the inner ends of which enter the slots in the studs, *h*, and the outer ends pass beneath or behind the toes, *i*."

The claim is for a combination in which the "springs, *f*," and "the projections, *i*," are elements. As shown in the drawings, the springs are not strictly volute springs, but are flat springs, coiled at the end at which they are fastened, and which exert their pressure at the other end, and when they are less closely coiled; and are similar to those shown in prior patents for door latches, and locks, which operate against the end of the latch or bolt, upon a toe, to throw the latch or bolt forward. The clasp alleged to infringe the patent is provided with two springs, which consist of short pieces of flat steel wire fastened at one end, and bent at the free ends, to conform to the two curved sides of the box, along which the springs press and move, and which curved sides in connection with the springs tend to draw the two parts of the clasp together. They are not volute or coiled. The free ends do not act against a toe or projection, unless the curved side of the box can be deemed to be a toe. I think that the complainants' patent, if it can be sustained at all, must be limited to one in which the springs are of the details in form and character, and have the co-operating parts as described, and that the springs of the defendants' clasp are not such springs. There was as much invention in employing the springs of the defendants' clasp instead of the springs of the patent as there was in employing the springs of the patent instead of the spiral springs. The bill is dismissed, with costs.

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NEW YORK GRAPE SUGAR CO. v. AMERICAN GRAPE SUGAR CO. *et al.*

(Circuit Court, N. D. New York. May 26, 1890.)

PATENTS FOR INVENTIONS—INFRINGEMENT—ACCOUNTING FOR PROFITS.

An interlocutory decree, after finding an infringement of plaintiff's patents by defendant corporation, directed the master to take an account of the profits which had arisen or accrued to the corporation thereby; and on suggestion that the individual defendants were all the stockholders and officers of such corporation, and might, under the guise of a new name and form of a new corporation, continue to infringe, the decree further directed the master to also take an account of profits that had accrued to such individual defendants over and above the profits of the corporation. *Held*, that the decree did not direct an accounting of profits arising from infringements by other previously existing corporations, in which defendants were stockholders, or by corporations which had previously been formed in good faith, and not for the purpose of evading the decree, though defendants were controlling stockholders therein.

In Equity.

*Ezek Cowen and F. H. Platt*, for plaintiff.

*John R. Bennett and John G. Milburn*, for defendants.

SHIPMAN, J. The matters in issue upon this hearing arise upon the admissibility of testimony which has been offered upon the accounting, which has been objected to by the defendants, and which has been certified by the master for the opinion of the court. The history of the patents is detailed in 18 Fed. Rep. 638, and 24 Fed. Rep. 604. The

four Hamlins, who were co-defendants in the *American Co. Case*, were the officers and all the stockholders of said company. The defendants were charged with a joint infringement of five patents in one and the same factory. The interlocutory decree, after finding an infringement by the corporation of three patents, directed the master to take an account of the profits which the defendant company received, or which have arisen or accrued to it, "and which have accrued to the other defendants, over and above, and not part of and distinct from, the profits of the defendant corporation by reason of any infringement by said defendants." This direction was inserted for two reasons—*First*, because it was suggested that the Hamlins, being all the stockholders and officers of the corporation, might have been able to obtain for themselves profits from the use of the patented process, and the consequent business of the company, which did not manifestly appear upon its books; and, *secondly*, because of the suggestion that these four individual defendants could, after the interlocutory decree, take the shield of some other name, and, under the guise and form of a new corporation, of which they were the real and sole owners and managers, continue to direct an infringement, and to infringe the patents; and it was urged that a decree for an accounting simply by the corporation would be inoperative.

It now appears that, during the period of the infringement by the American Company, the Hamlins were the controlling, though not the only, stockholders in two other corporations in other states which own glucose factories, and that, before the date of the decree, the stockholders in all these Hamlin corporations and their Buffalo competitor and rival, the Fermenich Company, had formed a new corporation, called the "American Glucose Company," which became the owner of substantially the entire property and plants of the old corporations, the Hamlins owning three-fourths, and the Fermenich stockholders owning one-fourth, of the stock of the new company. This was really a new company, and not a mere reappearance of the American Grape Sugar Company under another name, and was established in good faith, and not to evade the decree. Since its organization, it has bought three other glucose factories in which the Hamlins had no interest. The Hamlins are officers of the glucose company. The plaintiff has made inquiries in the accounting to ascertain whether the Peoria and the Glucose Companies have infringed, for the purpose of subsequently ascertaining the profits which the Hamlins made as stockholders of said infringing corporations, and claims the right to compel an accounting by the individual defendants of the profits which they may have received, as managing officers and stockholders of other corporations than the American Grape Sugar Company, by reason of the infringement by such corporations so under the direction of the Hamlins, of the patents in suit. These questions were objected to, and have been certified by the master.

The interlocutory decree intended that an accounting should be had of the profits which had accrued to the American Grape Sugar Company by reason of its infringement, and of other and distinct profits which had accrued to the Hamlins, who were the managers and all the stockholders

of said corporation, by reason of its said infringement, or which should, before the close of the accounting, accrue to them by reason of an infringement of the same patent by these individuals under the cover of some other name, or under the guise of a new corporation; but it was not intended to direct an accounting of profits arising from infringements by other previously existing corporations, like the Peoria Company, in which the Hamlins were stockholders, or in corporations which had previously been formed in good faith, and not for the purpose of evading the obligations or terms of the decree, although in such corporations the Hamlins were controlling stockholders. In the opinion of the court, the questions which have been certified by the master are inadmissible.

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NEEL *et al.* v. BLYTHE *et al.*

(District Court, W. D. Pennsylvania. May 20, 1890.)

1. COLLISION—VESSELS TORN FROM MOORINGS—FLOODS—INEVITABLE ACCIDENT.

During a sudden and extraordinary flood in the Monongahela river, the defendants' fleet of water-craft was torn from its moorings at night, and carried down stream, and, it was charged, collided with and damaged the libelants' coal-boats. Upon the facts disclosed by the proofs, *held*, that the case was one of inevitable accident.

2. SAME—DILIGENCE.

There being no such particular relation between the libelants and the defendants as imposed upon the latter any special obligation, they were not bound to exercise more than ordinary prudence, skill, and diligence to hold their fleet.

3. SAME.

The highest degree of caution that could be used was not required of the defendants.

In Admiralty. Libel *in personam*.

*D. T. Watson and Knox & Reed*, for libelants.

*D. F. Patterson and T. H. Baird*, for respondents.

ACHESON, J. I shall not discuss the question of jurisdiction, but, following the later decisions, will regard the case as one cognizable in a court of admiralty, and proceed at once to a consideration of the merits of the controversy. The libel charges, in substance, that the defendants' fleet of water-craft and rafts of timber,—composed of three barges, five coal-boats, a flat-boat, and several rafts,—which was lying in the Monongahela river at Monongahela City, was improperly, negligently, and insufficiently moored and tied up, and that by reason of negligence in that regard said fleet broke away from its moorings about 11 o'clock on the night of July 10, 1888, and, drifting down the river, came into collision with, and thereby sunk and damaged, thirteen coal-boats belonging to the libelants, which were lying in the river 200 feet below, well and securely moored to the shore. Upon a careful examination of the voluminous proofs, I find the material facts to be as follows: The defendants'

fleet was moored at their own private landing, which was in all respects a proper and safe place for mooring water-craft. At the head of the landing were four abutments, the tops of the tying posts of which were as high as the highest point on the river bank at that place. The fleet lay immediately below these abutments, and was secured thereto by a chain and five lines, which ran from the posts on the tops of the three outer abutments to different points on the head of the fleet. There were also two lines attached to the lower part of the fleet, and extending to a post on the shore up stream, and a further line tied to the inside barge, and running to an abutment in front of the defendants' planing-mill. This was the condition of affairs on the morning of July 9, 1888, when the river began to swell. Then, on the afternoon of that day, still another line was run from the inside post of abutment No. 2 to one of the rafts, and thence to the outside barge. All these lines were reasonably good and suitable, such as are ordinarily employed for the like purpose and under like circumstances. There had been no unusual local rain-fall, and no considerable rise was looked for by the defendants or others at Monongahela City. The rise, indeed, came mainly from the head-waters of the river; and, even after it began at Monongahela City, the height to which the water eventually there rose was altogether unforeseen. Mr. Ford, a man of experience, who assisted in putting additional lines on the defendants' fleet, testifies that on Tuesday, July 10th, he had no idea that the water would come to within 10 feet of the point it ultimately attained; and H. L. Abrams, who has had personal knowledge of the river for many years, testifies:

"It was the greatest rise we ever had, and the most deceptive rise,—kept on rising when everybody thought it had quit; and it kept on."

On July 10th, (Tuesday,) especially during the afternoon, some of the defendants, with a large force of employes, were engaged constantly in putting out additional lines to shore, tightening up the lines so as to keep an equal strain on them, breasting in the fleet, and doing whatever else seemed to them to be necessary for its security. Probably, altogether, there were as many as 15 men so employed, and those who had oversight of the work were at least of average experience and skill in such matters. On the morning of that day another inch and a half line was put out from the abutment near the logway of the planing-mill to the lower part of the fleet, and a stern line was run thence to a post on shore; and later in the day three other suitable lines were run from the lower part of the fleet, and fastened to shore. Then, some time after 2 o'clock in the afternoon, the defendants borrowed a new or nearly new two-inch line from Lewis Staib, and it was tied to a walnut tree which stood on the river bank a short distance above the head of the fleet, and was run and fastened to two of the rafts in the upper part of the fleet. Furthermore, several lines—four of them each an inch and a half thick—were run, some from a pear tree, and some from a cherry tree, on the river bank, and made fast to the upper part of the fleet. The walnut, pear, and cherry so used were live, sound trees; the

former being of the diameter of about 15 inches, and the pear and cherry each of the diameter of from 10 to 12 inches. These trees, and particularly the walnut, had been used for tying fleets for a number of years by the defendants and their predecessors in business. According to the clear weight of the evidence, all the lines so put out on Tuesday, except the one stern line, ran, with respect to the river, at an angle of about 45 deg., and thus operated as head-lines to hold the fleet up against the current, while tending at the same time, also, to breast the fleet into shore. Late in the afternoon (in consequence, it would seem, of a suggestion made by James Neel, one of the libelants) the defendants borrowed from the railroad company two two-inch lines, which they tied together, so as to give sufficient length, and the line was made fast to a cherry tree near the railroad, and the other end fastened to the upper part of the fleet as a breast-line, and a twister was put in the line, and used to draw the fleet in towards the shore.

Besides the suddenness of the rise, the flood was extraordinary in other respects. The water reached a height above that of any former flood of which there is any record or knowledge. The force of the current, too, was unusual; attaining on Tuesday, the witnesses declare, a velocity of from eight to ten miles an hour. The drift, also, was remarkable, both in quantity and composition. Besides the more usual things, the witnesses mention flats, coal-boats, barges, rafts, coal-tipples, bridges, out-buildings, and "large trees taken out by the roots" as being swept down stream. During Tuesday a great quantity of drift-wood, such as stumps, logs, etc., accumulated above the defendants' four abutments, and by the afternoon it had become a solid mass, piled up against the abutments. At 6 o'clock on Tuesday evening the water was over the tops of these abutments, and it had risen probably as much as four or five feet more by 10 or 11 o'clock that night, when the catastrophe under investigation occurred. It was then very dark, and those nearest could not see what took place. Only one of the witnesses claims to have been able to distinguish objects, and he states that he saw one of the defendants' barges strike the libelants' fleet. Several witnesses, who were favorably situated for hearing, testify that they first heard, apparently at the head of the defendants' fleet, a great crash,—“like two heavy bodies coming together,” one describes it,—which was immediately followed by the snapping of lines; the difference between the sound of the crash and that of the breaking of the lines which ensued being quite distinguishable. Capt. Wilson Layman, a witness for the libelant, who was on board the steamer *Stella*, which was tied to the outside of the libelants' fleet, the head of which fleet was 200 feet below the foot of defendants' fleet, states that he heard “the crash above,” and someone hallooing, “Here she goes!” and that about the same time he heard “lines snapping and cracking up about the mill;” and that very shortly afterwards, not more than a minute or two, he heard a crash into the libelants' fleet. He says he thought it was the defendants' fleet that struck the libelants' fleet; but he adds: “I could not say, it was so dark.” Whatever may have been the immediate cause of the disaster

which befell the libelants, it is certain that the two fleets were swept away at nearly the same time; the defendants' fleet moving first, and the libelants' fleet moving very soon afterwards.

The rise continued during the night; the flood not reaching its extreme height until the next morning. As indicating how "the waters prevailed" then, mention may here be made of the fact, stated by Mr. Neel, that the flood stood ten feet up on the trunks of the two Yohe pear trees, of which we shall soon have occasion to speak. After daylight it was discovered that the mass of drift which had been above the abutments was gone, and it also appeared that the walnut tree and pear tree and the cherry on the river bank to which lines were tied had been pulled out by the roots, and carried off bodily. The cherry up at the railroad was standing; the line attached to it having parted.

Now, the defendants maintain that the crash first heard by the witnesses was occasioned by the great mass of drift coming over the tops of the abutments, and striking the head of their fleet; and that this mass, sweeping onward, was the immediate cause of a common disaster to the two fleets. Certainly, there are circumstances among those heretofore narrated which well comport with the theory that the defendants' fleet was thus broken up and turned loose; and if, indeed, that body of drift-wood, rising with the water, came over the abutments, and was driven against the head of the defendants' fleet, it is very difficult to conceive how the loss here in question could have been averted by any precautionary measures open to the defendants. But the libelants, denying the soundness of the above hypothesis, insist that the loss they suffered was due to the culpability of the defendants in at least two particulars. It is shown that two large pear trees stood in the lot of "Yohe Brothers," a short distance above the walnut, and a little further in from the river than it stood, which trees for a long time had been used in high floods for tying fleets which lay at the defendants' landing; and it is asserted that the failure to use those pear trees on this occasion was a serious and inexcusable fault. Again, it is alleged that the defendants' fleet was not properly breasted into the shore, but was unnecessarily and negligently left exposed to the force of the current. To substantiate these charges, the libelants examined a number of witnesses. Such of them as are experts express the opinion that the defendants should have fastened head-lines to the Yohe pear trees; and they further say that the lines to the abutments should have been loosened, in order that the fleet might have swung or been drawn into the shore as the river rose; while at least one of these witnesses states that it would have been still better had the lines to the abutments been thrown off altogether. On the other hand, the defendants have shown that the Yohe pear trees had become rotten inside, and that their tap-roots had rotted away,—facts tending to the conclusion that those trees were no longer entirely safe for tying purposes; and then the witnesses on the part of the defense testify that in fact the defendants' fleet was properly breasted into the shore, and, indeed, as far in as the piles of timber and the oakum house on the river bank would allow.



After the most patient study of the evidence, I am not convinced that the defendants were guilty of culpable negligence in any particular whatever. If it be conceded that the direct cause of the libelants' loss was the collision charged, still, under the proofs, it was, in my judgment, a case of inevitable accident, within the rule in admiralty. *The Austria*, 14 Fed. Rep. 298. The rule is thus declared by the supreme court, even in respect to a vessel moving under the control and guidance of a master, officers, and crew:

"Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances, such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view,—the safety of life and property." *The Grace Girdler*, 7 Wall. 196, 203.

The witnesses who condemn the defendants speak with the wisdom that comes after the event. But the defendants are to be judged with reference to the extraordinary circumstances in which they found themselves. They were called upon to act in an emergency, and had to face perils unexpected, and increasing to the end. The situation was one of surprises. Certainly, the choice of trees to tie to was a matter for the exercise of mere good judgment, and a mistake here would not justly subject the defendants to a charge of carelessness. *Brown v. French*, 104 Pa. St. 604. Their own property was at stake, and they were moved by the powerful stimulus of self-interest to do whatever was possible to save their fleet. It is not to be doubted that to that end they gave their very best endeavors. The defendants stood in no such particular relation to the libelants as imposed upon them any special obligation; and assuredly they were not bound to exercise more than ordinary prudence, skill, and diligence. *Shear & R. Neg.* § 22. That they conformed, at least, to that standard of duty, I have no hesitation in holding. Let a decree be drawn dismissing the libel, with costs.

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### THE SAGUA v. THE GRACE AND THE RESCUE.<sup>1</sup>

### THE GRACE v. THE SAGUA AND THE BATTLER.

(District Court, E. D. Pennsylvania. May 13, 1890.)

#### 1. COLLISION—TUGS WITH TOWS—LIABILITY OF TUGS.

Where tugs having tows in charge pass, and allow sufficient room, if their tows follow them, to pass safely, they cannot be charged with fault if the tows, through bad steering, collide, although they could have allowed more room.

#### 2. SAME—LIABILITY OF TOWS.

When a tow fails to follow her tug, and as a result a collision takes place, she must respond in damages.

<sup>1</sup>Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

Libel for Collision by the brig *Sagua* against the schooner *Grace* and tug *Rescue*; also by schooner *Grace* against brig *Sagua* and tug *Battler*.

*Richard C. McMurtrie*, for the *Sagua*.

*Curtis Tilton* and *Henry R. Edmunds*, for the *Grace*.

*Alfred Driver* and *J. Warren Coulston*, for the *Rescue*.

*John F. Lewis*, for the *Battler*.

BUTLER, J. As the *Sagua*, in charge of the *Battler*, was passing up the river Delaware to Philadelphia on December 22, 1887, near 9 o'clock in the evening, she encountered the *Grace* passing down, in charge of the *Rescue*, opposite Billingsport. The *Sagua* and *Battler* were well over towards the eastern side of the channel, and the *Grace* and *Rescue* were slightly further west. The night was clear with bright moon. The *Sagua* is 127 feet long, of 366 tons burden, 9½ feet draught, was in ballast, and towed by a hawser 60 to 70 fathoms long. The *Grace* is 145 feet long, of 516 tons burden, 15 feet draught, was loaded with iron, towed by a hawser 50 to 60 fathoms long. At a distance of half a mile, and probably more, the *Battler* signaled the approaching vessels to port, and immediately ported herself. The *Rescue* answered promptly, and ported also. The latter passed the *Battler* and *Sagua* at a distance of 70 to 90 feet. The *Grace*, instead of following her tug, turned eastward after passing the *Battler*, and ran into the *Sagua*, striking the port side with her head at an angle near 45 deg., forcing her aground, and inflicting much injury. The *Sagua* libeled the *Grace* and *Rescue*, and was in turn, with the *Battler*, libeled by the *Grace*. Subsequently the *Grace* brought the *Battler* in to answer the *Sagua*'s claim also. It is thus seen that the several vessels are charged with fault. A large amount of testimony has been taken, some part of which is irrelevant, some part improbable and incredible, and much that is contradictory and irreconcilable. To analyze and discuss it would be a waste of time; and I will do little more, therefore, than state conclusions.

As respects the *Sagua*, I find nothing to justify the charge against her. She was in proper trim, had her lights burning, and followed her tug, bearing eastward. She may, however, be responsible for the conduct of her tug, possibly, if the latter was in fault.

Was the *Battler* in fault? I find no reliable evidence that she was. Her course, and position in the channel, were proper. She was, I believe, well over to the eastern side. At a safe distance she signaled the approaching vessels to port, and, receiving a favorable answer, ported,—bearing as much eastward as was necessary and safe. The circumstances did not require her to stop, (she could not safely do so with the *Sagua* in her rear,) or take other precautions against danger. No danger was apparent until later, when no precautions were available.

Was the *Rescue* in fault? She answered and ported promptly when signaled, and passed the *Battler* and *Sagua* at a safe distance. There is difference of opinion respecting the distance. The witnesses capable of forming the most reliable judgment are those from the *Battler*, the

Sagua, and Rescue. Those from aboard the Grace could know little about it. Their situation was not favorable to judging. If the Grace had followed, no collision would have occurred. She might have passed a little nearer, because of the situation of her hawser, but the difference would have been unimportant. The distance would have been sufficient to avoid danger.

It is entirely clear, therefore, that the collision resulted from the Grace's sheer eastward, and from this alone. But for it there would have been no collision. I see no room whatever for controversy on this subject. The Grace's answer virtually admits it, and the testimony leaves no room for doubt. Instead of sheering to starboard when she received the signal, and following her tug, she held her course a little while, and then turned in the opposite direction, obliquely across the channel, and ran into the Sagua, striking her at an angle of nearly 45 deg. She asserts in excuse that her sheer was unavoidable; that it resulted from the situation in which she was placed, without fault of her own. If this is true, she is not responsible. In such case her tug is. Is she (the Grace) responsible,—was her sheer unavoidable? The case turns on the answer to this question. The burden is on her to prove that it was unavoidable. Presumably the rudder would control her course, and, in the absence of proof to the contrary, her sheer must be attributed to a starboard wheel. And besides, setting up the inability to control her course, as a defense, she must prove its existence. The alleged cause of this inability is the passage of the Battler near her track, and the commotion produced by the latter's screw. By this means, it is asserted, she lost control of her movements, and was forced over into the Battler's wake; and thus, without fault of her own, brought into collision with the Sagua. If this is true, I repeat, she is blameless, and the consequences must rest on her tug for running so near. There was plenty of water westward, and the tug should have kept further away, if such consequences were to be apprehended. The tug must be held to knowledge of the danger, (if it existed,) and was bound to avoid it by keeping further off.

Has the Grace proved her excusatory allegation? Many witnesses were examined respecting it, and their testimony is irreconcilable. A statement and discussion of this testimony is unnecessary. It is sufficient to say that the excuse is not proved. Indeed, I think the circumstances clearly disprove it. It is incredible that the commotion produced by the Battler, a small vessel, light and high in the water, could have had such an effect on one of the Grace's size, especially against the influence of both her hawser and rudder. It would have been quite as likely to affect the Battler, indeed much more so; because of her smaller size and draught; and it is quite as likely that a similar effect would have been produced on the Sagua by the Rescue's passage of her; and yet neither of these vessels were disturbed. Supposing the water to have forced the Grace over as alleged, it seems physically impossible that she should have been carried into the position assumed. The Battler had passed her some distance before she reached the Sagua, and as her

stern, with the rudder turned to starboard, would respond to the current much more readily than her head, she would have straightened up in the Battler's wake and met the Sagua head on. She could not have struck her in the side at an angle of 40 deg. The Sagua was following in the Battler's wake. It is not necessary to pursue the subject further. The Grace's excuse for her sheer cannot be accepted. In my judgment, not only is the weight of the direct testimony against her, but the inferences from undisputed facts, disprove her allegation. I have not overlooked the fact that her wheelman and another of her crew, swear that the wheel was to port. I do not, however, place any faith in this testimony. It was their duty to so place the wheel, and if they failed I would not expect them to admit it. Such men generally feel an obligation to stand by their vessel when testifying, as well as under other circumstances, and where their interests are involved little reliance can be placed upon what they say. I believe these men were slow to act, and that no order was executed which produced visible change, until nearly abreast of the Battler; that when it was executed, (or attempted,) and the wheel changed, it was turned the wrong way. By no other hypothesis can her course be accounted for. It cannot justly be urged that this mistake resulted from confusion arising from peril and fright, at the time when the change should have been made.

On first blush there is something impressive in the suggestion that the tugs should not have brought their tows so near together as to render a collision possible; that with plenty of water westward the Rescue should have passed at greater distance. But it must be seen, I think, on reflection, not to be entitled to any weight. Had the collision not occurred, no one would have considered the proximity unusual. The distance was sufficient for safety. A tug is not required to sheer so far off her course as to guard against possibility of danger from negligent management of her tow. The latter is expected to follow the former, and, if there is room to allow it to pass with safety while following, by the exercise of ordinary care, this is sufficient. It is idle to speculate about the distance at which the vessels would have passed if the Grace had followed the Rescue. As before said, it is entirely clear that the disaster occurred solely because she did not. Her efforts to excuse herself by attributing faults to others, are natural; but, when it is found that her own disregard of duty in turning eastward, fully accounts for the collision, the case is at an end.

The Sagua is entitled to a decree against the Grace for the damages inflicted. The libels against the Rescue, the Battler, and the Sagua must be dismissed. A decree may be prepared accordingly.

## PURCELL v. BRITISH LAND &amp; MORTGAGE Co., Limited.

(Circuit Court, D. Kansas. May 16, 1890.)

## 1. REMOVAL OF CAUSES—CITIZENSHIP—FOREIGN CORPORATION DEFENDANT.

A corporation organized under the laws of a foreign country, and having its chief office there, does not become a resident of a state of the United States by doing business and having an office therein, so as to defeat its right to remove a case against it from the state to the federal court, under the act of 1888, (25 St. U. S. 434.) § 2, providing that an action brought in a state court may be removed to the circuit court of the United States "by the defendant or defendants therein, being non-residents of that state."

## 2. SAME—WAIVER.

The court having jurisdiction of the subject-matter and the parties, the right of a defendant to object to being sued in a district of which he is not an inhabitant is personal to himself, and he may insist upon or waive that right as he chooses.

## Motion to Remand to State Court.

*John E. Hessin, W. P. Douthitt, and Rankin Mason, for plaintiff.*  
*Johnson, Martin & Keeler and T. S. Brown, for defendant.*

FOSTER, J. This case was removed to this court from the district court of Riley county, on the application of the defendant, on the ground that it is a foreign corporation and non-resident of the state; and the plaintiff, who is a citizen of the state of Kansas, now moves for an order remanding the same to the state court. The ground on which the motion is made is that the defendant is a resident of this state, and, therefore, not entitled to remove the cause. The more formal manner of proceeding under a plea in abatement to the jurisdiction of the court is waived, and the matters submitted on motion and affidavits. The facts as to the organization and business of the defendant company are briefly these: It is a corporation organized under the laws of Great Britain and Ireland, with its head-quarters or chief office in London. It is now engaged in loaning money on real and personal property in Kansas, with its place of business and office at Manhattan, and under charge of Stewart J. Hogg, a subject of Great Britain. It has no other place of business in this country. The first section of the act of 1888 (25 St. U. S. 434) confers jurisdiction on this court, as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, \* \* \* in which there shall be \* \* \* a controversy between citizens of a state and foreign states, citizens, or subjects. \* \* \* And no civil suit shall be brought before either of said courts [circuit or district] against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

In section 2 the second clause of the removal act reads as follows:

"Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section,  
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and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state."

Under this provision the right of removal from the state court has two essential limitations: *First*, it must be a suit of which the circuit courts are given jurisdiction by the first section; *second*, the right of removal is limited to the defendant who is a non-resident of the state. This is an action of which the circuit courts are given jurisdiction, as it is a controversy between a citizen of Kansas and a citizen or subject of a foreign state. It has been judicially determined that for the purposes of jurisdiction a foreign corporation is a subject of the state under which it has its corporate existence. *Railroad Co. v. Letson*, 2 How. 497; *Terry v. Insurance Co.*, 3 Dill. 408. This being a suit between a citizen and an alien, and not between citizens of different states, the plaintiff insists, under the act of 1888, that it could not have been brought originally in this court unless the defendant is an inhabitant; in other words, that this court could have no original jurisdiction of this case unless the defendant is an inhabitant of this district; and, if it is an inhabitant, it cannot be a non-resident, and hence is not entitled to remove the case. This argument would be quite conclusive if the inhibition against bringing suit in any other district was jurisdictional; but it does not appear to be so, although in the early case of *Yuba Co. v. Mining Co.*, 32 Fed. Rep. 183, the court seems to favor that view. The clause giving jurisdiction precedes the clause fixing the *situs* of the suit, and is general in its terms, and irrespective of the locality where the suit shall be brought, and the removal clause says, "any other suit \* \* \* of which the circuit courts of the United States are given jurisdiction by the preceding section;" not the circuit court of a particular district. The court having jurisdiction of the subject-matter and the parties, the right to object to being sued in any other district is personal to the defendant, and he may object or waive it as he chooses. *Zambrino v. Railroad Co.*, 38 Fed. Rep. 450; *Cooley v. McArthur*, 35 Fed. Rep. 372; *Meyer v. Herrera*, 41 Fed. Rep. 65; *Ex parte Schollenberger*, 96 U. S. 369. The matter of residence or inhabitancy is largely a matter of intention. A person may live but a day in a certain locality, and be an inhabitant or resident; while he might live there many days, and become neither. The intentions of parties are not always apparent to the world, but the party himself may concede inhabitancy by simply being found in the district.

The question, then, to be determined on this motion is whether the defendant is a resident or a non-resident of this state, within the meaning of the removal act. The use of the word "non-resident" in the act of congress is somewhat perplexing. If it means non-citizenship of the state, the question here involved has been repeatedly adjudicated, for a corporation for judicial purposes is conclusively presumed to be a citizen of the state or country under the laws of which it is created. *Railroad Co. v. Koontz*, 104 U. S. 12. In this case Mr. Chief Justice WAITE, speaking for the court, uses the following language:

"A corporation, therefore, created by and organized under the laws of a particular state, and having its principal office there, is, under the constitution and laws, for the purpose of suing and being sued, a citizen of that state, possessing all the rights and having all the powers its charter confers. It cannot migrate nor change its residence without the consent, express or implied, of its state, but it may transact business wherever its charter allows, unless prohibited by local laws. Such has been for a long time the settled doctrine of this court. 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.'"

*Steam-Ship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. Rep. 58; *Railroad Co. v. Letson*, *supra*; *Railroad Co. v. Harris*, 12 Wall. 65; *Terry v. Insurance Co.*, *supra*. The cases on this subject are legion, but it is too familiar to require further citations. It is very doubtful whether the term "non-resident" is used in the removal act in any different sense than that of "non-citizenship." In that sense it would be in harmony with antecedent legislation on this subject. In that sense the single compound word "non-resident" would include the right of removal to defendants, whether citizens of another state or citizens or subjects of a foreign state. It has been repeatedly decided that the words "citizen" and "resident" are not synonymous terms. *Parker v. Overman*, 18 How. 137. So, a citizen of a state may be a non-resident of the state; but no one would seriously contend that a non-resident citizen of a state, when sued in the courts of his own state by a citizen of another state for over \$2,000, could remove the case to the United States court on the ground of diverse citizenship. And yet a literal and restricted following of the term "non-resident" must lead to such a result; for, certainly, the case is one of which the circuit courts of the United States are given jurisdiction, and the defendant is a non-resident of the state. The use of the terms "inhabitant" in the first, and "non-resident" in the second, section of the act of 1888, are exceedingly perplexing, as applied to foreign corporations; and the more I study on it the more I am convinced that there is but one rational solution of this question, and that is to return to the old, fixed landmarks, and apply the rule enunciated by the authorities before cited. A corporation is a citizen or subject of the state under whose laws it is created, and it does not become a resident of another state by doing business therein, so as to deprive it of the right to remove its case from the state to the federal court under the act of 1888. *Fales v. Railway Co.*, 32 Fed. Rep. 675.

I reach this conclusion after full consideration of the *Case of Zambrino*, *supra*. In that case the railway company was a citizen of Texas, with its principal office in the eastern district of that state, and it was sued in the western district, where it also operated its road. The only question was whether it was an inhabitant of the western district so as to make it liable to be sued in that district. Judge MAXEY held it was; and again, in *Scott v. Cattle Co.*, 41 Fed. Rep. 225, the same court applied the rule to a foreign corporation doing business in Texas. In *Riddle v. Railroad Co.*, 39 Fed. Rep. 290, the circuit court of Pennsylvania followed the rule laid down in the *Zambrino Case*. With the question involved in those cases, I am not now dealing. It is not improbable that a citizen

of one state or country, whether an individual or a corporation, may at the same time be an inhabitant of another state or country, and, as such, subject to be sued in the federal courts. What I do hold in this case is simply this: that it was not the purpose of the removal act to make the question of residency, if the defendant corporation could acquire a residence here, override that of citizenship. If so, it is inconsistent with all former legislation and the constitution itself, and leads to the absurdity of allowing a citizen temporarily non-resident, and sued in the courts of his own state by a citizen of another state, to remove the case to the federal court, which he could not do if residing in his own state. *Mills v. Newell*, 41 Fed. Rep. 529. The motion to remand this case to the state court must be overruled.

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NEW YORK & N. E. R. Co. v. WOODRUFF *et al.*, Commissioners.

(Circuit Court, D. Connecticut. May 22, 1890.)

CIRCUIT COURTS—JURISDICTION—QUESTION PENDING IN SUPREME COURT.

After *mandamus* proceedings had been commenced in a state court, defendant filed a petition for removal to the circuit court of the United States on the ground that it was a civil suit arising under the constitution of the United States. The petition was denied, and the judgment of the lower court was affirmed by the highest state court. A writ of error was allowed by the supreme court of the United States. After the decision of the state court, a bill was filed in the circuit court of the United States to enjoin the enforcement of the peremptory *mandamus* issued by the state court. *Held*, upon demurrer to the bill, that, since the same questions were before the supreme court as were raised by the bill in the circuit court, a decision by the latter was unnecessary, and the demurrer was overruled *pro forma*.

In Equity. Demurrer to bill.

Edward D. Robbins and S. E. Baldwin, for plaintiff.

Wm. F. Henney and H. C. Robinson, for defendants.

SHIPMAN, J. This is a demurrer to a bill in equity of the New York & New England Railroad Company, a Connecticut corporation, against the members of the commission appointed by the general assembly of said state in the matter of the grade crossing at Asylum street, in the city of Hartford. The bill prays for an injunction to prevent the defendants from taking measures to enforce a peremptory *mandamus* against said company, for which it was anticipated that application would be made to the superior court for the county of Hartford, and which has since been granted by said court. After the application for *mandamus* had been brought in said state court against the railroad company, and within the time prescribed by the statute of March 3, 1887, said company filed in said court its petition and bond for a removal of said cause to this court, upon the ground that it was a suit at law of a civil nature, arising under the constitution of the United States. No question of fact arising upon said petition, but the questions being exclusively of law, which were apparent upon the record, the superior



court proceeded to examine and determine the company's right to a removal of the case, decided that such right did not exist, and, upon further hearing, that a peremptory *mandamus* should issue. Upon a writ of error to the supreme court of errors that court held that there was no error in the decision of the lower court. 20 Atl. Rep. 17. True and attested copies of the petition for removal and accompanying bond, and of the record prior to the filing of the petition, had been filed at the proper time in this court. No action has been taken thereon. After the decision of the appellate court, this bill for an injunction was brought to this court. It further appears from the papers in the motion for a preliminary injunction that a writ of error from the supreme court of the United States has been allowed, and lodged with the clerk of the supreme court of errors.

The same questions which are raised by this demurrer are before the supreme court, and must be determined by that court upon the writ of error. They are the right to remove the *mandamus* proceedings to the federal court, and the constitutionality of the state statute. A decision of these questions by this court is simply nugatory. If the writ of error is prosecuted, they must be heard and decided by the highest tribunal; and an opinion by this court will be, in any event, a useless and unnecessary contribution to the legal literature upon the subject, and might cause useless expense to the parties. The proper course is to overrule the demurrer *pro forma*.

A motion for a preliminary injunction against the members of the commission has also been heard. It appears that, since the motion was filed, the superior court has issued a peremptory *mandamus*, and that a writ of error to the supreme court of errors has been allowed by one of the justices of the supreme court of the United States, who indorses upon the proceedings that the writ of error is a *supersedeas*, and that the bond is to operate as a stay of execution. If any proceedings are taken in the state court against the railroad company, they must be in the nature of an attachment for contempt, which would issue from the superior court. I am not advised whether the justice who allowed the writ of error intended to decide that it was a *supersedeas* of proceedings in the superior court, as well as in the supreme court of errors; but I do not think that there is such present danger of injury to the complainant as to call upon this court for a preliminary injunction, and it would be, in my opinion, improper for me to assume that there is a necessity for interference on my part. The motion is therefore denied.

GIANT-POWDER Co. v. OREGON PAC. RY. Co. *et al.*

(Circuit Court, D. Oregon. June 16, 1890.)

## 1. MECHANICS' LIENS—PROPERTY SUBJECT TO—RAILWAYS.

The general phrase in the act of 1885, "any other structure," following, as it does, a specific enumeration of works declared to be subject to a lien for labor and materials furnished for their construction, such as a "building," "ditch," "flume," and "tunnel," held to include a railway.

## 2. SAME—PROPORTION OF RAILROAD SUBJECT TO LIEN.

A person entitled to a lien on a railway for materials furnished for its construction may, in his notice of lien, confine his claim to that portion or section of the road in the construction of which his material was used.

## 3. SAME—MATERIALS—GIANT-POWDER.

Giant-powder furnished by the manufacturer to a contractor for the construction of a railway, and used by the latter in the progress of such work, is "material," within the purview of the lien law of 1885, for the value of which, such manufacturer is entitled to a lien on the railway, or such portion thereof as the powder was used in the construction of.

(Syllabus by the Court.)

In Equity.

Mr. George H. Williams, for plaintiff.

Mr. L. Flinn, for defendants.

DEADY, J. This suit is brought by the Giant-Powder Company, a corporation of California, against the Oregon Pacific Railway Company and the Wallamet Valley & Coast Railway Company, corporations of Oregon, and James Searle and E. B. Deane, doing business under the firm name of Searle & Deane, citizens of Oregon, to enforce a lien for material on a certain section of the Wallamet Valley & Coast Railway.

It is alleged in the bill that the defendant, the Wallamet Valley & Coast Railway Company, is the owner of said railway, which extends from Yaquina bay, Or., eastward through Corvallis, into the Cascade mountains. That in 1888 and 1889 said company contracted with the defendant the Oregon Pacific Railway Company to construct said road eastward from Albany, Or. That on August 25, 1888, the Oregon Pacific Railway Company contracted with the defendants Searle & Deane to construct the portion of said road commencing at station numbered 2659, plus 78, in Marion county, and extending from there eastward for 15 miles along the established route of the same; in which contract it was provided that Searle & Deane should furnish all the material and labor for such construction. That Searle & Deane commenced work on the road on September 1, 1888, and completed said section thereof, according to the contract, on January 15, 1889; and there remained due them and unpaid thereon the sum of \$111,393.62.

That the plaintiff, between September 26 and December 31, 1888, furnished Searle & Deane "electrical material, powder, fuse, and caps, necessary and proper materials to use in the prosecution of said work;" and the said defendants (Searle & Deane) agreed to pay the plaintiff the sum of \$7,148.82 therefor; that said material was used by Searle &

Deane in the construction of said road; and the value thereof, namely, \$7,148.32, is now due from them to the plaintiff.

That on January 22, 1889, the plaintiff filed with the clerk of Marion county its claim for such material, under the lien law of Oregon, for the purpose of establishing a lien upon said section of said road, and the land for 30 feet on either side of the center line thereof, which claim was duly recorded; and that the plaintiff has obtained a judgment against Searle & Deane for said money, but nothing has been or can be made on the same.

The prayer of the bill is that it be adjudged that the plaintiff has a lien on said section of the road for the amount due it for said material and costs of suit, including the cost of preparing such lien and a reasonable attorney fee, and that the property may be sold to satisfy the same.

The defendants the railway companies demur to the bill.

On the argument the following points were made in support of the demurrer:

(1) At and prior to the filing of the alleged lien, the law of the state did not give a lien on railways to material-men.

(2) A lien cannot be had on a part or section of a railway.

(3) The material in question did not enter into the construction of the road, but was merely used by the contractors as a part of their plant or means in performing their contract.

Section 1 of the act of February 11, 1885, (Comp. 1887, § 3669,) provides that every person "furnishing material of any kind to be used in the construction \* \* \* of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or superstructure, shall have a lien upon the same for the \* \* \* materials furnished \* \* \* at the instance of the owner of the building or other improvement, or his agent; and every contractor \* \* \* shall be held to be the agent of the owner for the purposes of this act."

Section 5 of the act (Id. § 3673) provides that any material-man desiring to claim the benefit of the act must, within a certain time, "file with the county clerk of the county in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand," with the name of the owner of the property, and the person "to whom he furnished the materials; and also a description of the property to be charged with said lien, sufficient for identification."

- Section 12 of the act (Id. § 3681) declares:

"The words 'building or other improvement,' wherever the same are used in this act, shall be held to include and apply to any wharf, bridge, ditch, flume, tunnel, fence, machinery, aqueduct to create hydraulic power, or for mining or other purposes; and all other structures and superstructures, whenever the same can be made applicable thereto."

By section 1 of the act of February 25, 1889, (Sess. Laws, 75,) any subcontractor, material-man, or laborer who shall "furnish to any contractor, to any railroad corporation, any fuel, ties, materials, supplies, or other article or thing, or who shall do or perform any work or labor

for such contractor, in conformity with any terms of any contract, express or implied, which such contractor may have made with any such railroad corporation, shall have a lien upon all property, real, personal, and mixed, of said railroad corporation."

This is a most extraordinary act. The lien of the material-man or laborer is declared to exist against all the property of the corporation, including "personal," without limit as to situation or place of existence, on the furnishing of materials or the performance of labor, without any record being made of the same, or notice to any one of the claim, except in the case of a laborer, when notice is required to be given to the corporation that he will hold its property for his "pay."

It is contended by counsel for the demurrer that the passage of the act of 1889 amounts to a legislative declaration that the act of 1885 did not include or apply to railways.

The subsequent act might have been passed out of abundance of caution, and not upon any well-grounded or serious impression that the former was wanting or insufficient in this respect. Be this as it may, the opinion of the legislative assembly of 1889 as to the scope and purpose of the act of 1885 is of very little moment, and can have no weight in the construction of the latter one, concerning rights and transactions which were vested or transpired before its existence.

The intention of the legislature of 1889 in passing the act of that year is a proper subject of judicial inquiry and determination; but its opinion of the scope and effect of the act of 1885, if it had any, is not material in this case. Considering the peculiar provisions of the act of 1889, the most obvious reason for its passage is that the legislature thereby intended to take the subject of claims against railway corporations for materials and labor furnished, out of the operation of the general lien law of 1885, and put it under this special act, which does not require any notice of the claim to be filed with any clerk or other officer, and provides a special proceeding, in which all such claims must be enforced as in one suit.

It must be admitted that, if the legislature intended to include railways in the act of 1885, it is not apparent why so important a subject was not mentioned in the long list of those expressly named.

Still, the language of the act is certainly broad and comprehensive enough to include a railway. It is certainly a "structure," if not a "superstructure." A lien can as conveniently be imposed upon it as upon a "ditch," "flume," or "tunnel." These instances of lienable property are expressly mentioned in the statute; and the scope and operation of this general term, "structure," immediately following this specific enumeration, must be ascertained by reference to the latter. The doctrine of *nosctur a sociis* applies; and the significance of the word "structure," in this statute, is indicated by the company it is found in,— "ditch," "flume," and "tunnel." If the language of the act was, "building or other structure" only, then it might not be construed as including a railway. But the words, a "ditch or any other structure," cannot, consistently with this established rule of construction, be held to exclude a rail-

way. A railway is literally and technically a "structure." It consists of the bed or foundation, which may be of earth, stone, or trestle-work, on which are laid the ties and rails. These, taken together, constitute a "structure," in the full sense of the word,—a something joined together, built, constructed. Freund, Lat. Lex. "*Structio*," "*Struo*," Worcester. Dict. "Structure."

In 2 Jones on Liens, § 1618, it is said that statutes giving a lien for labor and materials furnished for the construction of "buildings" are not usually regarded as being applicable to railways. But the author says, (section 1624,) where the terms "structure," "erection," "improvement" are used in the statute, it is possible to establish a lien for anything that can be attached to the realty; and cites *Neilson v. Railroad Co.*, 44 Iowa, 71, where it appears to have been held, under such a statute, that a lien existed against a railway for ties used in its construction.

In *Forbes v. Electric Co.*, 23 Pac. Rep. 670, it was held by the supreme court of this state that poles set in the ground, and connected together by wire, in the usual way for the transmission of electricity, between Portland and Oregon City, constituted a "structure," within the meaning of that term as used in section 3669, (Comp. 1887;) and therefore a lien attached thereto for work done thereon at the instance of a contractor. In delivering the opinion of the court, Mr. Justice STRAHAN said:

"Do these poles planted in the ground, connected together with wires and insulators, constitute a structure, within the true intent and meaning of the statute? In answering this question, but little aid can be had from the decisions of other states, for the reason that no general principle of law is involved, and such decisions have generally turned upon the special or peculiar phraseology of the particular statute."

A railway is certainly a "structure," within the authority of this decision. The railway and the wireway, notwithstanding the different uses to which they are subject, are both structures, upon which a lien may be had as security for the labor and materials that entered into their composition.

The case of *Buncombe Co. Com'rs v. Tommey*, 115 U. S. 122, 5 Sup. Ct. Rep. 626, 1186, cited on behalf of the demurrer, is not in point. It turned on the construction of a statute of North Carolina that gave a lien on a "building, \* \* \* lot, farm, or vessel, or any kind of property not therein enumerated," for "the payment of all debts contracted for work done on the same, or material furnished."

Of the specific terms used in this statute, only two—"building" and "vessel"—include structures; and they do not, in the nature of things, suggest or show that the following general phrase—"any kind of property"—was intended to include such a structure as a railway. On the contrary, it is manifest that the general term "property" has reference to, and is to be interpreted, as a mere expansion of the specific kinds of "property" or land just mentioned,— "lot" and "farm."

The objection that a lien cannot be had on a part or section of a railway for labor or material furnished for its construction does not strike me favorably.

In 2 Jones on Liens, § 1619, decisions to that effect are referred to, but they appear to have been made on the language of a statute giving a lien on "the road" as a whole; and also on the ground of public policy, which it is said will not permit a sale of a portion of a road on execution. It is easy to say a thing is against public policy, but that does not make it so. Public policy is manifested by public acts, legislative and judicial, and not private opinion, however eminent. I have no knowledge of any such public policy prevailing in this state. A railway is nothing but private property devoted to public use, the same as a warehouse, and is so far, and no further, the subject of public policy. The owner, be he a natural person or a private corporation, can disuse or dispose of it, in whole or in part, at his or its pleasure.

True, it was held in *Brooks v. Railway Co.*, 101 U. S. 443, that a person who furnished labor and materials used in the construction of a certain portion of a railway had a lien on the whole of it. This ruling was made in favor of the lienor, and it does not follow from anything decided in that case that he might not have limited his lien to the portion on which he bestowed his labor and materials, and enforced it accordingly.

But there is a public policy of this state, as shown by its legislation, that should be considered in this connection, which is that persons who furnish labor or materials to be used in the construction of railways shall have a lien thereon as a security for the value of such labor and materials. To promote this policy, and to produce the practical results intended by the legislature, the statute giving this lien should be construed so far as in reason and right it may, and all mere doubts as to the extent and manner of its application should be so resolved.

The statute (Comp. 1887, § 3673) only requires the notice of the lien to be filed with the clerk of one county,—that in which the "building or other improvement, (structure,) or some part thereof, shall be situated." That was done in this case. If the effect of the transaction is to give the plaintiff a lien on the whole road, it may sell the whole road. But my own judgment is that even if the plaintiff might claim a lien on the whole road, it may, nevertheless, limit its lien by its notice to the part or section of the road for the construction of which it furnished material.

The notice also contains the name of the owner of the road, and the persons to whom the plaintiff furnished the material, as provided in said section, and also a description of the property "to be charged with said lien, sufficient for identification," in these words:

"The railroad known as the 'Wallamet Valley and Coast Railroad,' being built by the Oregon Pacific Railroad Company, and being that portion of said railroad commencing at station No. 2,659, plus 73, on the line of said road in Marion county, state of Oregon, and extending from there in an easterly direction a distance of fifteen miles along the surveyed and located route of said road in said county and state, as shown by the maps \* \* \* of the permanently located line of said railroad in the office of said company."

If there is no Wallamet Valley & Coast Railway in the state of Oregon which passes through Marion county, then this alleged lien does not ex-

ist; but, if there is,—and I suppose of this fact there is no doubt, at least on this demurrer,—then the description given of it, and the section on which the plaintiff claims a lien, sufficiently identified it. A conveyance of a farm, said to be situate in Marion county, Or., belonging to the Oregon Pacific Railway Company, and known as “Blackacre,” would be good, so far as description goes.

Was this material “used” in the construction of this section of this road, within the meaning of this statute?

In *Basshor v. Railway Co.*, 65 Md. 99, 3 Atl. Rep. 285, cited by counsel for the demurrer, it was held, under a statute giving a lien on a bridge for all materials used “in or about” its construction, that a person furnishing a contractor with machinery wherewith to build a bridge could not have such lien.

Admitting the correctness of this decision, as I do, the cases are not, in my judgment, parallel. The machinery and appliances furnished the contractor in that case, although “used” in the construction of the bridge, did not enter into the structure and become a part of it. They were the contractor’s “plant,” and retained their identity and fitness for further use, saving the limited and gradual wear and tear incident to such use.

This powder was not only “used” in the construction of this road, but it was thereby necessarily consumed, and it was so intended. It was furnished to be so used in the construction of this road. Nice questions may arise as to whether material is “used” in the construction of a road as a tool or plant simply, or so used and consumed as to entitle the furnisher to a lien on the result for its value.

The food furnished a contractor for his workmen may be said to be “used” and “consumed” in the construction of the road on which they work; but this is only so in a remote and consequential way or sense. The food does not enter directly into the structure, and is not so used. Mason-work may be done on a road in a dry country or season, when large quantities of water must be hauled many miles for the preparation of the necessary mortar. Upon the completion of the structure and the hardening of the mortar, the water has as thoroughly disappeared as the powder after the blast. Again, lumber may be used in the construction of a building for the purpose of scaffolding. However, it does not thereby literally enter into the composition of the building, nor, so to speak, become a part of it. But, in my judgment, both it and the water have been “used” in the construction of the building and mason-work, within the meaning of the lien law, and the purpose for which it was enacted.

And so I think this powder was “used” in the construction of this section of the road, whereby it was consumed, not gradually and incidentally, as a tool or part of a contractor’s plant, but wholly and at once, in aiding to clear and fit the road-way for the reception of the ties and rails.

The demurrer is overruled.

JONES v. VAN DOREN *et al.*

(Circuit Court, D. Minnesota. June 16, 1890.)

## PRINCIPAL AND AGENT—NOTICE TO AGENT.

In a suit for dower it appeared that complainant's son induced his mother, who was not familiar with business affairs, to sign a quitclaim deed for her dower interest in land to which he was entitled as heir, by misrepresentations as to the nature of the instrument. The son borrowed money, and mortgaged the land without reservation of his mother's interest. The money loaned belonged to defendant, but the note and mortgage were made to her husband, acting as her agent, and were immediately transferred to her. Her husband knew of complainant's interest in the land. *Held*, that complainant was entitled to recover the value of her dower interest from defendant, who was bound by the notice her husband had of such interest.

## In Equity.

*Bigelow, Flandrau & Squires*, for complainant.*J. M. Gilman*, for defendant.

NELSON, J. This is a suit in equity, brought by the complainant, Sarah M. Jones, a citizen of Pennsylvania, against Matilda M. A. Van Doren, a citizen of Indiana, and Samuel J. Jones and Samuel G. Glover, citizens of Illinois. The relief prayed for in the bill is for permission to redeem from a mortgage, should she be entitled to redemption, and that the defendant Mrs. Van Doren might be ordered to reconvey the land still held by her, on the payment of such sums as might appear from an account taken, and also for such other or different relief as the nature of the case might require, and might be agreeable to equity.

The only relief which the complainant is entitled to, in my opinion, is her right of dower in the premises covered by the mortgage foreclosed by Mrs. Van Doren, and I shall confine myself to that view of the case. The bill charged fraud by Samuel J. Jones in procuring a deed to be executed to himself by his mother, the complainant, of her dower interest in the premises covered by the Van Doren mortgage, which descended to her son, Samuel J. Jones, on the death of Robert H. Jones, intestate; and notice of this fraud by Mrs. Van Doren, who took the mortgage through her husband, and foreclosed it by sale of all the land. Mrs. Van Doren is the only defendant answering the bill, and she denies all knowledge of the fraud of Samuel J. Jones, and denies that the dower interest is of any value, and, in fact, puts in issue by her answer the material allegations in the bill of complaint. A replication is filed, and the case is heard upon the testimony taken. The defendant Samuel J. Jones is the only witness introduced by the complainant to sustain the allegations of the bill, and Mrs. Van Doren is the only witness for the defense. There is no effort made to contradict Samuel J. Jones, or impeach his veracity, and full effect must be given to his evidence.

The facts are these: Robert H. Jones died in April, 1863, intestate, and, at the time of his death, was seised in fee of an undivided one-fourth of certain lands in Minnesota. He left surviving him the complainant, his widow, and the defendant Samuel J. Jones, his son and only heir at



law. His widow, the complainant, became entitled to a dower interest in the land, and the defendant Samuel J. Jones was the owner in fee of the same, subject to the dower interest of his mother. With a view of managing the property and protecting her interest in a division, Samuel J. Jones induced his mother to execute a deed to himself of all her interest in the land, without informing her (she being a woman not familiar with business affairs) of the character and nature of the instrument; leading her to suppose, according to his testimony, that the instrument was in the nature of a power of attorney, for the purpose of aiding and facilitating a division of the property. This instrument, which was a release and a quitclaim of all her dower interest in the property left by Robert H. Jones, her husband, was executed and delivered on the 13th day of January, 1866, and filed in the proper county in Minnesota, January 29, 1867. On July 25, 1871, Samuel J. Jones borrowed \$10,000, and executed his note for that sum, and gave as security a mortgage, or trust-deed, upon property involved in this suit, to the defendant Samuel G. Glover, as a trustee. The money loaned belonged to the said Matilda A. Van Doren. W. H. Van Doren, who took the note payable to his own order, and immediately transferred it to the defendant Matilda A., his wife, acted as her agent in making the loan and taking the security; and so informed Samuel J. Jones. W. H. Van Doren was fully informed of the interest of the complainant in the mortgaged premises, and, according to the testimony of Samuel J. Jones, agreed, as the witness expresses it, "that our interests would be protected." Samuel J. Jones borrowed the money for his own purposes, and warranted the title in the mortgage without any exception or reservation of the interest in his mother. In October, 1871, William R. Marshall, one of the owners of an undivided interest in the property, commenced an action against Samuel J. Jones and others for a partition; and, in due course of time, a partition of said property was duly made, and a decree was entered, whereby 110 acres of the said property was set off in severalty to the defendant Samuel J. Jones, as the heir at law of the said Robert H. Jones. In July, or August, 1875, default having been made in the payment of the \$10,000 note given by Jones to Van Doren, suit was commenced to foreclose the trust-deed, and in due course of time judgment was obtained, the property sold, and 100 acres purchased by Matilda A. Van Doren, the mortgagee, and the title finally confirmed in her. After the title had matured, she sold and conveyed 40 acres of the property, for \$10,000, to William R. Marshall, who was an innocent purchaser. About six months before the commencement of this suit, after the death of W. H. Van Doren, Horace B. Jones, a nephew of the complainant, and an attorney at law, went to see Mrs. Van Doren, at Indianapolis, in regard to the interest of the complainant in the property, and whether there was any chance to make any arrangement in regard to it. Mrs. Van Doren refused to recognize complainant's right, claim, or interest in the property, and then, for the first time, Samuel J. Jones acquainted his mother with the state of affairs, and this suit was brought.

## CONCLUSIONS.

The relation of parent and child is one of mutual confidence, and, while no positive fraud is shown, I think this case develops facts which, in law, are regarded constructively fraudulent. The rule is that acts, in certain cases, growing out of some special and confidential relation between the parties, are carefully watched, because they afford the means of taking undue advantage of others; and when an absolute conveyance is obtained for one purpose, and afterwards made use of for another, a court will relieve against it, under the head of fraud. Transactions between parent and child are of this class, and a court of equity will grant relief when a child obtains from a parent, who is wholly unacquainted with business affairs, a conveyance of her estate for a nominal sum. Abused confidence may exist, and the surrounding circumstances may repel the idea that it was intended as a gift. Courts of equity do not sanction, but will interpose, in a transaction between a child and his parent, where great confidence has been reposed. When the least imposition is apparent, a court of equity will extend protection in such case, and administer the relief to which the party is entitled; and, if constructive fraud is a fair inference from the facts proved, the court is authorized to draw such conclusion. The act of Samuel J. Jones in using the property to raise money for his own purposes, and his conduct in keeping his mother in ignorance of the Van Doren mortgage, and of all proceedings relating to the foreclosure, are constructively fraudulent, and as reprehensible as positive fraud. The husband of the defendant Mrs. Van Doren, although he took the mortgage in his own name, and immediately assigned it, acted as her agent in loaning the money, and in managing the transaction with Samuel J. Jones. He knew that the complainant had an interest of some kind in the mortgaged property,—either one-third in fee, or a life-estate. Jones so informed him at the time the mortgage or trust-deed was given, and Mrs. Van Doren is bound by the notice her husband had of the complainant's interest in the mortgaged property. The complainant never lost her dower interest in the land left by her husband; the consideration was entirely inadequate, and the testimony shows there was no intention to part with the interest as a gift, by the conveyance which was given. The defendant through her husband, acting as her agent, had notice of the fact. There was no statutory bar of dower, as the statute of limitations did not commence to run until the complainant discovered, just before this suit was brought, that her interest in the property would not be recognized by Mrs. Van Doren, who purchased most of it at the foreclosure sale. In the partition suit, 110 acres being set off to the heir at law, S. J. Jones, his mother, the complainant, had a dower interest in this tract, after the decree made in that suit. Inasmuch as out of the 110 acres 60 acres only are now held by Mrs. Van Doren, and the remainder was conveyed to innocent purchasers, the value of the dower interest of the complainant must be obtained from this 60 acres. The interest of the complainant is one-

third of the rental value of 100 acres. Ten acres were purchased by Mr. Galusha at the foreclosure sale, and not involved in this suit, and 40 acres were sold to Mr. Marshall for \$10,000. There is no evidence in regard to the rental value of the 60 acres owned by Mrs. Van Doren. Being vacant land, and not under lease, it is questionable whether the dower interest is of any value. The amount of money received by Mrs. Van Doren for the 40 acres sold appears from the testimony; and, according to the Northampton annuity tables, upon the usual interest, at 6 per cent., the value of her dower in that portion of the tract can be easily determined, and a lien fixed upon the 60 acres. I find, therefore, that the complainant is entitled to the value of her dower interest in the part not conveyed, and for damages for having been fraudulently deprived of her interest in the rest.

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BRIGHT *et al.* v. LAND & RIVER IMP. CO. *et al.*

(Circuit Court, W. D. Wisconsin. June 6, 1890.)

**PARTNERSHIP—SURVIVING PARTNER OF FIRM—SALE OF REAL ESTATE.**

Land purchased by a surviving partner at sheriff's sale, under an attachment in a suit by such partner on a debt due the partnership, does not become partnership real estate, which will descend to the heirs of the deceased partner, so as to prevent the surviving partner from converting it into money by a sale.

In Equity.

*Michael S. Bright, (J. C. Sloan, of counsel,)* for complainants.

*F. W. Downer and Pinney & Sanborn,* for defendants.

BUNN, J. This is a suit brought by the complainants, who are citizens of Indiana, as the heirs at law of Michael S. Bright, deceased, seeking to charge an undivided one-half interest in a certain 80 acres of land lying in Douglas county, Wis., in the hands of the defendant the Land & River Improvement Company, with a trust in favor of the said complainants as such heirs at law. The case turns wholly upon questions of equitable cognizance, and the leading facts are as follows: In 1856 one Michael S. Bright, the father of the complainants Michael S. Bright and Sarah B. Bright, and the husband of the complainant Sarah L. Bright, formed a law partnership with the defendant Hiram Hayes, at Superior, Douglas county, Wis., which continued until 1862, when the partnership known as Bright & Hayes was practically dissolved, Bright going to New York, and Hayes going to Washington, and drifting thence into the war of the Rebellion. Hayes returned to Superior after the war, and resumed the practice of law; but there was never any settlement or winding up of the affairs of Bright & Hayes. On August 1, 1858, one Ambrose B. Burbank became indebted to the firm of Bright & Hayes in the sum of \$500, for legal services. In November of

1858 they brought an action against Burbank to recover the amount, and obtained a judgment, which is conceded to have been void for want of jurisdiction; Burbank having become a non-resident of the state, no personal service being had, and it appearing that there was no property of his in the state which might be attached. Nothing further was done by Bright & Hayes to collect this Burbank claim, and it remained in the same condition until August, 1880, when Hiram Hayes, as surviving partner of the firm of Bright & Hayes, brought an action in the circuit court of Douglas county, Wis., to recover the claim, with interest from 1858. In this action, Burbank remaining still non-resident, an attachment was issued, and levied upon the 80 acres of land in question, to secure the debt. Hayes, as such surviving partner, on the 19th July, 1881, recovered a judgment against Burbank for \$1230.90, with \$54.46 costs. Execution was issued, and the premises sold at sheriff's sale September 12, 1881, to Hiram Hayes for \$1,200, and the usual sheriff's certificate of sale issued. Under that certificate the debtor had 12 months in which to redeem, and his creditors 3 months more, making 15 months that elapsed before the sale became absolute. No redemption was had, and on 20th December, 1882, a sheriff's deed issued to Hayes. Hayes bid in the land on account of the debt, it not appearing that there were any other bidders at the sale, he having advanced and paid the costs and disbursements in the two actions mentioned and the costs of sale. Michael S. Bright, the former partner of Hayes, had died many years previous, on December 4, 1868, intestate. Administration of his estate had been granted in Jefferson county, Ind., to Caleb T. Lodge, who it appears was discharged from his trust on February 3, 1874. Administration was also granted in Wisconsin to defendant Hiram Hayes, on April 1, 1872, and on May 5, 1873, an order was made declaring that said administrator be discharged fully and finally from such administration, etc. Hayes has never paid anything to the personal representatives of Michael S. Bright on account of this claim, nor accounted to them for their share of the proceeds, though he avers that he is, and ever has been, ready and willing so to do; nor have they ever demanded an accounting. On the 13th of July, 1885, Hayes, for the consideration of \$2,800, sold and conveyed the land in question, by warranty deed, to the defendant, the Land & River Improvement Company, this being, as appears, the full and fair value of the land at that time, and that being the first opportunity to sell that had presented itself.

The complainants, by reason of these facts, claim that a trust arose in their favor, and attached to the land in the hands of Hayes, to the extent of an undivided one-half interest, when he bid it in at the sheriff's sale, and that he had no right, power, or authority, as surviving partner, to convert the land into money by a sale; that the land, upon the sale to Hayes, became partnership real estate, and that Hayes could not convert it into money in order to reimburse himself for the costs and expenses of the proceeding, and account for one-half of the net proceeds to the personal representatives of his deceased partner; and

that the trust which arose in favor of the heirs of Michael S. Bright followed the land, upon the sale by Hayes to the Land & River Improvement Company, into its hands, and still subsists in favor of the complainants.

There are some other important questions in the case as to the title to the land, but the question I wish to consider is whether this contention of the complainants can be sustained, allowing that the Land & River Improvement Company took title from Hayes by virtue of the deed by Hayes to it of 13th July, 1885. I am of opinion that it cannot. I think that no trust ever attached to the land in favor of the complainants; that it never was, in legal or equitable contemplation, partnership real estate. The claim originally was personal property, a mere chose in action belonging to the firm of Bright & Hayes. It was supposed by the parties, in the life-time of Michael S. Bright, to be worthless and uncollectible. Upon the death of Michael S. Bright, the legal as well as equitable title survived to and was in Hiram Hayes. He had full power and authority, as surviving partner, to go on and wind up the affairs of the partnership, and, among other things, to collect this debt. Nothing was done until 12 years after the decease of Michael S. Bright, Hayes supposing the claim was worthless. Finally Hayes ascertained, as he supposed, that this 80 acres of land stood on the record in Ambrose B. Burbank's name, and began suit and attached the land. In doing so, Hayes entirely ignored two certain deeds executed by Ambrose B. Burbank for this land,—one to Lester W. Markham of 5 acres, and one to Eleazar A. Burbank of 75 acres,—on the ground that those deeds were severally void for want of sufficient definiteness in the description of the land sought to be conveyed. After obtaining judgment, Hayes caused the land to be sold, and bid it in in satisfaction of the debt and costs. It seems to me this bidding in of the land was a necessary incident in the collection of the debt, there evidently being no other bidders at the sale, and therefore no other way or hope of collecting the claim. When did this claim become partnership real estate, and, as such, descend to the heirs at law of Michael S. Bright? Supposing such a thing could take place 12 years after Michael S. Bright's death, it is evident that when Hayes bid in the property to satisfy the debt the land could not have been considered as partnership land, which would descend to the heirs, because Hayes, as surviving partner, held no absolute title to it. He held a certificate of sale which was redeemable in 15 months. Whether it would be redeemed, nobody could say. He must wait and see. If the land had been redeemed, then, certainly, the claim would consist in personal estate, which would go to personal representatives, and not descend to heirs. Or, suppose Hayes, before the time to redeem had expired, having only in view his duty to do his best as surviving partner to collect the debt, had assigned the certificate to a third person for the amount of his bid and interest, could there be any doubt that he might lawfully do that? And, having done it, would there be any doubt that the money received would belong to him as surviving partner, subject to the

right of the personal representatives of the deceased partner to an accounting after the debts of the partnership were paid, and the business wound up? I think not. And it seems equally clear to the court that, the land not having been redeemed, Hayes might lawfully sell it as he did in order to get the debt into money, into a distributable shape, so as to wind up the affairs of the partnership. And how otherwise was he to get his costs and expenses out? He had shown very commendable energy and perseverance in hunting out this land, and in prosecuting and defending several other suits as he did, to defend and perfect the title, and in selling the land to get the claim into money, in which several proceedings he had incurred considerable expense,—somewhere between \$300 and \$400, as the testimony shows. How should he be reimbursed these costs and expenses if he could not sell the land? *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. Rep. 517. There was nothing else from which the debt could be made. This land, assuming that Burbank had title, constituted a fund out of which Hayes must make the debt, if made at all. He treated it, he says, and I think correctly, just as he would a pile of lumber, or any personal chattel, the purpose being to get the debt out of it. When the sheriff offered it for sale, and there were no other buyers, he bid it in to save the debt, and then sold it the first opportunity. The claim being in the first instance personal property, the mere accident that, in the course of the collection, it assumed the form of real estate, would not change its character in the eye of the law, nor the contingent interest of personal representatives into partnership real estate, which would descend to heirs.

There are questions in the litigation regarding the title which I do not find it necessary to determine definitely, as it would be necessary if the case rested wholly upon them. The land was originally entered by Michael O'Connor, who, on October 25, 1856, conveyed it to Ambrose B. Burbank. On October 19, 1857, Ambrose B. Burbank deeded to Lester W. Markham "five square acres in the north-east corner of the south-west half of said section twenty-seven," etc.; and on October 4, 1868, Ambrose B. Burbank conveyed to Eleazar A. Burbank "seventy five acres of land, being in the west half of the south-west quarter of section twenty seven, township forty-nine, range fourteen," etc. Afterwards Eleazar A. Burbank, on October 28, 1886, purchased the five acres from Markham, and brought suit in ejectment against the Land & River Improvement Company to recover the 80 acres. That suit was defended by the land company, who employed Hayes as their attorney. The result of it was that a compromise was effected, by which Eleazar A. Burbank, for the sum of \$2,000, conveyed the land to the Land & River Improvement Company. A question is made as to the effect of this deed of Eleazar A. Burbank to the land company,—whether it conveyed title; and that question turns upon the sufficiency in the description of land in the deed of 5 acres to Markham and that of 75 acres to Eleazar A. Burbank, the complainants contending that these deeds were both absolutely void for uncertainty in the description. If these deeds

were void, then the sheriff's deed to Hayes and Hayes' deed to the land company conveyed the title. If these deeds are valid, there was no interest remaining in Ambrose B. Burbank, the debtor in the attachment suit, to be levied upon, the sheriff's deed conveyed no title, and the complainants have no claim against the land company upon their own chosen theory of the case.

Without going into the question at length, I would say that, in my judgment, the deed from Burbank to Markham of the 5 acres would probably be void for uncertainty, but that the deed of Ambrose B. Burbank to Eleazar A. Burbank would not be absolutely void, but probably conveyed an undivided 75-80 of the land to the grantee, (see *Freem. Co-tenancy*, § 96;) or, if not that, would give the grantee the equitable right to have the 75 acres located, either by agreement or by suit. The description in this deed is complete, except that it does not locate definitely the 75 acres conveyed in the 80 from which it is taken. I cannot think, however, that it conveyed no substantial interest in the land, either legal or equitable. But I am contented to decide the case on the theory of the complainants, that the sheriff's deed conveyed the title to Hayes, and Hayes conveyed it to the land company. Upon that theory, I am satisfied that the complainants have mistaken their remedy wholly. If they had asked for, or would have taken a decree for, an accounting against the defendant Hayes, on the basis of the sale by him to the land company, they might have had all the relief in this suit that they seem to be entitled to upon the facts. But though the court on the hearing (it appearing that the complainants were the proper personal representatives of Michael S. Bright, deceased) offered them a decree granting the above relief against Hayes, they declined to accept it, but dismissed the bill as to him, choosing to rely wholly upon an appeal from the decree dismissing the bill as to the Land & River Improvement Company. Probably there are few men who, in the state of the title to the tract of land in question, would have persevered in pushing the claim against Burbank to collection, and it is quite as probable that most people, having a half interest in that almost desperate \$500 debt against a non-resident, after looking upon it for so long a time as worthless, would have been satisfied with an amount of money exceeding by several times the amount of the original claim; and in all likelihood these complainants would also have been satisfied but for the one circumstance that, since the sale of the land to the land company in 1885, the land, owing to the general improvement in a new country, has risen very rapidly in value. The prize is tempting, and, if the complainants can win it in another court, it will be their right to do so.

## CAMPBELL v. PULLMAN PALACE-CAR CO.

*(Circuit Court, N. D. Iowa, W. D. May 9, 1890.)*

## 1. SLEEPING-CAR COMPANIES—ASSAULT BY EMPLOYEE—LIABILITY OF COMPANY.

The Pullman Palace-Car Company is liable for injuries sustained by occupants of its sleeping-cars through the negligence or willful misconduct of the employee whom it places in charge of the car.

## 2. SAME—DAMAGES.

Where the porter placed in charge of such a car by the company makes an indecent assault on a female occupant thereof, she is entitled to recover from the company a fair pecuniary compensation for all injuries, temporary or permanent, directly caused to her in her person, health, and strength, including compensation for the pain and suffering, mental and physical, which has been, or may thereafter be, caused.

At Law. Action for damages for assault.

*Joy, Hudson, Call & Joy*, for plaintiff.

*Hubbard & Spaulding and John S. Runnels*, for defendant.

SHIRAS, J., (*charging jury.*) In the cause now on trial before you, the plaintiff, Mrs. Campbell, claims damages against the defendant, the Pullman Palace-Car Company, in the sum of \$20,000, for injuries which she claims were caused to her when she was an occupant of a sleeping-car furnished by defendant for use as a sleeping-car upon a train of passenger-cars operated by the Chicago, Milwaukee & St. Paul Railway Company between Chicago, Ill., and Sioux City, Iowa, such injuries being alleged to have been caused by the misconduct of the porter employed by the defendant upon said sleeping-car. Before passing to a statement of the particular issues to be submitted to you in this cause, it is proper for me to instruct you as to the relation existing between the Pullman Car Company and persons occupying the sleeping-cars furnished by the defendant company for the use of the traveling public. As I construe the contract between the defendant and the Chicago, Milwaukee & St. Paul Railway Company, the Pullman Company agrees to furnish for the use of the public what are commonly known as "sleeping-cars," which, when in use, form part of the train run by the railway company for the transportation of passengers along the line of railway. The Pullman Company, by thus furnishing cars to be used as sleeping-cars by the traveling public, does not assume towards the persons occupying such cars the relation of a common carrier. It does not undertake the duty of transporting the passenger to his destination. That duty is assumed by the railway company, and for the performance thereof the passenger must look to the company managing the railway; and the Pullman Company is not liable for injuries received by the occupants of its cars from accidents connected with the movement of the train. Nor is it responsible for the negligence or misconduct of those persons charged with the duty of operating the train of which the sleeping-cars may form part. While, however, it assumes no responsibility for the mere transportation of the persons occupying its cars, and does not occupy the re-



lation of a common carrier to them, it nevertheless does assume certain duties and obligations to its patrons, and becomes bound to the exercise of reasonable care in the performance thereof. The Pullman Company, by its mode of managing these sleeping-cars, represents to the traveling public that they may be occupied with reasonable safety and comfort as sleeping-cars; and, by receiving pay for the use thereof, the company agrees with its patrons that it will exercise ordinary care to secure the comfort and safety of those using the same for the purposes for which such cars are furnished. The person or persons placed in charge of such sleeping-cars by the Pullman Company is bound, as an employe of the company, to the exercise of ordinary care for the protection and comfort of persons using such car in accordance with the regulation of the company; and if such person, either through failure to exercise proper care, or by willful misconduct on his part, permits or causes injury to happen to an occupant of the sleeping-car placed under his charge, the Pullman Company will be liable for the damages caused thereby.

In the answer filed in this case, the defendant admits that on the 15th and 16th days of February, 1889, it was engaged in operating a sleeping-car on the line of the Chicago, Milwaukee & St. Paul Railway Company between Chicago, Ill., and Sioux City, Iowa, in connection with the regular passenger train reaching Sioux City in the morning, and admits that the plaintiff was a passenger upon the passenger train in question, and had purchased and paid for a ticket from defendant for a seat and berth in said sleeping-car belonging to defendant. There is no conflict in the testimony adduced by the parties plaintiff and defendant touching the fact that the plaintiff was an occupant of the sleeping-car which left Chicago on the 15th, and reached Sioux City on the morning of the 16th of February, 1889. It thus appears that the plaintiff was rightfully an occupant of said sleeping-car at the time named; and, while it was being conveyed to Sioux City, the plaintiff was entitled to demand of the defendant the exercise on its part of ordinary care to secure to her the safe and comfortable use of said sleeping-car, and its conveniences, for the purpose for which said car was placed in said train. In the performance of its duty in this respect, the defendant company would be responsible for the willful misconduct, if any such there was, of its own employes placed in charge of said sleeping-car, when such misconduct was of such nature as to interfere with the safe and comfortable use of said car by the plaintiff for sleeping-car purposes.

On part of plaintiff, it is charged that the porter employed by the defendant and placed in said car, did, in the morning of said 16th of February, 1889, between the station of Manilla and Sioux City, make an indecent assault upon plaintiff while she was occupying the berth assigned to her,—placing his hands upon her person, making indecent proposals to her, and exposing his person before her. On part of the defendant, it is denied that the porter did thus misconduct himself; that, while it is true that the porter did go to plaintiff's berth, he did so for the purpose of arousing her from an uneasy sleep, and awakened her in the usual manner, and that plaintiff, not being accustomed to travel-

ing upon sleeping-cars, nor to the sight of colored persons in close proximity to her, and being thus aroused, may have been rendered somewhat nervous and frightened, and has thus been led to misconstrue the action and purpose of the porter in going to her berth. If, in fact, the porter on said car did act towards the plaintiff in the manner charged by plaintiff, such conduct on his part would unquestionably be a violation of the duty due and owing from defendant to the plaintiff while she was an occupant of said sleeping-car. The pivotal point in the case, gentlemen, is this question of fact, which you are called upon to decide. In determining this question, you will be required to consider the credibility of the witnesses, and the weight to be given to their testimony. In considering these questions, you take into account the pecuniary or other interest, if any, which a given witness may have in the result of the case, or the absence thereof; the appearance of the witness, if brought before you; the manner of his testifying; his means of knowledge; and whether his testimony is corroborated, or the contrary, by the admitted or proven facts of the case. For the purpose of attacking the credibility of witnesses, it is permitted to either party to show that a given witness has made at other times statements contradicting some material part or portions of his testimony; the proper foundation therefor being first laid. In considering impeaching testimony of this character, the jury should be careful to distinguish between such discrepancies in statements made at different times by a witness touching a given fact or transaction as may naturally arise from the usual imperfections of the human memory, and those which indicate an intention on part of a witness to prevaricate and mislead. It is only those of the latter character that have weight as matter of impeachment.

The burden of the issue is upon the plaintiff; and she must satisfy you, by a fair and reasonable preponderance of the evidence, that in fact the porter in charge of said sleeping-car was guilty of the misconduct charged against him, before she can ask a verdict in her favor at your hands. If the plaintiff has failed to satisfy you, by a fair and reasonable preponderance of the evidence, that the porter did commit the acts of misconduct alleged against him, then she has failed to make out her case, and your verdict must be for the defendant. On the other hand, if, by a fair and reasonable preponderance of the evidence, you are satisfied that the porter in charge of said car was guilty of the alleged acts of misconduct towards the plaintiff, then your verdict should be for the plaintiff. What, then, gentlemen, do you find the fact to be in this particular? Was or was not the porter guilty of the acts of misconduct alleged against him by the plaintiff? You have heard the evidence adduced on behalf of the plaintiff, including her own testimony, giving the plaintiff's version of what occurred on the sleeping-car on the morning of February 16th as it came from Manilla to Sioux City. You have likewise heard the evidence adduced on behalf of the defendant, including the testimony of the porter of the car, giving the defendant's version of what occurred on that occasion. You have heard the evi-

dence adduced by both parties touching plaintiff's arrival at Sioux City, the meeting of her husband, going to the hotel, and thence to a boarding-house kept by Mrs. Fuller; touching the complaints made by plaintiff; touching the physical condition of plaintiff; touching the complaint made by plaintiff's husband to the railway superintendent, the porter, and others, and all other matters introduced by both parties with the intent to throw light upon the main issue involved. Counsel for the respective parties have, in their arguments before you, presented the views taken by each party of the facts of the case, and of the conclusions of fact they seek to deduce from the evidence submitted to you. It is for you, calmly, dispassionately, and impartially, to consider the entire evidence thus submitted to you, and from it determine what the truth is upon this issue of fact between the parties. If, upon due consideration of the case, you find that the porter employed on the sleeping-car was in fact guilty of the misconduct alleged against him by the plaintiff, then your verdict should be for the plaintiff; but, on the other hand, if the evidence, by a fair and reasonable preponderance thereof, fails to satisfy you that he was guilty of such alleged misconduct, then your verdict should be for the defendant.

If, upon this issue, you find for the plaintiff, you will then be required to assess the damages to be awarded to the plaintiff. What the plaintiff is entitled to, in case you find in her favor, is a fair pecuniary compensation for the injuries naturally and immediately resulting from the outrage and wrong inflicted upon her. She is entitled to be compensated for the mental and physical pain and suffering, if any, caused to her at the time, and which she has since suffered as a direct consequence of the wrong done her. On part of plaintiff, it is claimed that, when she went upon the sleeping-car, she was in a pregnant condition; that the assault upon her brought on a miscarriage, which occurred within a few days after she reached Sioux City; that from the time of reaching Sioux City she was suffering and ill, caused by the wrong done her; and that she is still suffering in her health and strength as a consequence thereof, and that she has probably been rendered barren, and that she is not likely ever to fully recover from the injurious effects resulting to her from the wrongs complained of. On part of defendant, it is denied that any such injuries were caused to the plaintiff; that, while it may be true she suffered a miscarriage, it was caused by plaintiff's own negligence and want of proper care when she was recovering from her first illness, and from her improperly exposing herself at that time. If the plaintiff, through her own want of care, and failure to exercise ordinary prudence and foresight, aggravated the injuries under which she was at the time suffering, and thereby caused the miscarriage, she cannot hold the defendant responsible therefor, as such result would then be due to her own negligent conduct.

Now, gentlemen, you have heard the evidence adduced by both parties on this question, including the evidence tending to show the condition of plaintiff immediately following her arrival in Sioux City, and what her condition was, and what she did up to the time the mis-

carriage took place, together with the testimony of the physicians touching her condition, and the causes of miscarriage; and from the entire evidence it is for you to say what the cause of the miscarriage was. If you find that it was caused by the wrong done the plaintiff upon the sleeping-car, then the plaintiff is entitled to be compensated for the suffering caused her thereby, and for any injurious effects, temporary or permanent, caused thereby to the person, health, and strength of the plaintiff.

Briefly restated, the plaintiff is entitled to be fairly compensated for all injuries, temporary or permanent, directly caused to the plaintiff, in her person, health, and strength, by the wrong done her, including compensation for the pain and suffering, mental and physical, which has been caused, or may be hereafter caused, to the plaintiff, by reason of the wrong suffered by the plaintiff. The ascertainment of the amount to be awarded as compensation for such injuries as you find the plaintiff is entitled to recover for is of necessity intrusted to the sound common sense and good judgment of the jury. The case, gentlemen, is in your hands. Give it the consideration it deserves, and render the verdict which, in your impartial judgment, appears to be the proper response to the evidence submitted to you, and the instructions given you by the court.

Verdict for plaintiff for \$11,000.

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STEPHENS v. BERNAYS.

(District Court, E. D. Missouri, E. D. June 7, 1890.)

1. WITNESS—TRANSACTIONS WITH DECEASED PERSON—SUITS AGAINST EXECUTORS.

Under Rev. St. U. S. § 858, providing that in actions against executors no witness who is a party to the action shall be allowed to testify as to any transaction with the testator, a witness who is not a party, but is interested in the result of an action, may testify concerning transactions between himself and the testator.

2. SAME—CONFLICTING STATE AND FEDERAL LAWS.

This statute covers the case; and under the rule that, where congress has enacted a law covering a particular case, such law must prevail in the federal courts, though it differs from the state law, Rev. St. Mo. § 8918, on the same subject, does not apply.

At Law.

George D. Reynolds, U. S. Dist. Atty., for plaintiff.

H. A. Loery, for defendant.

THAYER, J. The testimony of C. C. Crecilius, taken in connection with other testimony offered by the plaintiff, clearly shows that the deceased assigned his stock in the insolvent bank to Crecilius, the cashier, with intent to evade his liability as a shareholder. According to the testimony of Crecilius, the deceased had not only been advised before the

sale that the bank had sustained considerable losses, but he declared at the time of the sale that his purpose in selling was to avoid his liability as a stockholder. The sale appears to have been made only two days before the bank closed its doors, and no change took place in the condition of the bank in the mean time. Crecilius gave his notes for the stock, instead of paying for the same in money; and according to his statement the notes were to be surrendered, and the sale canceled, if at the end of 60 days the deceased was then assured that the bank was all right. Crecilius himself had little or no means, at the time of the purchase, and was rendered utterly insolvent by the failure of the bank two days later. His object in making the purchase in question was to withdraw the stock from the market, and save the credit of the bank, which was then in a precarious condition. These facts, most of which were established by the testimony of Crecilius, warrant the conclusion that the pretended sale was and is voidable as to creditors of the insolvent bank, who are represented in this proceeding by the receiver. *Thomp. Liab. Stockh.* § 215, and cases cited.

A question arises, however, and was reserved at the trial, touching the competency of Crecilius to testify against the executrix concerning transactions between himself and the testator. The federal statutes provide (section 858) that—

"No witness shall be excluded \* \* \* in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, \* \* \* in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, \* \* \* unless called to testify thereto by the opposite party. \* \* \* In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in courts of the United States," etc.

The state law on the subject (section 8918, Rev. St. Mo. 1889) provides that—

"No person shall be disqualified as a witness in any civil suit \* \* \* by reason of his interest in the event of the same, as a party or otherwise: \* \* \* provided that, in actions where one of the original parties to the contract or cause of action in issue and on trial is dead or \* \* \* insane, the other party to such contract or cause of action shall not be admitted to testify \* \* \* in his own favor; \* \* \* and, where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify," etc.

The first clause of the proviso of section 8918, *supra*, as heretofore construed by the state courts, has much greater scope than the federal statute above referred to. Thus, in *Meier v. Thieman*, 90 Mo. 434, 2 S. W. Rep. 435, it was held that by the proviso in question a person was rendered incompetent to testify as to transactions with a decedent in a suit brought by his heirs, although the person tendered as a witness was not a party to the suit. The decision appears to be based on the ground that a witness, to be excluded by the state law, need not be a party to the record, but will be excluded as a witness as to all contracts or trans-

actions between himself and a deceased person, when the witness has an interest in the result of the suit, whether he is or is not a party to the record. Hence it is important to determine, in the first instance, whether the competency of Crecilius to testify as to transactions between himself and the decedent is to be tested by federal or state law. The rule is that, where congress has legislated on the subject,—that is, has enacted a law covering the particular case,—such law must prevail in the federal courts, notwithstanding it differs from the state law. *Potter v. Bank*, 102 U. S. 165; *Insurance Co. v. Schaefer*, 94 U. S. 458; *Rice v. Martin*, 8 Fed. Rep. 476. The state laws control in determining the competency of witnesses only in cases like that of *Packet Co. v. Clough*, 20 Wall. 537, which do not fall within any provision of the federal laws.

The case at bar is clearly within the terms of section 858. The effort is to exclude Crecilius as a witness on the ground of interest; but the first clause of the section declares that interest shall be no disqualification "in any civil action," and the only exception to that rule is that mentioned in the proviso,—that a person called as witness shall not be allowed to testify as to any transactions with or statement by a decedent, if the suit is against his executor or administrator, and the witness is himself an opposing party to the suit, unless the witness is called upon to testify by the executor or administrator. The case at bar seems to be strictly like the case of *Potter v. Bank*, *supra*, in which a person situated as Crecilius is, with respect to the litigation, was held to be a competent witness. Whatever view, therefore, the court might entertain as to the competency of the witness under the state law, it is compelled to hold that he is made a competent witness by the federal statutes. Judgment will accordingly go against the executrix for the amount of the comptroller's assessment; that is, for \$3,500, with interest at 6 per cent. per annum, to be computed from September 24, 1889, to this date.

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### STABLER v. VILLAGE OF ALEXANDRIA.

(Circuit Court, D. Minnesota. May 19, 1890.)

#### MUNICIPAL CORPORATIONS—SERVICE OF PROCESS—SPECIAL LAW—VILLAGE OF ALEXANDRIA.

Since the charter of the village of Alexandria, (Act Minn. March 5, 1881,) § 21, provides that, when any suit is commenced against the village, the service therein shall be made by copy left with the recorder, the general law (Gen. Laws Minn. 1885, c. 153) prescribing for service of summons on municipal corporations on "the mayor or chief executive officer of such corporation" does not apply, and a service upon the village of Alexandria by leaving a copy with the president of the council is defective.

At Law. Motion to set aside summons.

*Reynolds, Stewart & Geo. H. Reynolds*, for plaintiff.

*H. Jenkins*, for defendant.

NELSON, J. Service of summons is set aside. The charter of the village of Alexandria, incorporated by act of the legislature of Minnesota approved March 5, 1881, provides in section 21, as follows:

"When any suit or action shall be commenced against said village, the service therein shall be made by copy left with the recorder of said village."

By the General Laws of Minnesota approved February 28, 1885, (chapter 153,) the manner prescribed for the service of summons upon municipal corporations is that it "shall be served upon the mayor or chief executive officer of such corporation," etc. The service was made in this case upon the "village of Alexandria, by handing to and leaving with N. P. Ward, president of council, a true and correct copy hereof, personally," etc. As there was a special law with regard to the village of Alexandria, contained in section 21 of the charter, the General Laws of 1885 did not supersede it. See *Amy v. City of Watertown*, 130 U. S. 303, 9 Sup. Ct. Rep. 530. Ordered that summons be set aside.

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KEENEY *et al.* v. MAGONE, Collector.

(Circuit Court, S. D. New York. April 22, 1890.)

CUSTOMS DUTIES—CONSTRUCTION OF LAWS—CLASSIFICATION—CORK CARPETING.

Cork carpet or carpeting, used to cover floors, and composed of ground waste cork bark, linseed-oil, gum, and a loosely woven jute fabric as a back, such cork bark, though greater in bulk than the bulk of its other component materials combined, being one-eleventh only of its entire value, is not dutiable as "cork bark, manufactured," under the provision for "corks and cork bark, manufactured," contained in Schedule N of the tariff act of March 3, 1883, (22 U. S. St. 512; Tariff Index, New, par. 422.)

At Law. Action to recover back duties.

During the year 1888 the plaintiffs made nine importations from Kirkcaldy, Scotland, into the port of New York, of so-called "cork carpet or carpeting." This cork carpet or carpeting was classified by the defendant, as collector of customs at that port, as, or as assimilating to, "oil-cloth," under the provision for "all other oil-cloth except silk oil-cloth," contained in Schedule J of the tariff act of March 3, 1883, (22 U. S. St. 507; Tariff Index, New, par. 340,) and pursuant to this provision duty was exacted thereon at the rate of 40 per cent. *ad valorem*. Against this classification and exaction the plaintiffs duly protested, claiming that, by force of treasury decision S, 1,436, made February 28, 1873, and of the provision for "corks and cork bark, manufactured," contained in Schedule N of the same tariff act, (22 U. S. St. 512; Tariff Index, New, par. 422,) this cork carpet or carpeting was dutiable at the rate of 25 per centum *ad valorem*. Thereafter the plaintiffs, having made due appeals, duly brought this suit to recover the difference between the duties at the rate exacted by the defendant as said collector, and duties at the rate claimed by them in their protests. Upon the trial of this suit it appeared that

this cork carpet or carpeting was composed of ground cork, mixed with linseed-oil and gum, and applied by rollers to a loosely woven jute fabric as a back; that this ground cork was waste cork bark produced during the manufacture from cork bark of corks for bottles, floats for seines, and other articles, and ground fine in burr-stone mills; that the bulk of this ground cork was greater than the bulk of the other component materials of the cork carpet or carpeting combined, and that its value was about one-sixth of that of the linseed-oil and gum, and one-fourth of that of the jute fabric, or, in other words, about one-eleventh of that of the entire cork carpet or carpeting; that oil-cloths for floors, stamped, painted, or printed, were composed of jute burlaps, or other like foundations, as backs, ochre mixed with linseed-oil and gum, were generally painted on their backs, and stamped, or painted and stamped, or painted and printed, on their surfaces; that there were other oil-cloths composed of cotton cloths as backs, painted and printed, or printed and stamped on their surfaces, and used for table covers, for stairways, and sometimes for other purposes; that the oil-cloths for floors, above described, and cork carpet or carpeting of the kind of that in suit, were both used for the same purpose, viz., to cover floors.

Both sides having rested, the defendant's counsel moved the court to direct the jury to find a verdict for the defendant, on the grounds: (1) That the cork carpet or carpeting in suit was in fact oil-cloth, and, as such, was dutiable at 40 per centum *ad valorem*, as assessed by the defendant collector, under the provision "for all other oil-cloth, except silk oil-cloth," contained in Schedule J of the tariff act of March 3, 1883, (Tariff Index, New, par. 340.) (2) That, if it was not oil-cloth, it was in fact "a carpet or carpeting" of "other material," and as such was dutiable at the rate of 40 per centum *ad valorem*, under the provision for "carpets and carpetings of wool, flax, or cotton, or parts of either or other material, not otherwise herein specified," contained in Schedule K of the same tariff act, (Tariff Index, New, par. 378.) (3) That, if it was neither such oil-cloth, nor such carpet or carpeting, it assimilated, under section 2499 of the same act, in use, and to a considerable extent in texture and material, to, and was dutiable at the same rate, 40 per centum *ad valorem*, as, some one of the "oil-cloths for floors, stamped, painted, or printed," or "all other oil-cloth, except silk oil-cloth," as provided in said Schedule J. (4) That if it was neither such oil-cloth, nor such carpet or carpeting, nor assimilated to such oil-cloth, it assimilated in use to the carpets and carpetings provided for in said Schedule K. (5) That the plaintiffs had not proven facts sufficient to entitle them to recover.

*Stephen G. Clarke and Charles Curie*, for plaintiffs.

*Edward Mitchell*, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (*orally*.) I am unable to concur in the views of the plaintiffs' counsel as to the phraseology "cork bark, manufactured." I think there must be some intention of congress to discriminate and differentiate between the expression "manufactures of cork," and the phrase



"cork bark, manufactured." Therefore, on the testimony of this case as it stands, touching the manufacture of this article, I am unable to accede to the proposition that it is covered by the 422d paragraph of the tariff act, and I shall therefore direct a verdict for the defendant.

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LEHMAN v. LaFORGE.

(Circuit Court, E. D. New York. May 13, 1890.)

1. **BANKRUPTCY—FEDERAL JURISDICTION—RIGHTS OF ASSIGNEE.**

Under Act Cong. June 7, 1873, (20 St. U. S. p. 99, c. 160), and act of March 3, 1837, (24 St. U. S. p. 553, c. 373,) repealing the bankrupt law, except as to cases pending, including rights of debtors and creditors, "and rights of and suits by or against assignees" in any matter or case which had arisen, or which might thereafter arise, and saving the jurisdiction of the United States circuit courts in such cases, the circuit court has jurisdiction of a suit by an assignee in bankruptcy to prevent a person from establishing on the bankrupt's property, by proceedings in a state court, the lien of a fraudulent judgment obtained in 1869.

2. **SAME—SUIT TO ENJOIN ENFORCEMENT OF JUDGMENT—EVIDENCE.**

In such suit, though the judgment was rendered by a court of competent jurisdiction, and is regular on its face, the oral admissions and declarations of defendant that it was fraudulently obtained are sufficient to defeat its operation, where such statements were deliberately made, in answer to inquiries by interested persons, and with such detail of circumstances and reasons as to leave no doubt that he fully understood what he said.

3. **SAME—INTEREST OF ASSIGNEE IN BANKRUPT'S PROPERTY.**

Rev. St. U. S. § 5046, vests in the assignee in bankruptcy the title to all property of the bankrupt conveyed in fraud of creditors; and Code Civil Proc. N. Y. § 882, provides that actions founded on fraud, except for the recovery of money, do not accrue until the fraud is discovered. *Held*, that an assignee in bankruptcy has sufficient interest in property conveyed by the bankrupt in fraud of creditors, where the bar of the statute of limitations is not completed, from the time the fraud was discovered, to maintain a suit to prevent such property from being subjected to the lien of a fraudulent judgment.

4. **SAME—POSSESSION OF PROPERTY BY ASSIGNEE.**

It is not necessary, to entitle the assignee to maintain such suit, that he have actual possession of the property.

5. **SAME—LIMITATION OF ACTIONS BY ASSIGNEE.**

The two-years limitation on suits "between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferrable to or vested in such assignee," imposed by Rev. St. U. S. § 5057, does not apply, in such suit, where the suit is brought within two years after defendant commenced proceedings to establish the lien. The assignee seeks to prevent the establishing of the lien, and not to set aside the judgment.

6. **SAME—POSSESSION BY ASSIGNEE.**

The objection that the assignee may not be able to obtain possession of the property on which the judgment is sought to be established as a lien cannot be sustained by defendant where he is a party to the proceedings in bankruptcy; since, if the proceedings go through without reaching the property, the assignee's right to it ceases, and defendant can then enforce his judgment.

In Equity.

Henry Daily, Jr., for the orator.

Roswell W. Keene, for defendant.

WHEELER, J. On November 3, 1869, judgment was entered in the superior court of the city of New York in favor of the defendant against

William A. Hoar for \$4,995.48. On the 5th day of June, 1871, Hoar was adjudged a bankrupt in this district. His property was concealed, and the title to it stood in the names of others, and none of it came to the hands of the assignee. Deeds of it from those in whom the title stood were made, and delivered privately to him, and kept by him without being registered. He died in 1885. An administrator of his estate was appointed; and these deeds, found among his effects, were registered. On the 24th day of May, 1888, judgment was entered on the former judgment in the supreme court in the county of Kings in favor of the defendant, against the administrator, for \$11,064.49, and thereupon proceedings were commenced for the sale of the real estate in the surrogate's court for the satisfaction of this judgment. At the instance of creditors in bankruptcy, the orator, on the 8th of March, 1889, was made the assignee in bankruptcy, in place of the former assignee; and the property, on the 5th day of June, 1871, of the bankrupt, was assigned to him. This bill was brought on the 12th of March, 1889, in which the orator alleges that the judgment in favor of the defendant was entirely without any foundation whatever, and wholly fraudulent and void as to creditors in bankruptcy, and prays to relieve the estate in bankruptcy from it. The answer denies that the judgment was without foundation, or fraudulent, and that the estate represents property of the bankrupt in 1871, and challenges the jurisdiction of this court.

The act of June 7, 1878, to repeal the bankrupt law, left the provisions of that law in force as to all pending cases and future proceedings therein, including rights of debtors and creditors, "and rights of and suits by or against assignees," in any matter or case which had arisen, or which should thereafter arise. 20 St. U. S. p. 99, c. 160. The circuit courts have jurisdiction in matters of bankruptcy. Rev. St. U. S. § 630. The title of the orator arises wholly by the laws of the United States, and jurisdiction of this court if a suit upon it is saved by the act of March 3, 1887, (24 St. U. S. p. 552, c. 373, § 1.) The jurisdiction of this court of this case seems unquestionable. *Lathrop v. Drake*, 91 U. S. 516; *Burbank v. Bigelow*, 92 U. S. 179.

The proof of the want of foundation for, and fraudulent character of, the judgment, rests upon oral declarations of the defendant. Counsel argue, in his behalf, that such evidence is inadequate to defeat the operation of a judgment of a court of record regular on its face. That the admissions and declarations of a party are competent evidence against him, that the facts are as he states them to be, is elementary. Best, Ev. §§ 519, 520, (Wood's Ed., 948;) *Gaines v. Relf*, 12 How. 472; *Insurance Co. v. Newton*, 22 Wall. 32. If the declarations were merely casual or loose, and disputed or explained, they might be regarded as of insufficient weight to impeach the judgment. But these statements of the defendant appear to have been made deliberately, in answer to inquiries made by those interested, at several times, to various persons, and with so much detail of circumstances and reasons as to leave no room for doubt that the defendant fully understood what he said,—said what he meant,

—or that what he said has been correctly reproduced. The defendant is a competent witness, near by, and he has not testified in explanation or denial of his statements, nor produced any evidence to show the facts to be in reality otherwise than according to his statements as proved. The weight of the evidence, when it is considered, is quite satisfactory to the extent and effect that the judgment was a mere hollow sham, set up as a menace to those claiming to reach the property of the bankrupt; and that the defendant is now seeking to take advantage of the position of creditors in the judgment to reach the property of the bankrupt, contrary to the purpose of the judgment, and to the rights of the creditors of the bankrupt. *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. Rep. 202. That the real estate in question was partly property of the bankrupt on June 5, 1871, and partly came from such property, the title to all of which was concealed till after administration on the bankrupt's estate, also satisfactorily appears. The placing of the title in the name of others was a conveyance in fraud of creditors, and all property so conveyed by a bankrupt was by the bankrupt law expressly vested in the assignee. Rev. St. U. S. § 5046. Such a judgment as this would be void by the principles of the common law as affirmed and enacted in the statute of 13th Eliz., which is a part of the common and statute law of this country in respect to creditors. 4 Kent. Comm. 462. The assignee in bankruptcy has ever since he has been such had the right to this property of the bankrupt, free from this judgment, whenever it could be discovered and reached. The case does not show that any other person is claiming this property adversely to the orator; and, if such claim should be made, the right of the orator would seem to be good, and the fraudulent concealment of title might be sufficient to save it from loss by any statute of limitations, should it be set up against the right. By the laws of the state, actions founded on fraud, except for the recovery of money, do not accrue till the fraud is discovered. Code Civil Proc. § 382. That statute, as a rule of property, might furnish a guide in this court with reference to general statutes of limitation, which are somewhat relied upon in argument. *Clark v. Smith*, 13 Pet. 195. And, usually, time does not begin to run against rights of action concealed by fraud till after the fraud is discovered. *Michoud v. Girod*, 4 How. 503; *Moore v. Greene*, 19 How. 69; *Badger v. Badger*, 2 Wall. 87. The orator thus appears to have sufficient title to and interest in the property to maintain this bill. *Ward v. Chamberlain*, 2 Black, 430; *Stone-Cutter Co. v. Jones*, 21 Blatchf. 138, 13 Fed. Rep. 567.

Counsel for defendant raise objection, in argument, that the orator has not possession; but neither bill or answer sets up either possession or want of it, or makes any question about it. In the former of the two cases last cited, possession in such a case does not appear to have been deemed material; and, in the latter, that the orator was not in possession clearly appeared, and yet the bill was maintained. The defendant's judgment did not of itself constitute any cloud upon the title. He is endeavoring by proceedings in the surrogate's court to create one; and this bill is brought rather to prevent than to remove one.

The limitation of two years on suits by assignees in bankruptcy, imposed by section 5057, Rev. St. U. S.,<sup>1</sup> is relied upon as a bar to this suit. If this statute was set up, and its running would not be saved by fraud, it would seem to be a bar to any suit to set aside the original judgment. But this suit is not maintainable in this court to set aside or annul the judgment of the state court as such. The orator has no right to or interest in that judgment. He is interested only in preventing proceedings upon it to reach the property of the bankrupt. These have been started by the defendant within the two years. The right of action against them accrued within that time. All the orator is entitled to is to have those stayed. *Ward v. Chamberlain*, and *Stone-Cutter Co. v. Jones*, before cited. Such a stay appears to be excepted out of the prohibition of injunctions in the United States courts to stay proceedings in state courts, being a proceeding in bankruptcy. Rev. St. U. S. § 720. Leave is asked in behalf of the defendant to set up the statute of limitations, if necessary to save his rights. It would not save anything against this relief. Besides, this discretion would not be freely exercised in aid of a bar to relief from proceedings on such a judgment.

That the orator may not obtain possession of this property as against others is urged as a reason for not granting relief against the defendant. But diverse claims cannot be all settled at once. The defendant instituted the bankruptcy proceedings, and is a party to them, entitled to move to speed them. If the proceedings go through without reaching this property, the orator's right to it, on which relief here is founded, will fail, and it will still be left for administration in the surrogate's court. If, as urged with plausibility, and perhaps correctly, any after-acquired property came with the other property into this real estate, so that creditors have a right to a share of it outside of the bankruptcy proceedings, the bankrupt law provides for the adjustment of such rights in the bankrupt court in favor of those entitled to them. Rev. St. U. S. § 4972. All just claims of the defendant may be safely followed there. Let a decree be entered in favor of the orator, as assignee in bankruptcy, for an injunction to restrain the defendant from further proceedings in the surrogate's court against the property in the bill of complaint described, during the pendency of the proceedings in bankruptcy, with costs.

<sup>1</sup> Rev. St. U. S. § 5057, provides that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching the \* \* \* rights of property transferrable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. \* \* \*".

ADEE v. PECK *et al.*

(Circuit Court, D. Connecticut. May 14, 1890.)

## 1. PATENTS FOR INVENTIONS—PATENTABLE INVENTION.

Reissued letters patent No. 6,739, issued November 16, 1875, to James Foley, for an improvement in waste-valves and overflows, consisting in bringing up the outer pipe of the overflow through the casing contiguous to the basin or bath-tub, and securely attaching it to a removable cap resting upon the outside of the casing, is not invalid for want of invention.

## 2. SAME—REISSUE OF LETTERS.

The claim of said reissue being substantially the same as that of the original patent, except that it gives a statement of the prior state of the art, so as to limit the scope of the patent, and omits the element of a rubber ring around the valve, which was only an incidental feature of the invention, and was inserted in the original claim by mistake, the reissue is valid.

## 3. NAME OF PATENT AS TRADE-MARK.

A bill alleging that defendant has infringed a patent owned by complainant, and originally granted to James Foley, for an improvement in waste-valves, and that complainant has sold said valves under the trade name and style of "Foley's" and "Foley's Patent," and "that said trade name, during the life of said letters patent, is identified therewith, and of great value \* \* \* in describing said patented valves as a trade-mark, and that the defendant has sold his infringing valves under the trade name of 'Foley's Patent Valves,' and praying, *inter alia*, that defendant be enjoined from selling any waste valves under the name of "Foley's" or "Foley's Patent Valves," states only one good cause of complaint, *i. e.*, for infringement of a patent. The name of the patented device is not, properly speaking, a trade-mark. Following *Adee v. Peck*, 39 Fed. Rep. 209.

In Equity.

*Briesen & Steele*, for complainant.

*Edward H. Rogers*, for defendants.

WALLACE, J. This is a suit to restrain infringement of reissued letters patent No. 6,739, granted to James Foley, assignor, November 16, 1875, upon an application filed October 1, 1875, for an "improvement in waste-valves and overflows." It is also brought to restrain the infringement of an alleged trade-mark in the name, "Foley's Patent Valves." The defendants are manufacturers and dealers in plumbers' goods, and in 1882, or earlier, purchased from the complainant the patented valves, and sold them in their business, describing them in a catalogue issued by them as "Foley's Patent Valves." In 1886 they commenced to manufacture the valves themselves, having, as they say, satisfied themselves that the patent to Foley was invalid, and consequently that the complainant was not entitled to a monopoly in the manufacture and sale of the valves; and since that time they have continued to manufacture and sell the article, calling them "Foley's Patent Valves."

The subject of the patent is an improvement in devices for permitting the overflow of basins, baths, etc., to escape, when the water reaches a given elevation, by means of the valve, which is closed to permit the basin or bath to be filled. Such devices consist of a vertical tube or stand-pipe which connects by a T coupling with a pipe leading to the basin and a waste-pipe, and having a valve-seat at its lower end, so located in relation to the basin-pipe and the waste-pipe that when the valve is closed the water flowing into the basin cannot escape. The stand-pipe

leads to a wooden or marble slab at the side of the basin or bath-tub, and is covered by a cap, which in the earlier devices was commonly attached by screws to the upper side of the marble or wooden slab. The valve is formed upon the lower end of the tubular stem, which is arranged within the stand-pipe, and the stem is of the length extending above the valve to a point as high as the point in the basin or bath-tub which is to be filled. The valve stem is open at both its upper and lower ends, and is provided with a handle which plays through an opening in the cup. The stand-pipe surrounding the valve-stem allows the water to rise, as the basin fills, until the top of the valve-stem is reached, when any further flow into the basin would overflow into the valve-stem, and escape to the waste-pipe. The valve-stem and valve are practically one structure, and are provided with a device by which they may be raised by means of the handle extending to the cap, and held in a fixed position to permit the water to escape from the basin into the waste-pipe. The specification states the nature of Foley's improvement as follows:

"My invention relates to an improvement that is made for allowing the valve and overflow to be easily removed. For this purpose the valve and its tubular stem is continued up through the marble or wooden slab, or table contiguous to the basin or bath, and provided with a removable cap, through which the stem to the handle passes."

The details of the improvement are particularly described in the specification as follows:

"This standing tube, *f*, passes through the slab or table, *b*, and is provided with a removable cap, *l*, preferably screwed upon the tube, *f*; and through the cap, *l*, is a rod, *m*, with a handle, *n*, at the upper end, and the lower end is connected by a bridge or bail with a tubular stem, *o*, that is within the tube, *f*, and forms the overflow pipe when the water rises in the basin or bath above the upper end of this tube, *o*. The rod, *m*, is made so that, when it is raised and partially revolved, it will suspend the tubular stem and valve."

The claim is as follows:

"The stand-pipe, *f*, of the bath or basin overflow passing through the slab or table, *b*, and receiving at its upper end the removable cap, *l*, in combination with the overflow-pipe, *o*, valve, *r*, and means of suspending the valve and overflow cap from the pipe, substantially as set forth."

It is quite apparent from the evidence in respect to the prior state of the art that the improvement really made by Foley in pre-existing waste-valves consisted in bringing up the stand-pipe or outer pipe of the overflow through the casing or slab contiguous to the basin or bath-tub, and securely attaching it, preferably by a screw connection, to a removable cap resting upon the outside of the casing or slab. This improvement was a useful and meritorious one. The stand-pipe is efficiently supported in position by the cap itself; both parts, when connected, being integral, thus affording a firm and durable attachment of the stand-pipe to the slab. The cap can be removed more readily than can those which are fastened by bolts or screws to the slab; and when the cap is removed the whole diameter of the stand-pipe is exposed, and the valve-stem and its parts can be conveniently removed for cleaning or repairs. According to the testimony, since the Foley valves have been introduced, they

have completely superseded the old valves with the trade. No one can examine his valve for a moment without seeing that it is a more convenient, more artistic, and a better device, practically, than any of those shown in the earlier patents; and, when it appears that many modifications of the connection between the stand-pipe, the cap, and the slab had been made by plumbers in attempts at improvement, which fell so far short of success that as soon as his was introduced the old ones were supplanted, there is sufficient evidence that the change made by him, though a simple one, was not an obvious thing to those skilled in the art, and involved invention. The phraseology of the claim is such that the patent is not infringed unless the improved stand-pipe and cap of the claim are employed in conjunction with all the other operative parts of an overflow valve. The stand-pipe of the claim is one which passes through the slab, and is adapted to receive the cap by a connection which unites the two parts integrally. The cap is one that is removable,—adapted to be disconnected with the stand-pipe. The “means of suspending the overflow pipe from the cap” are the bail and rod. Inasmuch as the defendants are making and selling the identical valves of the patent, the complainant is entitled to a decree, if the patent is valid. As has been indicated, the patent is not invalid for want of invention. The claim is not met by any waste-valves previously patented or in public use which did not have the stand-pipe and cap constructed and arranged as described. The valves which are alleged to have been made in 1872 by Carr & Co. are the only ones, containing such a stand-pipe and cap, in respect to which any evidence has been given. The defense which rests on the use of these valves is not established by that cogent evidence which is required to overthrow the presumption of novelty arising from the grant of letters patent. Indeed, the patent to Carr, granted December 7, 1875, in which he disclaims expressly the device shown in the patent to Foley, is enough, in view of the circumstances of the alleged prior use, to discredit the defense. Although the patentee acquiesced in the rejection of the present claim by the patent-office until it was amended by adding the words, “means for suspending the valve and overflow pipe from the cap,” the only effect of such acquiescence is to preclude the owner of the patent from setting up any construction of the claim which would omit the parts introduced by the amendment as a limitation of the scope of the claim.

The defendants insist that the reissue is invalid. The application for the reissue was made within two years from the grant of the original, and nothing appears in the record to indicate that the reissue was sought in order to overreach devices which had been invented or patented, or used by others, in the mean time. The peculiar details of construction and arrangement of the stand-pipe and cap which constitute the real invention of the patentee were plainly shown in the drawing of the original patent, suggested by the language of the description, and incorporated into the claim by letters of reference to the drawing. The reissue contains statements respecting the prior state of the art which did not appear in the original. These statements are, in effect, a disclaimer,

and limit the scope of the patent as the original patent would be limited by judicial construction, upon proof of the prior state of the art, in a suit brought upon it. They tend to define more clearly the line between new and old, and thereby to remove doubts as to the precise limits of the invention. There is no substantial difference between the claim of the original, interpreted as it would be if a suit were brought upon it, and the prior state of the art shown, and the claim of the reissue, except that in the latter the rubber ring around the valve is omitted as an element. It is obvious that the rubber ring around the flange or rib of the valve, although useful, was only an incidental and preferable feature of the invention, so obvious that the inference that there was a mistake in incorporating it into the claim of the original is almost irresistible. The claim of the reissue omits as an element the T coupling, which is the seat of the valve, and forms the connection between the basin-pipe and the waste-pipe and the stand-pipe. By necessary implication, this must be read into the claim of the reissue; otherwise the combination would be wholly inoperative. The claim of the reissue is consequently, in all respects, the claim of the original, except in omitting the rubber ring around the valve. In short, a comparison of the original and reissued patents suggests that the power of the commissioner to grant a reissue, to correct a mistake which would render the original patent inoperative, has seldom been more wisely and reasonably exercised than in the present instance.

The complainant is entitled to the usual decree for an injunction and an accounting. So far as his case proceeds upon the theory of an infringement of his trade-mark, it is controlled by the previous decision of this court, upon the demurrer to the bill, by Judge SHIPMAN. 39 Fed. Rep. 209.

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### ROOT v. SIOUX CITY CABLE RY. Co. *et al.*

(Circuit Court, N. D. Iowa. June 2, 1890.)

#### PATENTS FOR INVENTIONS—PRIOR STATE OF ART—CABLE RAILWAYS—GRIP.

Letters patent No. 180,757, March 16, 1875, to William Eppelsheimer, for an improvement in clamp apparatus for connecting street-cars with endless traveling devices, consisted of vertical pulleys to support the cable, and a lower clamping jaw, which, when the car was being propelled, was raised so as to grasp the cable between it and an upper stationary jaw, thus raising the cable from the pulleys. When the car was at rest, the lower jaw dropped below the pulleys, releasing the cable, and allowing it to rest upon them. *Held* that, since there were already inventions for such clamping bars and for supporting pulleys, the patent could not be broadly construed, and was not, therefore, infringed by a device consisting of a movable upper jaw, which, when the car was in motion, pressed the cable down upon a stationary lower jaw, which was slightly below the surface of the pulleys, on which the cable rested, both while the car was in motion and at rest, and which, when the car was at rest, was raised, allowing the cable by its own strain to rise from the lower jaw.

In Equity. Bill to restrain infringement of letters patent.



*Coburn & Thacher*, for complainant.

*C. L. Wright and Offield & Towle*, for defendants.

SHIRAS, J. Letters patent No. 160,757 were issued to William Eppelsheimer under date of March 16, 1875, for "an improvement in clamp apparatus for connecting street-cars," etc., "with endless traveling devices." The second claim in the patent is as follows: "In combination with the lower jaw, L, the transverse bar, O, with its vertical rope supporting pulleys, P, substantially as described." This combination forms part of the gripping apparatus, which, by taking hold of the moving cable furnishing the motive power, propels the car upon the track. In effect, this grip consists of two jaws, one above the other, the upper jaw being fixed, and the lower movable, so arranged that when clamped together the cable is held between them; when opened, the lower jaw falls, and the cable drops upon the two pulleys at the ends of the bar O. The object of the device is to prevent friction between the moving cable and the lower jaw of the grip, when the car is at rest. Complainant, who is the present owner of the patent, claims that the defendant company uses a device upon its cars upon the line in Sioux City, Iowa, which is an infringement of this second claim of the patent named. The defendant questions the validity of the second claim of this patent on several grounds, and also denies that the device in use upon its line is an infringement.

In view of the fact that the validity of this patent was sustained in the case of *Root v. Railroad Co.*, 39 Fed. Rep. 281, I shall not re-examine that question, but shall pass at once to the issue of infringement. In the consideration of this question, it is necessary to ascertain the scope of this claim,—whether it is to be given a broad construction, as being essentially a foundation invention, or whether the prior state of the art requires it to be limited to the exact combination described. There are two features shown in the combination in question,—one being the clamping jaws, and the other the supporting pulleys to receive the weight of the cable, when released by the unclamping of the jaws. It is admitted by counsel for complainant in his argument that "it was old to have a gripping device with one movable and one stationary jaw for clamping the cable to transmit the power to the car, and release the cable whenever it was desired to stop the car." The use of pulleys to carry the cable, and prevent friction and injury thereto, was also old. The novelty in the combination is claimed to consist in attaching to the ends of the gripping device two vertical pulleys, by which the cable is supported when the car is stopped, and thus the wearing of the lower jaw by friction is avoided, as well as avoiding the effect of friction on the cable itself. In the testimony of complainant's expert witness, William A. Skinkle, it is said:

"I do not hold for a moment that Eppelsheimer was the first or only inventor to provide a supporting pulley or pulleys in a gripping device to carry the cable when it is released from the grasp of the gripping jaws, for Hallidie, Foster & Brown, Beauregard, and others show pulleys that do or would serve this purpose; but in no one of them do I find such a combination of specific elements as the claim recites."

If this be true, then Eppelsheimer was not the first inventor of the idea of attaching pulleys to the grip for the purpose of supporting the cable when released from the grip. The novelty, therefore, in the Eppelsheimer combination, seems to be reduced to dropping the lower jaw so that it will not be in contact with the cable when the car is at rest, thus escaping friction, and consequent injury thereto. In this combination, when the jaws of the grip are closed in order to set the car in motion, the cable is raised up from contact with the pulleys by the upward movement of the lower jaw. The gripping effect, therefore, is wholly produced by the clamping of the cable between the jaws, and the pulleys neither support the cable, nor aid in the clamping effect, and consequently they perform no function so long as the grip holds fast to the cable. When the cable is released by the opening of the jaws, it drops down upon the pulleys, and is supported by them. To prevent friction between the cable and the lower jaw, the latter drops down below the surface of the pulleys on which the cable rests, and thus contact with the cable is prevented. In the device in use upon the defendant's line of railway, the lower-jaw of the grip is stationary, and the upper one is movable. The pulleys are so placed that when the car is at rest, and the cable is running over the pulleys, the strain upon the cable keeps it level with the upper surface of the pulleys, which is higher than the surface of the lower jaw, and hence no friction is produced by contact therewith. When it is desired to connect the car with the cable, the upper jaw is pressed down, and the cable is clamped between the upper jaw, the lower jaw, and the surface of the pulleys. In this device the pulleys always serve a purpose. The cable always rests thereon, and is always supported thereby.

In the device of the Eppelsheimer patent, friction between the lower jaw and the cable is prevented by having the lower jaw movable, and dropping it below the line of the cable. In defendant's device the lower jaw is stationary, but friction is prevented by suspending the cable upon the pulleys so that it will not touch the lower jaw when the car is at rest. In the one case, the jaw is moved away from the cable; in the other, the cable is removed from the jaw. It is argued that the difference between the devices having the lower jaw movable and the upper stationary, and the lower jaw stationary and the upper movable, is so slight that it should be held that the one is the equivalent of the other. If the question arose as to the invention of the clamp itself,—that is, a grip having one fixed and one movable jaw,—a mere interchange in the position of the jaws would not enable one to escape the charge of infringement, but that is not the way the question is now presented. What Eppelsheimer was seeking to do was to prevent friction between the cable and the grip. He sought to solve it by a combination, in which he put that form of a grip in which the lower jaw was movable, and he combined this lower movable jaw with the carrying pulleys in such shape that, when the grip was closed upon the cable, the lower jaw carried the cable upward and free from the pulleys, and then, when the grip was released, the cable returned upon the pulleys, and the lower jaw sank down out of

contact with the cable. In this combination, the arrangement of the lower jaw and the supporting pulleys, which are the main elements named in the claim, was such that, in the process of attaching and releasing a car from the cable, the lower jaw would first be below the line of the upper surface of the pulleys, and then above, and then again below, the same. It will be noticed that in the second claim of this patent there is no reference to the upper jaw of the clamp. The only elements mentioned are the lower jaw, the bar, O, and the supporting pulleys.

It is upon the working of these elements, and these alone, that Eppelsheimer relied for the accomplishment of the object sought, and, as already said, the manner in which he avoided friction between the lower jaw of his device and the cable was by having the lower jaw movable, and dropping it below the line of the moving cable. In other words, contact with the cable was prevented by using a movable lower jaw, so combined with the bar having attached the supporting pulleys that the jaw could be dropped sufficiently to escape contact with the cable. In the defendant's device the other form of grip was selected; that is, the one having a fixed lower jaw. In this form of grip, friction between the cable and the lower jaw could not be avoided in the method followed by Eppelsheimer, for, the lower jaw being immovable, it could not be dropped to avoid contact with the cable. The plan followed was to have the supporting pulleys and the lower jaw fixed immovably together, with the surface of the upper part of the pulleys always higher than the surface of the lower jaw. When the grip is released and the upper or movable jaw moves upward, the strain upon the cable removes it from contact with the lower or fixed jaw. In the Eppelsheimer combination, the essential elements are the supporting pulleys and movable lower jaw, so combined together that when the grip is opened this lower jaw may drop below the level of the supporting pulleys, and to secure this it is essential that the lower jaw be movable. In the defendant's combination this movable lower jaw is not used. In view of the prior state of the art, a broad construction cannot be given to the Eppelsheimer patent. He was not the inventor of the grip having clamping jaws, one movable and the other stationary, nor of the cable supporting pulleys. In making the combination described in the second claim of the patent, he chose for one element therein that form of grip having a movable lower jaw, and the claim cannot, by construction, be now enlarged to embrace a combination which does not use a movable lower jaw, but entirely eliminates it. The charge of infringement not being made out, it follows that complainant's bill must be dismissed, at his costs.

GREENWOOD v. THE FLETCHER AND THE GRAPESHOT.<sup>1</sup>

(District Court, S. D. New York. May 14, 1890.)

## 1. COLLISION—DAMAGES—SALVAGE MONEY—INTEREST—COSTS.

When a vessel was sunk by fault of another vessel, salvage money paid out by the owner of the sunken boat is a proper item of damage to be allowed against the wrong-doer, with interest thereon, as well as on other expenses of repair from time of payment, but not costs or counsel fees paid in defending a suit for such salvage.

## 2. SAME—DAMAGE TO BOILER—EVIDENCE.

The boiler, on being removed from a vessel which had been sunk by collision, was found to be cracked. Libellant claimed that this was caused by the sudden submersion of it in cold water while it was hot. *Held*, that the claim, being of an unusual kind, ought to be sustained by evidence correspondingly convincing. The evidence not meeting this requirement, *held*, that this item should be disallowed, together with such demurrage as had been allowed for detention while repairing the boiler.

In Admiralty. On exceptions to commissioners' report.

*Hyland & Zabriskie*, for libellant.

*Wilcox, Adams & Macklin*, for claimants.

BROWN, J. 1. The libellant's canal boat Hebe having been sunk in the North river through the fault of the above defendants' vessel, (38 Fed. Rep. 156,) a claim for salvage services to the sunken boat afterwards arose, which was allowed in the district court of New Jersey to the extent of \$110, with \$39 costs of suit. In the assessment of damages, the libellant has been allowed this salvage charge, but was disallowed the costs included in the decree, as well as the much larger costs for the fees of his own counsel incurred in the defense of that suit. The precise question as to both these classes of costs arose in the eastern district of New York in the case of *The Homely* and *The C. F. Ackerman*, 8 Ben. 495-498, where both were disallowed as items of damage against the wrong-doer, and this decision was affirmed by Mr. Justice HUNT on appeal to the circuit court. I am not at liberty to depart from that adjudication.

2. *Net Freight*. As respects the sum of \$191.20 for the loss of the freight on the pending charter, I think there should have been a further deduction for expenses for the wages and board of the master, engineer, and deck-hand, for six days, amounting to \$36. This would leave \$165.-50 for net freight, which is allowed, with interest.

3. *Boiler*. I am not satisfied with the evidence in support of the claim for damages to the boiler. The boiler rested vertically on top of the furnace. After the collision the boiler was taken out, and the lower end, or crown sheet, was found to have two or more cracks in it, which it is estimated would cost \$262 to repair. The libellant contends that these cracks were caused by the sudden submersion of the boiler in cold water while it was working hot. No previous instance is shown, either in the adjudications or in the evidence, where the crown-sheet of such

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

a boiler was cracked from such a cause; yet the sinking of tugs, under a similar circumstance, is not uncommon. The claim, being, therefore, of an unusual kind, ought to be sustained by evidence correspondingly convincing. I do not think the evidence meets this requirement. The evidence of the defendants' experts, that such cracks could not be caused in this manner, is quite as strong as the testimony of the libellant's experts, and seems to me much more probable; inasmuch as the only access of water to the under side of the crown-sheet was through the door of the furnace, and over and through the raging fire within it. There is no proof, and I very much doubt, that any water that thus made its way to the crown-sheet would be cold enough to harm it, or would, in fact, be cold at all. All the witnesses also say that the same cracks might be caused by dirt and grease.

- The condition of the crown-sheet had not been examined for at least several months before the accident. At that time Hogan repaired a bulge in the furnace. He says he also examined the boiler or tubes, and sounded them. But the examination must have been casual, if the boiler was the same; for this boiler had several ferrules about the tubes, and Hogan says that at the time when he examined it there were no ferrules on the tubes. The engineer and deck-hand both state that the boiler in use at the time of the accident leaked; and, as I understand the testimony, there was found after the collision a further bulge in the furnace, showing injury since Hogan's last repairs. Much testimony was given to show repairs to the boiler during several years previous; but near the close of the libellant's testimony it appears that the boiler in the Hebe at the time of the accident was not the boiler on which those repairs had been made, but was an old boiler taken out of the Marshal, and put into the Hebe; and, as the Marshal had a new boiler in 1888, it is probable that of the Marshal was put in the Hebe about that time. The fact that the libellant should introduce testimony as to repairs to a boiler which he knew was not the one that was in the Hebe at the time of the accident detracts from the credit to be given to his own testimony.

The fact also that, after the accident, the boiler in question was taken out of the Hebe without any knowledge of these cracks, and therefore not in consequence of them, and so far appears without any reason, if it was previously sound or supposed to be sound, (for removal was not necessary to repair a bulge,) that no notice of any survey was held upon it, and that no claim to any such amount as is now claimed was then presented, and that no repairs have since been made on it, tend to confirm the belief that the boiler before the accident was known to be old, worn, and out of repair, and not fit for much longer use. To my mind, there is no satisfactory proof that any material change in the condition of the boiler was produced by sinking, and I therefore disallow this item, together with 10 days' out of the 15 days' demurrage allowed for the repair of the boiler and engines, 5 days being sufficient for the repair of the engine. The libellant is entitled to interest on the item of salvage; on the net freight, as above corrected; on the amount allowed for repairs on the hull from the time of payment, March 13, 1889; and

on the demurrage for 19 days, at the rate allowed by the commissioner, which agrees with my own computations. The other items are allowed as reported, with interest.

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WILSON *et al.* v. CITY OF CHICAGO *et al.*

(District Court, N. D. Illinois. March 17, 1890.)

1 TOWAGE—LIABILITY OF TUG FOR NEGLIGENCE.

Libelants' vessel, with a heavy cargo, was being towed by defendant towing company's tug-boat through a draw-bridge across a navigable river. The draw was so obstructed by a grounded vessel that in order to pass it was necessary to take the tow through at a sharp angle. The pier of the bridge was so constructed that the abutment, instead of sloping gradually from the bottom up, rose in a series of stone steps, the corners of which were concealed by the water. Piles coming above the surface of the water had been driven around this abutment to prevent passing vessels from striking, but had just been removed by defendant contractors for the purpose of building another bridge across the river, under a contract with defendant city. The tug took the vessel in tow at such speed that it lost control of her, and she was injured by striking the abutment. *Held*, that the tug company was liable for such injuries, since they were caused by the negligence of the men in charge of its tug.

2. NAVIGABLE WATERS—BRIDGE CONTRACTORS—NEGLIGENCE.

The bridge contractors, having taken up the piles which would have protected the vessel, were also liable, whether they knew the mode in which the abutment was constructed or not, since by their contract with the city they agreed to be responsible for any damages the city might have to pay in consequence of their neglect to protect the public against accidents, and thus placed themselves in the same position as was occupied by the city, which was chargeable with notice of the construction of the abutment.

In Admiralty. Libel for damages.

*H. D. Goulder and George W. Morgan*, for libelant.

*Schuyler & Kremer*, for Vessel Owners' Towing Company.

*Ball & Oakley*, for Fitzsimmons & Connell Company.

BLODGETT, J. This suit is brought by the owners of the steam-ship Wallula, and the underwriters upon her cargo, to recover for damages sustained by said steam-ship and her cargo from a collision with the south abutment of the Wells Street bridge, in the Chicago river, on the 9th of April, 1888. The original libel made the city of Chicago, the North Chicago Street Railroad Company, the Fitzsimmons & Connell Company, and the Vessel Owners' Towing Company, respondents, charging them all with having contributed to the damage sustained by the libelant: but the suit has since been dismissed as against the North Chicago Street Railroad Company, and was brought to hearing only upon pleadings and proofs as against the remaining respondents.

The proof shows that the steam-ship Wallula, with about 66,000 bushels of oats on board, left the St. Paul elevator, near the junction of the two branches of the Chicago river, soon after dinner-time on the afternoon of the 9th of April, to proceed down the river to the Illinois Central Railroad slips, where she was to take on the balance of her cargo at

the Central elevator. She was in tow of the tugs Carpenter and Van Schaick, belonging to and managed by the Vessel Owners' Towing Company, was not using her own propelling power, and had her rudder lashed amid-ships; the tug Carpenter towing the steamer, and the Van Schaick being fast to her astern, for the purpose of aiding in maneuvering and handling her during the trip. She was drawing about 12½ feet of water astern, and about 10 feet forward. The Fitzsimmons & Connell Company were at the time engaged in removing the old south abutment, preparatory to the construction of the new bridge which the North Chicago Street Railroad Company had, in consideration of certain franchises granted it by the city, agreed to construct across the Chicago river at Wells street. The north draw of the bridge was obstructed by vessels and scows, which lay either within the draw, or so close to it as to make it impracticable to attempt to take the Wallula through it, and just to the west of the entrance of the south draw of the bridge, the course of the river being nearly east and west at that point, a steamer, called by some of the witnesses the "Palmer," and by others the "Coffinberry," lay aground in such a position that it was necessary to take the Wallula around the north side of the vessel, which lay aground, and which made it necessary that the Wallula should enter the draw at a pretty sharp angle, her bow pointing directly toward the south abutment of the old bridge. As the vessel moved forward towards the abutment, and it was seen that she was in danger of striking it, the Carpenter, being the leading tug, made an effort to swing her more to port, so as to prevent her from striking her bow upon the abutment, but, as some of the witnesses say, the steamer seemed to take a sheer, and the efforts of the tug were unavailing to change her course, until she collided with the abutment, striking the bluff of her bow on a projecting corner of the abutment, which, as it was afterwards discovered, broke a hole into the bluff of her bow about five feet below the surface of the water, and damaged her cargo, and required the steamer to go into dry-dock to repair the breach; the injury to the hull also requiring the removal of the portion of her cargo which became wet from water entering the hole in the bow. The proof also shows that, in constructing this south abutment for the old bridge, its base had been made much broader than the portion which stood above the water, and instead of drawing the face of the abutment in from the bottom by a regular slope to the top, so as to give an inclined batter-face, the retraction or narrowing from the base had been by a series of steps, like stairs, under the water, leaving the angles or corners of these steps concealed from observation; and along the face of the abutment, close to its base, parallel with the general course of the stream, there had been driven a row of piling, reaching above the water, and standing in such a manner as to act as fenders to protect the passing vessels from colliding with the abutment, or with these steps or projections below the water. Some of the witnesses seem to think these piles were part of an old coffer-dam, built at the time the abutment was put in; but I think it immaterial whether they were first used as part of a coffer-dam or not, as all seem to agree that they acted as a protection to the

abutment, and prevented vessels from striking upon the base or corners of the abutment, which projected into the channel below the surface of the water. The abutment was also further protected by clumps of piles driven at the corners of it, the tops bound together with chains, so as to make spring fenders or guards to the abutment, and to prevent vessels from colliding against the same. A day or two before the collision in question, the Fitzsimmons & Connell Company, in the prosecution of their work of preparing to put in the substructure of the new bridge, had taken out these fender piles, which were arranged along the face of the abutment, and left no protection against these submerged corners of the abutment, and their men were at work, at the time the Wallula attempted to pass through in removing the clumps of piles at the north-west corner of the abutment. It appears from the evidence that the steamer was swinging and progressing down the stream at the time the bluff of her bow so came in contact with one of the submerged projections or steps of the abutment, and it is quite evident that she must have struck the corner of one of these steps, one of which was about five feet below the surface of the water, and received the injuries complained of by such collision.

It is conceded that the Chicago river is a navigable stream, and that the city of Chicago has the right to construct bridges across the same, subject only to its obligation not to materially interfere with the navigation of the river. And it also appears that the Fitzsimmons & Connell Company, in their contract for putting in the substructure of the new bridge, agreed that they would effectually guard the public from liability to accident in consequence of their operations during the progress of the work of building the bridge, and agreed to be held responsible for any damages the city might have to pay in consequence of neglect on the part of said company to protect the public against such accidents; and said company also agreed to be held responsible for all damages the city might have to pay to private individuals or corporations in consequence of their doings or negligence in connection with said work. It is contended on the part of the libellant that the city is liable for the acts of the contractors in the construction of this bridge, and that, by the removal of these fender piles, the concealed edges and corners of the abutment below the water line had been exposed, so that it was possible for vessels to be brought in contact with and injured by them, and that the act of the contractor in removing these piles is the act of the city itself. It is also contended that the contractors, the Fitzsimmons & Connell Company, were guilty of negligence in the removal of these piles, and that the Vessel Owners' Towing Company, acting through the crews of its two tugs, was also guilty of negligence in carelessly towing the steamer, so as to bring her in contact with the exposed corners of the abutment.

It is quite apparent to me, from the proof, that the injury to the steamer was brought about by the combined effect of the removal of the fender piles from the front of the abutment, and the manner in which the Wallula was handled by the tugs in allowing her to enter the draw at such an angle, and at such a rate of speed that she could not, by the power of the tugs, be prevented from collision with the abutment. It is



insisted on behalf of the Vessel Owners' Towing Company that these corners and edges of the submerged steps or projections to this abutment were concealed obstacles to the navigation of the river, of which the towing company and its men had no knowledge or notice, and that, therefore, the towing company is not responsible for the injury; and that contention might avail if the tugs had not so handled the steamer as to allow her to strike the obstructions which the Fitzsimmons & Connell Company had negligently uncovered.

It is quite clear to me that the removal of this row of fender piles from the front of this abutment exposed craft navigating the river to danger from these projections of the abutment below the water; and it is also clear to me that the steamer would not have collided with these projections if she had been towed straight through the draw, or if her course had been changed after she entered the draw, so as to prevent her from colliding, or, even if she had struck the abutment fairly end on, it is not probable she would have been seriously injured; but the swinging and progressing motion combined brought the bluff of her bow directly against the corner of these steps, concealed below the surface of the water, in just the kind of motion which would cause the corner to do the injury complained of. The witnesses who had the best opportunity to see the affair all agree that when the Wallula came along-side the grounded steamer above the draw she nearly stopped; that the leading tug made a very vigorous pull at her, which seemed to start her ahead quite rapidly, not following the tug, but with a sheer toward the abutment, which the tug was not able, by all its efforts, to prevent, and the collision with the abutment ensued. With the entrance to the draw obstructed by this craft, which lay just above it, it is obvious that the attempt to pass the Wallula through the draw was attended with no little difficulty, and I do not think that the crews of the tugs sufficiently comprehended the peril into which they were taking their tow, and proceeded as carefully as the circumstances required. The Wallula was about 190 feet long over all, and with so much of a cargo on board it required the utmost care on the part of the tugs to pass her through this devious channel without injury. It is very clear that the stern tug contributed but little, if any, aid in steering the Wallula, as, with the steamer aground blocking the passage, she was practically powerless to swing the stern of the Wallula to starboard, and thus help swing her bow to port. It was therefore incumbent on the leading tug to have proceeded all the time at so low a speed as to have the steamer in full control. This she did not do, but allowed the steamer to get away from her, the result of which was the collision and the breach in the Wallula's bow. The negligence, therefore, which I think the proof fastens upon the tug-men was in allowing the Wallula to enter the draw at an angle which must necessarily carry her into contact with the abutment at such a speed as made it impossible for the tug to control or change her direction.

If the fender piles which had been removed by the Fitzsimmons & Connell Company a few days before had been left standing, they would undoubtedly have prevented the steamer from striking the bluff of her

bow upon the projections of the abutment. I conclude, therefore, that the injury to the steamer and her cargo resulted from the joint negligence of the Fitzsimmons & Connell Company in removing these fender piles, and giving no notice or warning to the tug-men of the danger which lurked beneath them, and the mismanagement of the steamer by the tugs which brought her in contact with the exposed corners of the abutment. It is urged on the part of the Fitzsimmons & Connell Company, that they did know of these projections under the water forming the base of the abutment, and I do not think the proof does show that they were aware of the peculiar manner in which the abutment below the surface of the water was constructed; but, by their contract with the city, the Fitzsimmons & Connell Company had placed themselves in precisely the position the city itself occupied in reference to this obstruction of the river. The city is undoubtedly chargeable with notice of the manner in which it constructed this abutment, and the Fitzsimmons & Connell Company, having assumed all the risks of the city in doing this work, must be held chargeable with all the knowledge of the city as to the danger to be avoided. If it would have been negligence for the immediate agents of the city to have removed these fender piles, and thereby exposed these projections of the abutment to contact with craft in the channel, then it was equally negligence for the Fitzsimmons & Connell Company to do so.

My conclusion therefore is that the injury to the Wallula and her cargo was the result of the joint negligence of the Fitzsimmons & Connell Company and the tugs, and that the damages sustained should be divided between them, share and share alike. A decree may therefore be entered finding that the injury to the steamer Wallula occurred through the negligence of the Fitzsimmons & Connell Company and the Vessel Owners' Towing Company, and that each of these respondents shall pay one-half the damage. But, as I am not quite content with the showing which has been made in this regard as to the amount of these damages, the case will be referred to a commissioner to take proof and report the amount of the damages to the vessel and cargo, for which a decree will be entered.

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PINCKNEY v. THE HUNGARIA.

(Circuit Court, D. South Carolina. May 24, 1890.)

ADMIRALTY—LIBEL—JURISDICTION.

The circuit court of the United States has no jurisdiction of a libel, where, at the time of the service of the warrant of arrest, the vessel was without the limits of the district.

Appeal from district court. 41 Fed. Rep. 109.

*J. N. Nathans*, for libellant.

*Bryan & Bryan*, for respondent.

BOND, J. This cause coming on to be heard on the pleadings and proofs on the plea to the jurisdiction of the court, it is ordered, adjudged, and decreed that the decree of the district court be affirmed, and the libel herein dismissed, on the ground that the district court had, and this court had, no jurisdiction of this cause, because, at the time of the service of warrant of arrest, the vessel was without the limits of the district of South Carolina, and without the territorial jurisdiction of this court. It is further ordered and decreed that respondent's stipulation for value be canceled, and delivered up to respondent's proctors.

## KERBUSH v. HAVERMEYERS & ELDER SUGAR REFINING Co.<sup>1</sup>

CHURNIDE v. SAME.

(District Court, S. D. New York. May 13, 1890.)

### SHIPPING—FREIGHT—SHORTAGE IN DELIVERY—EVIDENCE.

Two vessels delivered sugar in bags to the respondent, and thereafter, on suit brought to recover their freight, the defense of short delivery was interposed. The vessels proved that their hatches were kept battened down until the unloading was taken charge of by the respondent, and that all the sugar received was delivered. The evidence showed rough usage of the bags by the respondent in unloading, whereby some bags and their marks were destroyed. No direct proof was given by respondent of the number of bags actually received. *Held* that, though the ship was bound to account for the number of bags shipped, under such circumstances, the burden of proving shortage being on the respondent, the mere absence of a few marks was not sufficient proof of shortage, and that the alleged offset failed, and the vessels were entitled to recover their freight.

In Admiralty. Action for freight, with offset of shortage of cargo.

*Convers & Kirlin*, for libelants.

*John E. Parsons*, (*H. B. Closson*, of counsel,) for respondent.

BROWN, J. The Hampshire and the Ixia were both chartered by the respondent for the transportation of sugar. The shortage in weight of the sugar delivered is not 1 per cent. upon the amount stated in the bills of lading. This is so small that, considering the liability of sugar to vary from inherent quality, it affords no presumption of neglect of duty on the part of either ship in transportation. No allowance can be made, therefore, merely for this difference in weight. But the ship is accountable for the number of bags that she received on board. There ought to be no shortage on these. There is no exception in the bill of lading that can cover the alleged shortage of the 15 bags in one case, and of 11 bags in the other. The ship must account for the bags she does not deliver. There is general evidence in behalf of each ship that her hatches were kept battened down until the unloading was taken charge of by the respondent, and that all the sugar received was delivered. The respondent attended

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

to the discharge. The ship kept no tally. Under such circumstances, the burden of proving a shortage on the number of bags received is on the respondent. There is no direct evidence of the number actually received, and hence no strict proof of shortage. No tally is proved. The respondent relies upon the libelants' answers to the third interrogatory. If the answer to this interrogatory admitted a short delivery of bags, the ship would, doubtless, be required to account for the shortage, or pay for it. I do not think such is the effect of the answer, and of the testimony. The third interrogatory is: "(a) How many bags containing sugar were delivered *ex* Hampshire to the respondents? *Answer*. 25,711 bags." This is 211 more than are called for by the bills of lading. The *Ixia* answered the same interrogatory, "19,085 bags," which is an excess of 76. The next interrogatory is: "(b) How many bags of sugar marked as described in the said bill of lading were delivered *ex* Hampshire? *Answer*. 25,474 bags." The *Ixia* answers, "18,982." The third interrogatory is: "*Question*. How many empty bags marked as described in the bill of lading were delivered?" The Hampshire answers, "2." The *Ixia* answers, "None." The libelants' testimony shows, however, that the bags, in course of the discharge, were roughly handled by the respondent's employes who unloaded the cargo; that this rough handling was continued against the protest of the ship's officers; that many of the bags were thereby torn, and some destroyed, and their contents spilled; that an unusual quantity of sweepings remained after the bags were discharged; and that those sweepings, together with old and torn bags, were placed in other new bags or sacks. The ship's own coopers were employed in repairing the injured bags and in sewing old bags upon the new sacks, bag for bag, so that the new bag should be counted in place of the old one. This is the practice on discharging. There was some dissatisfaction on the stevedore's part because the ship's coopers were thus employed. He complained that they did not work fast enough; and it was very likely, under such circumstances, that some of the old bags and marks were not kept separate and turned over to the coopers, or tacked to the new bags, as should have been done. I have no doubt, from the testimony, that a considerable number of the bags was destroyed, and their marks lost or obliterated, through the acts of the respondent's employes. The respondent cannot require the vessel to pay for bags whose marks, in consequence of such handling, were not produced. The testimony fully explains any apparent discrepancies in the answers to this interrogatory. The utmost that is admitted is that the number of bags "marked as described in the bills of lading" were a few less, while the number of bags delivered was more. The absence of the proper mark is sufficiently accounted for by the rough usage of the respondent in unloading, whereby bags and marks were destroyed together. In the absence, therefore, of any strict proof that the actual number of bags received was less than the amount shipped, the alleged offset fails, and the libelants in each case are entitled to a decree, with costs.

## MELOY v. ORTON.

(Circuit Court, W. D. Wisconsin. May 30, 1890.)

**1. ATTACHMENT—CONTINUATION OF LIEN PENDING APPEAL.**

In Wisconsin, an appeal by plaintiff from a judgment for defendant on the merits, in a case in which an attachment has been issued on land, does not preserve the attachment lien pending the appeal, unless immediate notice of appeal is given, a proper bond tendered, and the lien continued by special order of the court. Rev. St. Wis. § 2748, as amended by Laws Wis. 1881, c. 157, providing that, when defendant in the writ of attachment shall recover judgment in cases where real estate has been attached, the clerk shall certify the judgment to the register of deeds, who "shall enter such certificate upon the records of his office in satisfaction of the lien of such attachment," is inconsistent with the continuance of the lien *propria vigore*.

**2. SAME—DISCHARGE OF LIEN.**

The lien of the attachment is discharged by the rendition of a judgment against plaintiff, and cannot be continued by the failure of the clerk to perform the merely ministerial duty of certifying the judgment to the register of deeds.

**3. SAME—CONTINUATION OF LIEN.**

Rev. St. Wis. § 8061, providing that, on the giving of an undertaking on appeal from an order "vacating or modifying" an attachment, the court shall order the attachment to be continued, does not apply where the judgment is against plaintiff on the merits.

In Equity. Motion for preliminary injunction.

Wm. E. Carter, for complainant.

Orton & Osborne, for defendant.

BUNN, J. This is a motion by the complainant, based upon the bill of complaint, for a temporary injunction to restrain the defendant from selling or encumbering, during the pendency of the suit, a certain tract of land which forms the subject of the suit, which is brought to quiet title; and the case turns upon the question of the continuance of an attachment lien upon the property in a suit in the state court during the pendency of an appeal from the circuit to the supreme court, where a judgment on the merits in the case where the attachment was issued went against the plaintiff in the trial court, and no *supersedeas* or other bond was given or order made to continue the lien of the attachment during the pendency of such appeal. In Wisconsin, all actions are commenced by the issue of a summons, and in cases upon contract, when (among other specified cases) the defendant is a non-resident of the state, an attachment may issue as a collateral proceeding, to attach and hold the defendant's property found in the state, to answer any judgment that may be obtained against him in the action. On the 22d of June, 1885, Elizabeth Lamar made an affidavit for an attachment in an action against one Frank Scales, stating that he was indebted to her in the sum of \$6,000 upon contract, express or implied, and that he was a non-resident of the state of Wisconsin. This affidavit was made before a notary public in Chicago, Ill., and upon it a suit was commenced and an attachment was issued in La Fayette county, Wis., two days later, on June 26, 1885, and a certain 60 acres of land belonging to the defendant Scales was seized. Afterwards, on August 30, 1886, the action was tried by the court with-

out a jury, and a finding and judgment entered against the plaintiff, dismissing her complaint, and giving costs to the defendant. The record of the judgment was perfected on September 14, 1886. Nothing more was done in the case upon either side until some 14 months afterwards, when, on November 7, 1887, the plaintiff gave notice of an appeal from the judgment, and gave a bond for costs, as provided by section 3052, Rev. St. Wis. That section provides that, "to render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding two hundred and fifty dollars." Section 3053 provides for the giving of a bond by the appellant in case he wishes to stay the execution of a judgment directing the payment of money. This bond was not given, nor was any step whatever taken by the plaintiff at any time to continue the attachment lien, unless the naked appeal had that effect. On February 28, 1888, the case came on for hearing in the supreme court, when the finding and judgment of the circuit court were reversed, (36 N. W. Rep. 850,) and the cause sent back to that court for further proceedings; and where on September 26, 1888, a judgment was rendered in the circuit court for the plaintiff for \$9,000 and upwards. On this judgment an execution was issued, and the interest which the defendant had in the land attached, was sold on January 12, 1889, and the land bid in by Philo A. Orton, as attorney for the plaintiff. But in the mean time, on June 27, 1888, the defendant Frank Scales sold the land by warranty deed to Edward D. Meloy, the complainant in this suit, who, as appears, was an innocent purchaser, paying full value for the land, unless the lien of the attachment continued during the pendency of the appeal, and until final judgment was rendered in favor of the plaintiff, and the pendency of the appeal was constructive notice to him of the existence of the attachment lien.

Two questions have been argued as to the sufficiency of the affidavit,—one, whether it is enough to state, in the language of the statute, that the defendant is indebted to the plaintiff upon contract, express or implied; another, whether the machinery of the law in such a case may be set in motion in this state by an affidavit made two days previous, before a notary public in another state. The courts in Michigan, under a similar statute, seem to have held attachments void, issued upon such an affidavit. I have not found it necessary to decide either of these questions, and shall assume that the attachment was regularly issued, and dispose of the question of the issuance of a temporary injunction upon the main question in the case. Did the attachment constitute a lien upon the land when sold by the defendant in that action to the complainant in this action? There seems to be very little authority by way of adjudged cases upon the point, but, upon a careful consideration of all the provisions of the statute, I am satisfied that the contention of the complainant that the attachment lien, if any existed, was lost before the plaintiff in the case took steps to perfect his appeal, is correct. What has given the court more trouble than anything else in the decision of

this question is the apparent absence of any express provision in the law for continuing the lien of the attachment during the pendency of the appeal. Section 3061 provides that, "when a party shall give immediate notice of appeal from an order vacating or modifying a writ of attachment, \* \* \* he may, within three days thereafter, serve an undertaking executed on his part, \* \* \* to the effect that if the order appealed from, or any part thereof, be affirmed, the appellant will pay all costs and damages \* \* \* the adverse party may sustain by reason of the continuance of the attachment," and that, "upon the giving of such undertaking, such court or judge shall order the attachment to be continued," etc. The contention of the complainant is that this provision applies to a case like this; while that of the defendant is that it clearly has no application to cases of appeal from a judgment on the merits, and that, as there is no other provision for continuing the lien, none was necessary, except the general provision allowing an appeal to be taken within two years from the entry of judgment.

I cannot say I am satisfied with the contention of either party on this question. It seems to me the provision applies in terms only to the case of an appeal from an order vacating or modifying the writ, and has no application, unless by analogy, to the case where the injunction is dissolved by the entry of a judgment against the plaintiff upon the merits. And, the attachment being a proceeding collateral to and depending wholly upon the action, it cannot exist without that; and when the action itself goes down the attachment goes with it, unless continued by special order of the court. And there are other provisions of the statute which seem quite inconsistent with the idea of the lien continuing *propria vigore*, without such an order. Section 2748, as amended by chapter 157, Sess. Laws 1881, provides:

"Whenever the action shall be dismissed or discontinued, or the defendant in the writ of attachment shall recover judgment, all the money or property held by any writ of attachment shall be delivered up to him, subject to the plaintiff's rights on appeal, and he may maintain an action on the plaintiff's undertaking for the damages assessed, as sustained by reason of the writ of attachment, and his costs; and in cases where real estate has been attached, upon the entry of final judgment in favor of the defendant in the action either on the merits or on discontinuance or dismissal, or on satisfaction of a plaintiff's judgment, the clerk of the court shall certify the fact of such judgment or satisfaction; and, on filing such certificate with the register of deeds in any county in which lands attached in the action are situated, such register shall enter such certificate upon the records of his office in satisfaction of the lien of such attachments."

This provision seems wholly irreconcilable with the notion that the lien of the attachment continues during the two years allowed for an appeal from the judgment, without any *supersedeas* bond or undertaking of any sort being given, and without any order of the court made thereupon continuing the attachment. The purpose of attaching the property, and taking it out of the possession and control of the defendant, and keeping it in the custody of the law, is to have it forthcoming and available to answer any judgment the plaintiff may recover in the action;

and, this being so, it is absurd to suppose that the law should provide, upon rendition of a judgment against the plaintiff, that the property so seized should immediately be delivered over to the defendant, but that the lien of the attachment should nevertheless continue as though it had not been so delivered over, but had been kept by order of the court in the custody of the officer during the pendency of an appeal to answer any judgment the plaintiff might finally recover.

But it is claimed by defendant that such is the effect of the words, "subject to the plaintiff's rights on appeal," and I confess it is somewhat difficult, under any interpretation, to give proper effect to these words of the statute. But, whatever their meaning and effect may be, it seems quite conclusive that they cannot be given a meaning to suit the contention of the defendant. It cannot mean that money and personal property is to be delivered over to the defendant, who is to be thereby clothed with all the *indicia* of absolute ownership, including the possession and immediate personal control, with power to sell or mortgage to an innocent purchaser, and the lien of the attachment still continue. It cannot mean, in case of real estate, that the clerk shall certify the fact to the register that judgment has gone for the defendant, and make it the duty of the register to enter such certificate of record in his office in satisfaction of the lien of the attachment, and that the lien, notwithstanding all this, shall continue until the plaintiff's time for appealing has elapsed, in case he shall finally choose to appeal. The most rational effect that I have been able to give to the words is this: that if the plaintiff, upon the rendition of judgment against him and before the property is delivered over by the sheriff, shall give immediate notice of appeal, and tender a proper bond, perhaps analogous to that referred to by section 3061, to pay all costs and damages that may be awarded against him, and duly to prosecute his appeal, he may be entitled to an order continuing the attachment until the determination of the case in the supreme court, and requiring that the property be continued in the custody of the sheriff during the pendency of the appeal. If this is not the meaning and effect to be given to the words, I am quite at a loss to suggest any better or more plausible interpretation.

In this case no such certificate was made by the clerk, and no entry made in the register's office discharging the attachment. But I cannot think the failure of the clerk to perform such a clerical and ministerial duty can at all effect the question of the continuance of the lien, as to third persons or between the parties. The delivery over of personal property by the sheriff to the defendant is not what discharges the lien of the attachment, but it is the rendition of a judgment on the merits against the plaintiff in the attachment. It is not the bare entry on the records in the register's office which discharges the lien. But such entry of the clerk's certificate is to make the record to correspond with the actual facts, emphasized by the entry of the judgment, which of its own force discharges the lien, unless immediate steps be taken to continue the same; for I assume that, though there be no express provision for continuing the lien of the attachment after judgment in defendant's fa-



vor, there is no want of power in the court to continue it during the pendency of an appeal, provided the application be made immediately, and an undertaking given. The proceeding by attachment is a special proceeding, depending wholly on the statute. It has sometimes been declared by the courts a harsh proceeding. It is certainly in derogation of the common law. It follows, then, that the lien created by it is just such and no other or more pervasive than the statute makes it, and cannot be helped out to any extent by intendment. Where no warrant is found in the statute for the lien, it does not exist. The attachment being wholly collateral to the main action, a judgment against the plaintiff necessarily vacates the attachment, unless it be continued and kept alive by order of the court, made pursuant to law. As no such order in this case was made, I think the lien was gone long before the plaintiff's appeal was taken, and before the sale of the land to the complainant. The case cited most in point to favor the complainant's views is *Loveland v. Mining Co.*, 18 Pac. Rep. 682, recently decided by the supreme court of California. The case of *Harrison v. Trader*, 29 Ark. 85, seems to be an authority for the defendant. A temporary injunction will issue as prayed for in complainant's bill.

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**JUCK v. FEWELL et al.**

(Circuit Court, W. D. Texas, El Paso Division. October 23, 1889.)<sup>1</sup>

**1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—PAYMENT OF TAXES.**

Rev. St. Tex. art. 8193, provides that no suit shall be brought to recover land after five years against any person having peaceable adverse possession thereof, cultivating, using, or enjoying the same, "and paying taxes thereon, if any," and claiming under a deed duly registered. *Held*, that the claim of one having such possession is not defeated by his failure to pay taxes for the year in which the five years expire, where the taxes are not yet due at the date of the expiration.

**2. SAME.**

Failure to pay taxes by one claiming land by such adverse possession after the five years have expired cannot affect his title, since all right of action against him is then barred.

At Law. Trespass to try title.

*Teel, Merchant & Wilcox*, for plaintiff.

*Davis, Beall & Kemp, Nugent & Stanton*, and *Brack & Neill*, for defendants.

MAXEY, J., (*charging the jury*.) This suit of trespass to try title was originally brought by Mrs. Ida Juck and her children against W. J. Fewell, M. J. McKelligan, James P. Hague, S. G. Cowdry, O. T. Bassett, and Simon Kinsella to recover lot No. 35, block 6, situated in the city of El Paso. At a former day of the present term, and during the trial of this cause, the court permitted the children of Mrs. Juck to take

<sup>1</sup>Publication delayed by failure to receive copy.

a nonsuit, and the suit now stands in the name of Mrs. Juck as sole plaintiff against the defendants above named. Among other defenses, all of the defendants rely upon the statute of limitations of five years as a bar to the plaintiff's right of recovery. In suits of this character it is incumbent upon the plaintiff to recover upon the strength of her own title. In this case Mrs. Juck has exhibited a legal title to herself to the property in controversy, which would be sufficient to authorize a recovery on her part, unless the defendants' pleas of limitation defeat her. Under the laws of this state, "a party claiming land under the limitation of five years must have peaceable and adverse possession thereof, cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered." *Cantagrel v. Von Lupin*, 58 Tex. 577. The testimony is perfectly clear that the defendants Fewell, McKelligan, Cowdry, Bassett, and Kinsella are, beyond controversy, protected by the five-years statute of limitations, and hence are entitled to a verdict at your hands.

The real difficulty in the case arises out of the defense interposed by Hague; and that is one of law, rather than of fact, as the testimony leaves no doubt touching the facts proven. The question is one of construction of the statute, which reads as follows :

"Every suit to be instituted to recover real estate, as against any person having peaceable and adverse possession thereof, cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards." Rev. St. Tex. art. 3193.

The facts proven are as follows: (1) The plaintiff, who is styled Mrs. Juck in her pleadings, after the death of her first husband, Albert Juck, intermarried with Charles Pohl on September 5, 1873, and that marriage was dissolved by a decree of divorce duly rendered on the 10th day of February, 1882. (2) The original petition in this cause was filed April 13, 1888. (3) Hague's possession of the property claimed by him certainly began in the latter part of 1881, and probably at a much earlier date, and has continued to the present time. (4) Hague holds title to the property by duly-registered deeds, and he has paid the taxes due thereon for the years 1882, 1883, 1884, 1885, and 1886. Mrs. Pohl's disability of coverture having been removed by the decree of divorce on the 10th of February, 1882, and Hague being at that time in possession of the property, her cause of action then accrued, the statute of limitations was set in motion, and she had five years thereafter within which to bring the suit, or until the 9th day of February, 1887; and if the defendant, at that time, had been in possession five years, under deeds duly registered, coupled with the payment of all taxes due on the property, the plaintiff's right of action would have been barred, and the title divested out of her, under the terms of article 3196 of Revised Statutes of the state. That article of the statutes provides:

"Whenever, in any case, the action of a person for the recovery of real estate, is barred by any of the provisions of this chapter, the person having such

peaceable and adverse possession shall be held to have full title, precluding all claims."

It is not denied by the plaintiff that Hague had been in possession for the full statutory period, nor that he claimed title under deeds duly registered. But it is insisted that the proof should disclose the payment of taxes for that portion of the year 1887 ending with February 9th, in order to make the payment of taxes complete and effectual as a bar. The statute contemplates the payment of such taxes as were due and could have been paid. On the 9th February, 1887, the taxes for that year, under the laws of the state, were not due, nor could they have been paid until a much later period of the year. Hague had paid at that date all taxes which were due and payable, to-wit, for the years 1882, 1883, 1884, 1885, and 1886; and I must therefore hold that he had fully complied with the law in reference to the payment of taxes, and that he became invested with full title at that date. His subsequent laches in failing to pay the taxes would not inure to the benefit of plaintiff, for her right of action was debarred. See *Spofford v. Bennett*, 55 Tex. 293. Reference is also made to the case of *Cantagrel v. Von Lupin*, 58 Tex. 576, in support of the views here expressed. The facts in the *Cantagrel Case* are quite similar to those involved in this suit. The law of the case, as applied to the facts, being adverse to the plaintiff, it is my duty, gentlemen of the jury, to instruct you to find a verdict in favor of the defendants.

NOTE BY THE COURT. Upon reading the above charge, the plaintiff moved for a non-suit, which was granted.

## EVANS v. AMERICAN IRON & TUBE CO.

(Circuit Court, N. D. Ohio, E. D. February Term, 1890.)

### 1. MASTER AND SERVANT—NEGLIGENCE OF MASTER—UNLAWFUL EMPLOYMENT OF CHILD.

Under the Ohio statute making it a crime to employ in a factory a child under 12 years old, it is only necessary, in a prosecution for its violation, to prove the employment and defendant's knowledge of the child's age; but such proof is not, in itself, sufficient in a civil action for injuries sustained by the child through defendant's negligence.

### 2. SAME—CONTRIBUTORY NEGLIGENCE.

Where the employer of a child under 12 years of age furnishes him with a safe and suitable place to work, he is not liable for injuries sustained by the child by reason of his voluntarily going about the factory and exposing himself to dangerous machinery, where the child is of such age and experience, and has sufficient knowledge of the machinery, to be able to appreciate its dangerous character.

### 3. SAME—FELLOW-SERVANTS.

Such a child, if he is incapable, by reason of his youth and inexperience, of apprehending and appreciating the dangerous character of the machinery, is not a fellow-servant of the adult servants employed in the factory.

Now

Owen Evans, guardian of William Lewis, against the American Iron & Tube Company, for personal injuries sustained by said ward in the defendant's employ.

*D. L. King, R. B. Murray, and A. J. Woolf, for plaintiff.*  
*Sanderson & Norris, for defendant.*

RICKS, J., (*charging jury.*) This action was instituted by Owen Evans as guardian of William Lewis, to recover damages for injuries sustained by him while in the employ of the defendant when he was under the age of 12 years. The petition avers that said boy went into the employ of defendant, July, 1887, and continued in such employ until November 18, 1887, when he was injured by the negligence of defendant's boss in ordering him to a place of danger to do labor of a hazardous character, near machinery which was not properly protected; and that defendant placed said boy in this dangerous place without properly cautioning him as to the dangers to which he was exposed. These are the main allegations which you will find it necessary to investigate under the issues made. I may say at the outset that the case is to be tried upon the testimony as presented before you, and neither sympathy for the plaintiff's ward on the one hand, nor prejudice against the defendant corporation on the other, are to enter into your deliberations. There is nothing in the testimony to show, or to warrant you in concluding, that this defendant employed this boy for any censurable purpose. It is not here arraigned as a criminal under this statute for the employment of this boy; but, so far as there is affirmative evidence before you, it appears that the mill boss employed the boy out of sympathy for him and his mother, and that it therefore stands here entitled to the presumption of having employed him without any unworthy or criminal intent. Now, imbued with this spirit of perfect fair dealing between these parties, let us proceed to consider this testimony as to the legal principles that are to control you in finding your verdict.

The statute of Ohio prohibits all persons from employing boys under 12 years of age in such establishments as the defendant operates. How does this statute affect this case? If defendant was being prosecuted under Ohio laws for violation of this statute, the fact of employment by defendant, and the fact that it knew him to be under 12 years of age at the time of such employment, would be all that would be needed to secure conviction. But, in a civil action for an injury to such minor on account of such employment, other considerations may enter into the case before the defendant would be liable for such illegal employment. In a civil case, where the illegal employment was the direct and proximate cause of the injury, the defendant would be liable. But where, in such an action, injuries are complained of which go beyond the employment, and involve questions of negligence on the part of the defendant, or contributory negligence on the part of the plaintiff, then the mere employment or violation of this statute is not, in and of itself, enough to entitle plaintiff to recover. With this instruction as to the effect of this statute, you may then proceed to inquire as to the next question: Has the defendant been guilty of negligence other than the mere employment, which resulted in this accident?

If you find that the defendant gave this boy employment, and fur-

nished him a safe and easy task, in an unexposed position, and that if he had attended to his duties and labor and remained at his post he would have escaped this injury, such employment cannot be claimed to be negligence, or the proximate cause of this injury. If you find from the evidence that the defendant furnished this boy with a safe employment suitable to his condition at a safe position, but that of his own choice he undertook to go about the mill and its machinery, and so, voluntarily or without direction, exposed himself to dangerous machinery, or undertook, of his own will, to do dangerous work, and that he was of such age and experience, and had such knowledge of the machinery, as to enable him to know of such dangers, and that in so doing he exposed himself to risks that a prudent, bright, and careful boy, of his age, exercising ordinary and reasonable care, ought not to have done, and was thereby injured, then I say to you, as a matter of law, that he contributed to that injury, and cannot recover. A boy of his age and experience cannot be, and ought not to be, held to the same degree of care that ought to be expected of a man of years and knowledge. But you have seen the boy, and have heard him testify. You have heard evidence as to his bright and popular ways, and his habits, and from these observations and evidence you can safely judge as to his intelligence and knowledge of this mill and its machinery in November, 1887, and as to his information as to the process of making tubes; and you must judge therefrom as to what would have been ordinary care and prudence, or what would have been negligence, on his part, at that time in his life. He had been in the service of the defendant some months. He knew the employes, and the general nature of their respective employments. He had seen the machinery operate, and knew, or had opportunities to see, its dangerous and its hazardous points. You will consider all these facts when you come to apply the proper standard of care and prudence for such a boy, under the circumstances of this case. If in applying this standard you find that he acted without proper care and caution in voluntarily undertaking any part of the work about the mill, and through this want of care he voluntarily exposed himself to dangers about which he ought to have known, then he cannot recover in this case.

If you find that William Lewis was under 12 years of age at the time he received the injuries complained of, and that he was at that time incapable, by reason of his youth, inexperience, and want of knowledge, of apprehending and appreciating the dangers and hazards of dangerous machinery, then I say to you that he would not be in law a co-laborer or fellow-servant of the adult servants of defendant there employed. If William Lewis, being there under such employment, as described, was ordered, or knowingly permitted by one of the defendant's adult servants then and there engaged in dangerous and hazardous work, to assume such dangerous work at or near dangerous machinery, and in a dangerous and hazardous place, the dangers and hazards of which Lewis was incapable of appreciating, and that, while so employed in performing the work of such adult servant, he received the injuries complained of, it is a question for you to determine whether or not, under all the cir-

cumstances, such conduct of such adult male servant of defendant was negligent; and if you find that such adult servant was negligent, and that the injuries to this boy were the direct and proximate result of such negligence, then I say to you, as a matter of law, that the negligence of such adult servant would be the negligence of defendant, for which it would be liable, and for which the plaintiff would be entitled to recover; unless you find that said Lewis did not, in and about the performance of such service, exercise such care and prudence as boys of his age, experience, and intelligence are accustomed to exercise under the same or similar circumstances, and that his failure to exercise such care and prudence contributed to his injuries.

The plaintiff's ward was not a co-laborer to the other employes, in the legal sense that he stood on the footing of owing the same duties, the one to the other. He did not occupy, as to them, the same relation as though he had been a man, or a minor of more mature years. But he was not there as an infant and a ward, to be looked after by such employes whenever he might leave his post of duty to which he had been assigned. If he left that place of duty, and took other risks, he took and carried with him, wherever he voluntarily went about that mill, a duty to look after himself, and protect himself from dangers, to the extent of that care and prudence which you might reasonably expect of a boy of that age, as I have before explained, and the other employes in the mill owed to him no other or greater care and oversight than they would be expected to extend to a prudent and careful boy of that age and experience.

This takes us to the next point in the case. If you find, gentlemen, that although the defendant employed this boy to perform labor not dangerous to be performed, at an unexposed place, but during such employment by its mill boss, or superior officer, directed the boy to go to a place where he was not accustomed to be, and to do labor he had not been accustomed to do, and at a dangerous point, against which he had not been properly warned and cautioned; and you further find that the boy, under such orders, did go and undertake to perform that labor, with as much care and prudence as would be expected of a prudent and cautious boy of that age and experience, under similar circumstances; and while in that place, and while undertaking to do that work, he was injured,—then the defendant would be liable for such injury, and your verdict should be for the plaintiff. It was the duty of the defendant to anticipate that minors would not exercise the same care and foresight amid dangers that adults would, and it was the duty of the defendant, through its proper subordinates, to give to such minors, when taken in its employment, proper instructions as to their duties, and proper caution as to the danger of their employment, and of the machinery surrounding them. But if you find from the evidence that plaintiff's ward had been in the employ of defendant for a sufficient length of time to make him fully aware of the dangers of his work and of the place, or to have enabled a boy of his age and experience, by reasonable care and diligence, to have made himself aware of such dangers, and that he had such

knowledge, or should have had it, then the failure of the defendant to have originally cautioned and warned him, if you find that it did not do so, is not negligence that approximately or directly caused this injury.

These are the principles of law, gentlemen, that are to guide you in your deliberations in this case. The duty of defining the law is with the court, and you are bound by such definition and instruction, and you will accept them without any discussion or consideration, whether they are right or wrong in your judgment. The duty of deciding the facts is with you. But there are some well-settled general principles of law that govern you in passing upon these facts, and it is proper in this case that I should direct your attention to them. There is a marked conflict of testimony as to the facts upon which you are to pass. Your own experience has doubtless already made it plain that good and honest men will often differ as to the details of accidents about which they testify. This is especially true when an injury occurs in a noisy mill, and under the circumstances of this case, after over two years of time. This injury occurred in a mill where none but the employes of the defendant saw how it happened. The men to whom we must therefore look for the facts were employes. Some of them are still in the employ of the defendant, and some are not. You are to presume that all these men are honest and truthful, and have told the truth as they believe it, unless the contrary appears. It will not do to assume, as counsel have urged, that all these men have disregarded their oaths, and are unworthy of belief, simply because they are in the employment of defendant. It would be a most alarming and dangerous situation if the relation of employe to employer in this enlightened and free country should put such men under suspicion and disability. But you will fairly and properly consider whether, as to any of these witnesses, this relation has in any way embarrassed them, or restrained them from telling freely all the facts within their knowledge as to this accident. This you can properly judge from their conduct on the stand, for there has been nothing in the way of impeachment by direct attack upon their character. Did they manifest any disposition to suppress any of the facts, or were they reluctant to tell the whole truth as they knew it? Did they show feeling, antipathy towards the plaintiff, or any conduct that impressed you as throwing suspicion upon their truthfulness? If so, you will properly weigh their evidence as being impaired to that extent. But the mere fact that they disagree as to details, and as to which way or route of travel through this large mill the boy got to this place of accident, or in just what way he got caught in this gearing, should not, of itself, lead you to set aside their testimony, and disbelieve them *in toto*. It is, on the contrary, your duty to assume that they want to tell the truth, (if nothing in their conduct leads you to think otherwise,) and to reconcile their statements if possible. Look to see if they have any interest in this case which is likely to swerve their testimony. And this is true of the plaintiff's as well as of the defendant's witnesses; and, if you find such interest exists, it is a circumstance to which you can look in weighing their testimony. Witnesses may differ in details, and yet their testimony as to the important

facts may agree. Thus several witnesses agree that this boy at the time of the injury was at a certain place at a certain time, and yet disagree as to the route he traveled to get there, or why he went there, or what he did while he was on his way there. The differences as to the unimportant details you may pass over as matters about which witnesses may be honestly mistaken, but that would not warrant you in disregarding their evidence as to the essential and main fact as to which they agree and are corroborated. So you will treat the discrepancies between the witnesses as to where Smeltz, the mill boss, stood when it is claimed he ordered this boy to the place where the accident happened. The important fact in this connection is, was such order or direction given, and it is not important in settling that fact where he stood when he gave it. The exact position he occupied at this time may be important as relating to other disputed facts, and, if so, you may consider it in that relation as material. I refer to these general principles as indicating how you may intelligently consider all this testimony, reconcile so much of it as you can, and gather from all of it the important facts that must guide you in reaching a verdict.

The plaintiff must satisfy you by a fair preponderance of the evidence that the acts of negligence relied upon were committed by the defendant. There must be a fair preponderance of such evidence; not such as to remove all reasonable doubt, but such as to satisfy you that the fair weight of it is with the plaintiff; and, unless the fact of contributory negligence appears from plaintiff's testimony, the defendant must satisfy you of that by the same preponderance. But in this connection you should assume that William Lewis, at the time he was injured, possessed the ordinary intelligence and discretion possessed by others of the same age, unless the contrary appears.

If, under these instructions, you find that the plaintiff is entitled to recover, it will be your next duty to award him damages. The court can give you no exact rule by which you can measure these damages. All it can do in that particular is to give you such elements as you may take into consideration in making up your verdict. The compensation to which plaintiff is entitled, if entitled to recover at all, is measured by the nature of the injury. In estimating the compensation due the plaintiff, you should take into consideration his bodily suffering and pain, including the pain and suffering at the time of the accident; while recovering or partially recovering from his injuries; what he has suffered since; what he will suffer, if any, by reason of the accident in the future. You may also take into consideration the disfigurement of his face, and the loss of his arm. You should also consider whether or not the injuries to his body are permanent, and whether or not they are of such a character as to decrease his earning capacity in such work or vocation as he would probably be fitted to pursue. If you find that the injuries and mutilations of his chest are of such a nature as to interfere with and decrease his earning capacity, then you should estimate for those injuries. You should also consider the loss of plaintiff's arm; and, if you find that such loss will interfere with and decrease plaintiff's earning capacity in



such pursuit or vocation as he will probably be able to fill, then you should allow for such loss of earning capacity a sum sufficient to compensate him for such loss. You may also, in estimating the amount of compensation due plaintiff, take into consideration the mental suffering, if any, naturally resulting from the injuries received.

This is a case, gentlemen, naturally appealing to our sympathies; and I therefore feel it proper and prudent to remind you that the rights of parties in courts of justice are to be determined upon well-defined principles of law, and not upon the impulses of generous hearts, however well prompted. I need not, I am sure, say more to insure to both these parties a full, fair consideration of their rights, and to receive from you a just verdict according to the law and the evidence. Take the case, gentlemen, and make such a finding as your conscience will approve.

Verdict for plaintiff for \$6,000.

JACKSON, Circuit Judge, by invitation of District Judge, sat with the latter to hear motion for new trial, which, after full argument, was denied. Judgment rendered on verdict for \$6,000 and costs.

### ZEH *et al.* v. CADWALADER, Collector.

(Circuit Court, E. D. Pennsylvania. October 10, 1889.)

#### 1. CUSTOMS DUTIES—CLASSIFICATION—DECORATED EARTHENWARE.

If decorated china earthenware is bought, sold, and used under the name of "toys," it is to be classified for duty, under paragraph 425, at 35 per cent., and it is unimportant whether the articles are used for playthings for children or for household purposes.

#### 2. SAME—TOYS.

The term "toys" used in the tariff act is to receive the signification ordinarily attributed to it in common speech, unless evidence shows that it has a different trade signification,—that is, that it is differently used and understood when applied to such merchandise by those engaged in commerce respecting it, and had such different signification at the date of the statute in 1888.

#### At Law.

This was a suit brought for the recovery of certain customs duties alleged to have been unlawfully exacted upon certain earthenware, mugs, cups, saucers and plates claimed by the plaintiffs to be dutiable at the rate of 35 per cent. as toys, under paragraph 425, Tariff Index, (New,) the appraiser having returned them as decorated earthenware at 60 per cent. under paragraph 125, Tariff Index, (New.) The samples produced upon the trial of the importation consisted of A B C cups and plates, so-called tea muffins, decorated and fancy mugs, and plates. Upon the trial, the testimony of the plaintiffs tended to show that the articles in question were bought, sold, and used in the trade as toys, and were known by that name, while the testimony of the defendant tended to prove that the chief use to which they were put was not as playthings

to amuse children, but for ordinary household purposes. It was also contended on behalf of the defendant that under section 2499, as amended, the verdict should be for the defendant, inasmuch as where two or more rates of duty are applicable, the article is dutiable at the highest of such rates. The verdict was for the defendant.

*Frank P. Pritchard*, for plaintiff.

*William Wilkins Carr*, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for defendant.

**BUTLER, J.**, (*charging jury.*) The defendant asks the court to charge you on certain points, the first of which is as follows: "1. If you believe the goods in question are bought, sold, and used as earthen, stone, or crockery ware, and not as toys, then your verdict should be for the defendant." That is correct. "2. If you believe the articles in question on March 3, 1883, and prior thereto, were commercially known and designated as earthenware, and if you believe that they were not at that time described and designated as toys, then it is immaterial how they have since been known and designated, and your verdict should be for the defendant." That is true. This statute was passed in 1883, and if there is a trade designation it is the designation of that time and not subsequently that governs. "3. If you believe the articles in question are known as earthenware in the trade, and are chiefly used as other articles of earthenware, stone and crockeryware are used, and are not chiefly used as playthings for children, then your verdict should be for the defendant." We cannot so charge you. If they were denominated toys, by the trade, at that time referred to, it is unimportant how they were used. "4. The circumstance that the article in question may possibly be used for purposes other than household purposes, is not controlling, and even if you believe that sometimes they are incidentally used by children as playthings, your verdict should be for the defendant; if you believe that their chief use is for household purposes; and that they are known as toys in the trade." That is true. If they were not known by the trade as toys, then it is true that it is not important that they may have been used as playthings, if their chief use was for household purposes; but if they were known in the trade as toys, then it does not make any odds how they were used. "5. If you find that there is no trade designation of these articles as toys, then the question becomes purely and simply one of fact, viz.:—What is the predominating use to which these articles are devoted, and if you believe that they are not chiefly used as playthings for children, then your verdict should be for the defendant. That is correct. The court affirms that. This assertion is all predicated upon your not finding that they are known to the trade as toys. "6. If you believe that the articles in question are bought and sold under the names of a cup, saucer, and plate, and not under the name of toys, then your verdict should be for the defendant." That probably means the same thing. If they are not designated by and known to the trade as toys, but are known simply as cups, saucers, plates, etc., then they were properly classified, and your verdict should

be for the defendant. "7. A 'toy' is an article used exclusively for the amusement of children, and if you believe that the articles in question are chiefly used by children, otherwise than as playthings, then they are not toys within the meaning of the tariff act, and your verdict should be for the defendant: provided the word 'toys' has no special trade meaning." Here again is the same thought. What is asserted in the point is predicated upon your not finding that the word "toys" has a special trade meaning, and the point is therefore correct. I shall have more to say that will be found applicable to it in a few minutes, when I come to define the distinction between the meaning of the word "toys" as used in common speech, and when used as a trade designation, if it is a trade designation. "8. Upon the evidence in this case, the term 'toys' should not be given any technical or particular or commercial meaning, but should receive its proper signification and natural import; and if the articles in question are not 'toys' in the popular and general sense of the term, but are used for ordinary household purposes, like other articles of earthenware, and if such use is predominating and not exceptional, then your verdict should be for the defendant." This is true. But it is proper to bear in mind that it is predicated on the idea, although not so stated, that you do not find this term "toy" to have a trade signification. The ninth point raises a question of law, which for the present, the court must rule against the defendant. I would prefer to reserve it, but it contains the word "if," and while there is no question how the case should be decided, if the point is right, the circumstances are not such as will enable the court to reserve it, and direct a judgment for the defendant, notwithstanding the verdict, if the court hereafter be with the defendant upon the point—in the absence of an agreement between the parties respecting it, and therefore the point must be regarded as denied. Having thus disposed of the points I will now state the case, and my views respecting it, in a connected form.

The plaintiff having imported the merchandise involved—consisting of cups, saucers, plates, and mugs—it was classified by the customs officers as earthenware, and subjected to the duty imposed by the statute on this class of merchandise—to-wit, 60 per cent. The plaintiff claims that it should have been classified as "toys," and subjected to the duty imposed by the statute on this class, to-wit:—35 per cent. He therefore seeks in this suit to recover the difference between 35 and 60 per cent., which he paid. The term "toys," used in the statute, is to receive the signification ordinarily attributed to it in common speech, unless the evidence shows that it has a different trade signification, that is, that it is differently used and understood when applied to such merchandise, by those engaged in commerce respecting it, and had such different signification at the date of the statute, 1883. The signification of the term in common speech, embraces only such things as are primarily intended for the entertainment and amusement of children. It does not matter that they may be susceptible of other uses; if the predominating design and use is such amusement and entertainment, the articles fall within the signification of the term "toys" as employed in

ordinary speech. If the predominating use is not to amuse, although the articles may be suitable for, and be applied to, this purpose, they are not toys within the common signification, as before stated; that is within the meaning of the term as employed in common speech. If therefore you do not find from the evidence that the term "toys" has a different trade signification, as before explained, the criterion just indicated will guide you in determining whether the articles here involved are "toys." If, however, you find that it has such different trade signification, then the statute must be understood as using the term in this sense, and its ordinary signification in common speech before explained, will cease to be of any importance in disposing of this case. That it has a well-understood trade signification, the evidence seems to put beyond doubt. The witnesses on both sides testify that the term "toy" (at the date of the statute, and for many years before) was in common use among those engaged in this branch of commerce. They (the witnesses) differ only as respects the scope of its application. The question of fact for your consideration therefore, seems to be narrowed to the inquiry: What is the scope of the term as thus used, or rather, what was its scope at the date of the statute? In other words, what was then embraced within the signification of the term "toys" as employed by merchants engaged in this branch of commerce? Did it include the articles here involved? The plaintiff's witnesses, merchants, engaged in this trade, testify that it did embrace them. These witnesses are numerous, and have had large experience in the trade. If you believe them—if their statements are reliable, they settle the question; and the articles must therefore be classified as "toys," and a verdict rendered for the plaintiff in the amount of his claim. On the other hand a number of witnesses were called by the defendant who testified that the term as used in the trade did not, at the time referred to, and does not now, embrace these articles. That its scope was and is narrower—as they describe. Whether their experience and intelligence respecting the question are as great as that of the plaintiff's witnesses, and whether their testimony is as reliable and valuable, you must judge.

The plaintiff has also placed before you numerous trade circulars or price-lists containing information on the subject. From this evidence, and any other you may find in the cause bearing on the question, you must decide whether the term "toy" as used in the trade at the date of the statute, did or did not embrace these articles. If you find it did, your verdict will be for the plaintiff as before stated. If you do not so find, your verdict will be for the defendant.

There is no place here for sympathy or prejudice. If you find that the term in question has a well-known trade signification, (had at the date of the statute,) and that these articles fall within it, your verdict must be for the plaintiff, no matter whether the trade designation seems to you to be reasonable, or not. If you do not so find, your verdict must be for the defendant.

**LEMAIRE FEEDER Co., Limited, v. CADWALADER, Collector.***(Circuit Court, E. D. Pennsylvania. October 15, 1889.)***CUSTOMS DUTIES—CLASSIFICATION—HOOKS FOR CARDING-MACHINES.**

Iron hooks, used in the manufacture of feeders for wicker cards in a carding-machine, sharpened after being set in the cylinder, but first hammered up in the iron and then struck in a die, and known to the trade as hooks, and not as iron forgings, are a manufactured article, within the meaning of the tariff act, and liable to duty under paragraph 216, Tariff Index, (New.)

**At Law.**

This was a suit brought by the Lemaire Feeder Company, Limited, to recover certain customs duties alleged to have been improperly exacted in an importation of iron hooks used in the construction of carding-machines. They were returned as manufactures of metal, and the duty assessed under paragraph 216, Tariff Index, (New,) Schedule C, in accordance with the Treasury Decisions 6798, 7668, and 8323; and the plaintiff protested that they were dutiable as forgings of iron at two and a half cents per pound under paragraph 167, Id. But, upon the trial, witnesses called upon his behalf testified that the article was not known in trade as an iron forging; that it was first hammered out of the iron, and afterwards pressed in a die, and subsequently sharpened, after being placed in a carding-machine by a finishing process; and that they were sold under the name of "hooks."

*Frank P. Pritchard*, for plaintiff.

*William Wilkins Carr*, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for defendant.

By direction of the court, (BUTLER, J.,) plaintiff suffered a nonsuit.

**HEMPSTEAD *et al.* v. CADWALADER, Collector.***(Circuit Court, E. D. Pennsylvania. April 7, 1890.)***CUSTOMS DUTIES—ENTRY WITHOUT INVOICE—STORAGE CHARGES.**

Where merchandise is entered by appraisement without invoice, and the entry is incomplete for want of particulars, and is taken into the custody of the collector of the port and conveyed to a warehouse, the charges for storage and labor are legal.

**At Law.**

This suit was brought to recover charges for cartage, storage, and labor, alleged to have been improperly collected by the collector upon certain importations of merchandise under the following circumstances: Goods were brought to the port of Philadelphia, and entry made for immediate consumption, together with an application under Rev. St. § 2859, (article 328, General Customs Regulations of 1884,) under oath to enter

v.42f.no.10—34

dutiable goods of less than \$100 in value by appraisement, and also the affidavit that no invoice had been received of the merchandise described in the application. The goods were sent to the appraiser's store, and there kept until the appraisement was made and the entry completed; the charges were accordingly made for the labor of hauling, the storage to be paid by the importer. A protest was filed that under Rev. St. §§ 2859, 2926, it is provided that imported merchandise may be entered by appraisement without invoice, and that, under sections 2789, 2926, 2963, merchandise, the entry of which may be incomplete for want of particulars, should be taken into the custody of the collector of the port, and conveyed to some warehouse or store-house, and there remain until the particulars were ascertained by exhibition of original invoice or by appraisement. It was claimed in the protest that no charges could be exacted by the collector except when incurred for the storage of merchandise awaiting appraisement or invoice, and that they were not chargeable where the merchandise was sent to the United States public store for appraisement purposes only, inasmuch as under Rev. St. § 2955 that place was for appraisement purposes only, and not for the storage of the goods.

*F. P. Prichard*, for plaintiffs.

*W. W. Carr*, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for defendant.

The court, (*BUTLER, J.*), after the counsel for the plaintiff had presented his case, suggested that its view of the law was against the contention of plaintiff; a voluntary nonsuit was suffered.

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*LEE v. UPSON & HART Co. et al.*

(*Circuit Court, D. Connecticut. June 11, 1890.*)

**PATENTS FOR INVENTIONS—INFRINGEMENT—HOLLOW KNIFE HANDLES.**

Letters patent No. 365,819, July 5, 1887, to Horatio Jordan, for an art of welding the ends of metal tubes, had particular reference to the manner of shaping and bending the oval or round ends of the hollow handles of steel cutlery, so as to but-weld the handles, and make a perfect seam, which would not leak. The improvement consisted in shaping the blank so as to form at the end of the tube double lips or projections, which were adapted to be bent inwardly, and welding them together by the use of dies. *Held*, that the patent was not infringed by the use of a similar plan of turning the ends of the tube inward, and but-welding them, since before the patent was issued such a plan was known and practiced, though it was not carried out well enough to be a commercial success.

In Equity. Bill for infringement of letters patent.

*Edward S. Beach* and *J. E. Maynadier*, for complainant.

*John P. Bartlett*, for defendants.

*SHIPMAN, J.* This is a bill in equity which is based upon the alleged infringement of two letters patent, the first being No. 365,819, dated

July 5, 1887, to Horatio Jordan, assignor to William W. Lee, for an improvement in the art of welding the ends of metal tubes, and the other being No. 365,829, dated July 5, 1887, to the said Lee, for an improvement in the art of making hollow handles. Nothing need be said in regard to the Lee patent, as it is conceded that its infringement was not proved. The improvement described in the Jordan patent had particular reference to the manner of shaping and bending the oval or round ends of the hollow handles of steel cutlery, so as to but-weld the handles, and make a perfect seam, which would not leak. Great difficulty had been experienced in the manufacture of this kind of knives, because the ends of the handles could not be made perfectly water-tight, either by brazing or by lap-welding. No difficulty had been experienced in but-welding the side seam of the handle. The Jordan improvement consisted in shaping the blank so as to form at the end of the tube double lips or projections, which were adapted to be bent inwardly towards each other, in bending these projections towards each other, and afterwards in welding between dies so shaped as to force the inwardly bent portions together. The particular form which is given to the end of the tube by turning the edges inwardly towards each other is the distinctive feature of the improvement. The claim is as follows:

"The improved art herein described of but-welding the ends of metal tubes, consisting in first shaping the end to be welded, then closing the end of the tube sufficiently to bring the edges each opposite to the other, and then heating and welding between dies shaped to force the inwardly bent portions of the end of the tube together, and form a but-weld, substantially as and for the purposes set forth."

Before the date of Jordan's improvement, the handles of hollow handled cutlery had been made by but-welding the side seams, and by soldering, brazing, and lap-welding the end seam, and all these methods of uniting the edges of the tubular blank were well known. The fact that side seams were but-welded is not important, for there is an important practical difference between but-welding a longitudinal seam, where very little fin is formed, and but-welding the end portions of a tube where the metal is contracted into a cup-like form, and flows out more than it does at the sides. The flat or "square" ends of the handles of the Beecher and Patterson patents were lap-welded. The Jeralds and Lawton patent of 1884 showed a tubular metallic blank for a hollow handle, having at one end projecting lips which were bent inwardly, edge to edge, and brazed together. The lips of the blank were very like the Jordan blank, were bent towards each in the same way, but nearer together than in that blank, for the purpose of being cemented by the brazing process. A Jeralds and Lawton blank, of the proper thickness, was capable of being but-welded by the use of the appropriate dies, and a skilled forger of metals could have but-welded such a blank before the date of the Jordan invention, if he had been told to do it. Under this state of facts, without other testimony in regard to the history of the art, it would seem to be an advance not amounting to invention, to bring the inwardly inclined ends of the Jeralds and Law-

ton blank together by welding instead of by brazing; but an inspection of the various patents in the case, and the testimony of the expert mechanics, other than the two Messrs. Hart, who are connected with the defendant company, indicate that, as a matter of history, much time and thought had been ineffectually spent by experts in groping for success in the manufacture of hollow handles. A study of the history of the art will lead to the conclusion that the idea of but-welding the end of a Jeralds and Lawton blank was the fruit of an inventive mind. It is established by the testimony that this idea had been carried out, and hollow handled table cutlery had been manufactured in a small way by the Messrs. Hart, in the defendant's shop, in and prior to 1881, who but-welded blanks which were made substantially after the Jeralds and Lawton pattern; that the knives were used, and were given away; and that samples were sent to the plated cutlery establishments in the neighborhood. They were made from too thin steel, were probably not well made, and were unfavorably received. I think that but very few were sold. The fact that the officers of the different factories for the manufacture of plated cutlery to which these samples were sent, and who have testified, do not recollect their existence, is unimportant; for the receipt at the respective factories of samples of actual or alleged improvements is not so unusual an occurrence as to impress itself upon the minds of the witnesses.

The complainant at this point of the case urges that the Jeralds and Lawton blank and the Jordan blank are different things, because the edges of the earlier blank are brought close together for the purpose of brazing, while there is a considerable space between the edges of the later blank. It is said, with a good deal of earnestness, that if the ends of the Jordan blanks were bent together, as is the case with "Hart's Oval Handle," (which is substantially like the Jeralds and Lawton blank,) there would be metal in a space which ought to be empty, and that such metal would be surplusage, and would either form a fin which would prevent the dies from coming together and interfere with the perfection of the weld, or would be driven within the hollow space which would tend "to crippling of the surface of the hollow handle." It is thus contended that the invention consisted in part in so arranging the lips with reference to each other that there would be no surplusage of metal, and only a small fin, and that, therefore, merely but-welding a Jeralds and Lawton blank was far from the Jordan invention. The difficulty in the circumstances referred to is rather the difficulty of making an article with commercial success, than the impossibility of making, with the use of proper dies, a but-weld; for it is testified by the plaintiff, who is an expert upon the subject, that, under favorable conditions of dies, the end should but-weld, and it seems most plain that if the handles, made after the pattern of "Hart's Oval Handle," were not properly but-welded, and too much fin was created, the cause would be apparent to the skilled mechanic, who would make his dies of the proper shape, and would, from the knowledge gained by experience, regulate the space between the edges, which were to be brought together



and thoroughly welded by the dies. It may be added that the patent places no stress upon the particular distance between the edges of the tubular blank. After the idea had been reached that but-welding the end of a tubular blank could be beneficially obtained by inwardly bending the edges of the blank towards each other, the shape of the dies and the separation of the edges by the blank were matters of detail, to be wrought out by the mechanical, rather than by the inventive, mind. The defendant's testimony is to the effect that, after the oval handle had been made, and before the date of the application for the patent, it manufactured the round stub and handle, the blank for which is conceded to be like the Jordan blank, from which the plaintiff supposes that the round handle was copied. I am inclined to the opinion that the round handle was a modification of the oval handle, and was not copied from the Jordan invention; but I do not place the decision upon that ground, but upon the prior invention of the oval handle, which was manufactured in accordance with the distinctive characteristic of the Jordan method, although with little commercial success. The bill is dismissed.

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NIPPERT *et al.* v. THE J. B. WILLIAMS.

(*Ottawa Court, D. Kentucky.* April 5, 1890.)

1. MARITIME LIEN—ADVANCES—ACCOMMODATION INDORSERS.

Where a draft, drawn in a foreign port by the master of a steamer upon the owners, to the order of a firm accustomed to furnish the steamer with supplies, is indorsed by the firm, and discounted with a bank, and the proceeds immediately turned over to the master, the firm is an accommodation indorser only; and although it has taken up the draft, which bears upon its face the words, "Charge to wages and supply account," it cannot assert a lien against the steamer for the amount thereof.

2. SAME—DUTY OF INQUIRY.

It is incumbent upon one who makes advances to the master of a steamer in a foreign port to ascertain for what purposes the money is needed; and although advances are made upon drafts against the owners which bear upon their faces the words, "Charge to wages and supply account," there is no lien except for the amounts actually used in discharging claims which constitute a lien against her.

Reversing 89 Fed. Rep. 823.

In Admiralty. Libel for advances. On appeal from district court, 39 Fed. Rep. 823.

*Goodloe & Barr*, for libelants.

*Knox & Reed and Brown, Humphrey & Davis*, for intervenor.

JACKSON, J. The question presented by the appeal and cross-appeal in this case relates to the proper distribution or disposition to be made of the surplus proceeds in the registry of the court arising from the sale of the steamer or tow-boat J. B. Williams. The contest over the fund is between the intervening claimant, I. D. Risher, as mortgagee of the boat, and M. Nippert & Co., who on February 16, 1889, libeled the J. B. Williams for alleged advances made to her master in December, 1888,

and February, 1889, to enable him to pay off the crew and hands of the vessel, and supply bills furnished her by others. The steamer was sold during the progress of the proceedings, and the proceeds thereof were deposited in the registry of the court. Intervening libelants, asserting maritime liens against the boat, and as to whose claims there was no dispute, have all been paid out of said proceeds of sale, and there remains in the registry a considerable surplus, as to which libelants, Nippert & Co., claim priority of lien for their alleged advances to the steamer, or to the master thereof on the credit of the boat; while Risher, as mortgagee of the steamer, controverts the validity of said libelants' lien, and claims said fund as properly belonging to himself. The district court rejected a portion of libelants' claim and allowed the balance. From this decree both sides have appealed. The material facts of the case on which the questions of law arise, and the rights of the respective claimants depend, are the following, viz.:

The steamer J. B. Williams was owned by the Grand Lake Coal Company, a private firm or copartnership, composed of Joseph B. Williams, James Williams, John Williams, and Thomas Patterson, residents of Pittsburgh, Pa., which was the firm's place of business, and the home port of said steamer, and where she was registered or enrolled. John Williams, one of the partners, was the captain and master of the vessel, and Thomas Patterson, another partner, was one of his pilots. The Grand Lake Coal Company was engaged in the coal trade between Pittsburgh and points south on the Ohio and Mississippi rivers, by means of barges which were transported by its tow-boats, of which the steamer J. B. Williams was the largest. The J. B. Williams, being the largest tow-boat on the river, at the opening of navigation in the fall would come down from Pittsburgh to Louisville, Ky., with a tow of barges loaded with coal. After carrying its tow to destination, the steamer would return to Louisville, and lie up there, or at the landing on the Indiana side of the river, and await the coming down of another tow of coal-barges from Pittsburgh, which upon arrival it would take charge of and transport south to destination, generally New Orleans, and then return to Louisville, where its crew would be paid off, and the boat would be tied up until other barges arrived to be carried south. So that, after coming down from Pittsburgh in the fall, said steamer rarely, if ever, returned to that port during the season of navigation, but made Louisville, or the Indiana port opposite, her starting and returning port during the period. Upon her return from trips south, her crew and hands would be paid off. Her services being chiefly rendered for her owners, she earned but little money with which to meet her expenses, which were considerable for each trip south and back.

The libelants, M. Nippert & Co., were and are ship-chandlers and dealers in boat stores at Louisville, and were in the habit of furnishing said steamer with supplies upon the order or request of her master. Their bills for such supplies were generally paid at the company's office in Pittsburgh. Libelants knew that John Williams, the master of the steamer, and Thomas Patterson, the pilot, were each members of said

firm styled the "Grand Lake Coal Company." In addition to furnishing said steamer with boat-store supplies, libelants were in the habit, after each return trip of the steamer, of indorsing a draft of the master drawn at Louisville upon the Grand Lake Coal Company, at Pittsburgh, for such amount as the master might indicate or desire to meet the accrued expenses of the vessel. Such draft or drafts were made payable to the order of M. Nippert & Co., and contained upon their face the statement or direction to "charge to wages and supply account of str. J. B. Williams." After indorsement by said M. Nippert & Co., the drafts, usually drawn payable 90 days after date, would be discounted by the Masonic Savings Bank at Louisville, and the proceeds thereof be paid over to the master, and be by him or the clerk of the steamer expended or disbursed. This manner of raising funds for the steamer continued for 13 or 14 years. No question was ever made by the drawees of the master's authority thus to draw upon them, and his drafts, indorsed by Nippert & Co., and discounted by the Masonic Savings Bank of Louisville, were in every instance honored by acceptance upon presentation; and at maturity were taken up by the drawees, the owners of the steamer, except the drafts involved in the present controversy. The Masonic Savings Bank, which cashed or discounted such drafts of the master, required an indorser thereon, and such indorsement was made generally, if not in every instance, by libelants.

The steamer having returned from a towing trip to New Orleans, and the master, John Williams, needing funds for the boat, and \$2,000 for the Grand Lake Coal Company, went to libelants on December 11, 1888, to raise and procure, in the usual way, the sum of \$6,500 for said purpose. He drew his draft as captain for that amount, payable 90 days after date, to the order of libelants, on the Grand Lake Coal Company, at Pittsburgh, Pa., the draft expressing on its face that it was for "value received, and charge to wages and supply account of steamer J. B. Williams." This draft was indorsed in blank by M. Nippert & Co., and Christian Bosche, the financial member of said firm, went with the master to the Masonic Savings Bank of Louisville to have it discounted. It was discounted by said bank, the discount and exchange charged and deducted from the face of the draft being \$135, leaving, as the net proceeds of the draft, the sum of \$6,364.95, which was placed to the credit of the indorsers on the books of the bank, and for which M. Nippert & Co. at the same time drew their check, which was payable "to proceeds of draft or bearer." On this check of \$6,364.95, for the proceeds of the draft, the bank paid over to the master of the steamer the sum of \$3,864.95, and for the balance issued its two drafts on the Importers' & Traders' National Bank of New York, payable to the order of M. Nippert & Co.,—one for the sum of \$500, which said Nippert & Co. specially indorsed to the order of James Rafferty, a pilot on the J. B. Williams, to whom that amount was due from the steamer; the other for the sum of \$2,000, which said M. Nippert & Co. indorsed to the order of the Grand Lake Coal Company, and which was forwarded to said company, and used by it. This application of the \$2,000 bank draft will

be further noticed and explained later on. The proceeds of his \$6,500 draft, received by the master, amounting to \$3,864.95, appears to have been used by him or the clerk of the steamer in paying off the boat's crew, to whom about \$2,972.30 was then due, and for supplies. Said draft for \$6,500, so discounted by the bank, was accepted by the drawees on December 19, 1888. Early in January, 1889, the J. B. Williams made another trip to New Orleans, and returned about February 11, 1889, tying up on the Indiana side of the Ohio river, opposite Louisville, and on the 12th February, 1889, the master again went to libelants for the purpose of raising the sum of \$7,800 to meet the wants of the steamer. Christian Bosche, libelants' financial manager, explains in his deposition what then occurred between the captain and himself. He says:

"The captain came in in the morning, and he had a little memorandum on which was \$7,600 or \$7,800, I cannot tell exactly which, that he said that he needed for the boat. I asked him if that was not a large amount. He told me that he had drawn no money in New Orleans; that he owed bills at Memphis for supplies, and at different points; also Howard Ainslie & Cochran & Co.; and his yearly officers were pretty well behind, and it would take all that to pay it out. He says: 'Do you want any money?' I says: 'I would like to have the money to pay my November bill of stores that I supplied in November, and a few little bills paid here for you.' My bill was \$972.80, which, with costs paid out for the boat, made \$1,022.30. That, added to the \$7,600 or \$7,800, (I am not positive what the amount was,) made about \$8,800. He says: 'You had better make a draft for \$9,000;' which I did, and we went and had it discounted, and here is the check for the proceeds which I gave to the bank,—\$8,824.25. The draft is for \$9,000, and that is less the discount. The discount on that \$9,000 draft and exchange on Pittsburgh was \$175.25."

Said draft was in the same form as the December draft for \$6,500. It was drawn by John Williams, captain, payable 90 days after date, to the order of M. Nippert & Co., with the direction on its face to "charge to wages and supply account of steamer J. B. Williams," and addressed to the Grand Lake Coal Company, at Pittsburgh, Pa., as the drawees. The proceeds of this draft were placed to the credit of M. Nippert & Co., the indorsers, and at the time of the discount they drew their check, "Pay to proceeds of str. J. B. Williams, draft, or bearer," for the amount of said proceeds, \$8,824.25, which was applied as follows: \$1,022.30 in paying their own bill, for which they were given a deposit ticket by the bank, and the balance of \$7,801.95 was paid over by the bank to John Williams, the master of said steamer, and was by him appropriated and expended as follows: \$2,556.69 was used in paying off the crew; \$1,159.15 was paid to Thomas Patterson, one of the partners and joint owners of the steamer, for services as pilot, and the balance was appropriated by Capt. John Williams, also a partner and joint owner of the boat, towards the payment of his salary as master. When Capt. Williams applied to libelants on February 12, 1889, to assist him in raising the money he wanted for the steamer, the clerk of the boat, Ike Williams, accompanied him, and had on the back of an envelope a memoranda of the items making up the sum wanted. This memoranda,

which the proof satisfied the court was shown to and seen by said Christian Bosche, was as follows: "Crew, \$3,000; Capt. Thomas Patterson, \$1,000; Capt. Jno. Williams, \$2,000; bills amt. to \$1,300; sundries, \$500." Said Bosche knew that said Patterson and Capt. Williams were members of the firm that owned the steamer; that Capt. Williams was one of the yearly officers, and was informed, not only by Capt. Williams, but by said memoranda, that a portion of the money wanted was for the benefit of said yearly officers. But, aside from said memoranda, Capt. Williams and Christian Bosche, the managing member of libelants' firm, who conducted said transactions, both state that the latter made no inquiry as to the items for which money was wanted by the master, when applied for and raised as above stated; that libelants merely took the captain's word for what he wanted, or for the amount he needed for the boat, and raised it in the above-described manner, without asking any questions or making any inquiry, or without being furnished any statement as to the particular items or objects for which the money was wanted or needed. The funds were, however, understood by libelants to be for the purposes of the steamer, such as the payment of her crew, stores, supplies, and running expenses.

When said drafts for \$6,500 and \$9,000 were drawn and discounted, neither the master nor the steamer, or her owners had any funds on hand at Louisville, or on the Indiana side of the river, where the steamer was lying, with which to pay the crew and supply bills. There was at said respective dates no imperative or pressing necessity for money except to pay off the steamer's crew, which was generally discharged after each return trip of the boat. The steamer and her owners were not without credit at Louisville. It is shown that the master could have raised money for the wants of the steamer on similar paper at Louisville through other sources than libelants. The master made no express hypothecation of the steamer to secure said drafts, or the proceeds thereof, or to protect libelants as indorsers thereof. Libelants supposed that said drafts containing the words, "Charge to wages and supply account of str. J. B. Williams," gave them a preferred lien on the steamer. They state that the money was raised and supplied on the credit of the boat as usual, and that said recital on the face of the drafts was intended to record the fact. The proof, however, discloses no understanding or agreement between libelants and the master or owners that said drafts, or the proceeds thereof, were to constitute any lien upon the steamer; nor does it appear that libelants ever communicated, either to the master or owners, this supposition that the words, "Charge to wages and supply account of str. J. B. Williams," on the face of the drafts, created a lien upon the steamer. Neither as to said drafts of December 11, 1888, and February 12, 1888, nor as to any former draft of like character and purpose, does it appear that libelants kept or made any account or charge, against said steamer or her master or owners; for either the face of said drafts or the proceeds thereof. On the other hand, the books of the steamer, containing the contemporaneous entries of the transactions, show that the amounts of said drafts of December 11, 1888, and Febru-

ary 12, 1889, like all previous ones drawn for the purpose of raising funds for the boat, were debited to cash, while the discount charged for cashing said drafts, together with all other sums paid out of the proceeds received therefrom; are credited to cash. On February 13, 1889, the Grand Lake Coal Company, or the partners comprising said firm, conveyed said steam tow-boat J. B. Williams to the intervening claimant, I. D. Risher, by way of mortgage, to secure to him the payment of \$20,000, due him from said company. Said mortgage was duly filed for record on February 14, 1889, and recorded in the collector's office for the port of Pittsburgh, as required by law in such cases. The firm shortly thereafter made a general assignment for the benefit of its creditors. Upon learning of the company's failure, libelants requested the Masonic Savings Bank, as the holder and owner of said drafts of December 11, 1888, and February 12, 1889, to recall the former, which had been accepted, and not to forward the latter for \$9,000, which had not been presented for acceptance, which the bank did. On February 16, 1889, libelants filed their libel against said steamer J. B. Williams, alleging, in the third and fourth articles thereof, that on December 11, 1888, and February 12, 1889, they had furnished and advanced to said steamer the respective sums of \$6,500 and \$9,000, at the request of the master, and upon his representation that said amounts were at said dates needed for the purpose of paying wages of the boat's crew and hands, supplies, and that said advances were made on the credit of said steamer as well as of the owners. Five or six days after the steamer was libeled, libelants gave their paper or note to the Masonic Savings Bank for the \$9,000 draft, and the master then and that time gave them a receipt for \$9,000, the amount represented by the draft, and the note they gave the bank to take up the draft. This note they have not yet paid in full. Under an order entered in August, 1889, libelants withdrew \$7,500 of the funds in court, which they used in paying off the draft of December 11, 1888, for \$6,500, and in making a partial payment on the \$9,000 indebtedness to the bank. Under the same order, the intervening claimant, I. D. Risher, withdrew \$3,500 of said funds. Said order does not appear in the record, nor does it appear whether said parties are liable to return or refund said amounts. There still remains in the registry of the court, of said proceeds of the steamer, \$8,548.22. At the hearing in the district court, libelants produced said two drafts for \$6,500 and \$9,000, and offered to surrender the same.

By the decree of the district court libelants were allowed the full amount of the draft for \$9,000, with interest since February 12, 1889, and \$4,500 of the draft for \$6,500, with interest since December 11, 1888, which sums were declared a maritime lien on said steamer, and entitled to priority of payment out of the proceeds thereof remaining in the registry of the court. The \$2,000 sent, as above stated, to the Grand Lake Coal Company, December 11, 1888, out of the proceeds of the draft for \$6,500, was not allowed to libelants. From so much of said decree as disallowed said sum of \$2,000 libelants have appealed, and from so much of said decree as allows libelants said sum of \$9,000

and \$4,500 the intervening claimant and mortgagee, I. D. Risher, has appealed. Since said appeals were perfected, libelants have filed in this court, without leave of the court, so far as the record discloses, an amended libel, alleging that said sum of \$2,000, which was forwarded to the Grand Lake Coal Company, out of the proceeds of the draft of December 11, 1888, for \$6,500, was applied in part payment of a previous draft of like character, which matured about that time, and under the following circumstances: On April 7, 1888, the captain of the J. B. Williams drew a draft on the Grand Lake Coal Company, at Pittsburgh, for the sum of \$5,500, payable 90 days after date, to the order of libelants, containing on its face the usual words, "Charge to wages and supply account of str. J. B. Williams," which was indorsed by libelants, and discounted by said Masonic Savings Bank; the master of the steamer, as alleged, receiving the proceeds. That at the maturity of said draft, which the drawees accepted, it was renewed on July 9, 1888, for the sum of \$4,000, for which a draft was drawn upon the company, by Joseph B. Williams individually, payable at 90 days, to the order of the Masonic Savings Bank, containing the words, "Charge to wages account of str. Jos. B. Williams." This draft was indorsed in blank by M. Nippert & Co. It was not taken up at maturity, but was paid in part and renewed for \$3,000, by draft for that amount, dated October 9, 1888, drawn by John Williams, captain, on said coal company, payable 60 days after date to the order of M. Nippert & Co., saying on its face, "Charge to wages and supply account of steamer Jos. B. Williams." This draft was indorsed by M. Nippert & Co. It was duly accepted; and as it matured on the 12th December, 1888, said sum of \$2,000, out of the proceeds of the draft of December 11, 1888, for \$6,500, was forwarded to the coal company to take it up, and said amount was so applied. It is accordingly claimed for libelants that said sum of \$2,000, disallowed them by the decree below, went to pay off a prior subsisting maritime lien on the steamer arising out of the \$5,500 draft of April 7, 1888, and kept alive by said renewals. There is no evidence, aside from the paper itself, as to what the \$5,500 draft of April 7, 1888, was given for, nor what amount of the proceeds thereof, if any, were received by the master for the use of the steamer, or how expended, if received; nor upon what consideration said draft, and the renewals thereof, were indorsed by libelants. The renewal draft of July 9, 1888, for \$4,000, was not drawn by the master, but by Joseph B. Williams, and was made payable to the order of the Masonic Savings Bank, and was indorsed by libelants.

On the foregoing facts, the court finds or reaches the following conclusions of law:

1. That the claims of libelants to be allowed said sum of \$2,000, sent on December 11, 1888, direct to the Grand Lake Coal Company, out of the proceeds of the draft of \$6,500, drawn and discounted on that day, cannot be sustained, and was properly rejected by the district court.
2. That neither the drafts of December 11, 1888, and February 12, 1889, for the respective sums of \$6,500 and \$9,000, nor the proceeds

thereof received by the master of said steamer J. B. Williams, constituted any maritime lien on said steamer or its proceeds in favor of libelants.

There was no express agreement or understanding that either libelants, or the bank discounting such drafts, should have any lien, maritime or otherwise, on the steamer to secure the payment of the drafts. The words contained on the face of the drafts, "Charge to wages and supply account of str. J. B. Williams," had no other operation and effect than merely to notify and advise the drawees of the objects for which the drafts were drawn, and the account to which upon payment it should be charged. These words did not, nor did the drafts themselves, create a lien on the vessel.

In *The Woodland*, 104 U. S. 180, the master's drafts on the owners expressed on their face that they were recoverable against the vessel, freight, and cargo. The drafts were not paid, and the holders thereof libeled the boat. The supreme court held that—

"The drafts did not themselves create a lien on the vessel; unless the debt for which they were given bound the vessel, the drafts, notwithstanding what is expressed on their face, did not. If the owners owed Niles [the payee of the drafts] nothing under his contract with the master for the repairs and supplies which had been furnished, he had no lien on the vessel which he or any one else could enforce in admiralty. For the purposes of this suit, the libelants occupy no better position than Niles; and if he could not recover they cannot. Having advanced their money in good faith, they may not be affected, so far as their remedies against the parties to the drafts are concerned; \* \* \* but if the vessel owed Niles nothing, it does not owe them."

Libelants had no claim against the owners, or lien upon the steamer, for the amounts represented by said drafts at the time they were drawn and discounted. They had made no loan or advances of their own funds or money to the master for the use of the steamer, which the drafts were intended to repay. They indorsed the master's drafts to enable him to obtain from the Masonic Savings Bank the proceeds thereof. The bank derived title to the drafts through their indorsement, which was manifestly made for accommodation of the drawer and owners of the steamer, and paid over the proceeds thereof, less discount and exchange, to the master. The bank furnished the money upon the drafts, and the contingent liability of libelants as indorsers thereof. Libelants had no right of ownership to the proceeds of the drafts by virtue of their indorsement. They did not own the drafts before they were discounted. They had advanced or paid no consideration for the drafts, and were not the holders thereof for value when transferred to the bank, nor did they assume the primary liability of taking them up at their maturity. On the contrary, the drafts were drawn to be discounted for the benefit of the steamer in the usual way, and as between the steamer and her owners and the libelants, the latter occupied the position of accommodation indorsers. If the bank, while holding the drafts, had attempted to enforce against the steamer a maritime lien for their payment, its claim could not have been sustained, either as to the drafts or the proceeds



thereof received by the master, under the authority of *The Woodland*, because the words expressed on the face of the paper, "Charge to wages and supply account of str. J. B. Williams," did not operate to create a lien upon the steamer; because the bank did not discount the drafts upon the credit of the steamer, or upon the faith that the boat was hypothecated for their payment, and because the libelants, through whose indorsement it acquired title to the drafts, had no such lien upon the steamer at the time they were indorsed and received by the bank.

When the libelants took up the drafts, after libeling the steamer, they certainly did not thereby acquire any new maritime lien on the steamer superior to that held by themselves, before they were discounted or by the bank as the first holder thereof for value. It being settled that libelants advanced no consideration for, and acquired no beneficial right in and to, the drafts when drawn, and that said drafts did not operate either as an express or implied hypothecation of the steamer, notwithstanding the direction on their face to charge the amounts thereof to wages and supply account of the steamer, they can only be regarded as commercial paper, executed for the purpose of discount for the benefit of the owners of the steamer, and libelants, in taking up the same, under their liability as indorsers either before or after maturity, can occupy no better position in respect to liens on the steamer than the bank, the first holder for value, from whom they acquired the paper, which acquisition conferred upon them their first and only right to enforce payment, even against the owners of the steamer. If libelants had advanced their own money to the master as and for the purposes alleged in their libel, and indicated on the face of the draft, and had accepted the drafts as a mode of repayment or as conditional payment therefor, the question would have been different. But that was not the real transaction. Libelants only loaned the credit of their names by indorsing drafts, in and to which they had no right, title, or interest; and, on the loan of this credit, the drafts are discounted, and the proceeds received by the master and owners. In the careful examination of the authorities which the court has made in the investigation of this case, no decision has been found which will warrant the court in placing a loan of credit in the shape of an accommodation indorsement upon commercial paper upon the same footing as an actual advance of funds to a master to enable him to discharge maritime liens. In the absence of any controlling authority on the point, our conclusion is that libelants' indorsement of the drafts for accommodation, and their subsequent taking up of the same, do not sustain the allegations of their libel that they made advances to the master of the steamer on December 11, 1888, and February 12, 1889, which gave them a maritime lien upon the boat for any portion of said drafts. It is proper to state that the foregoing considerations, which lead the court to this conclusion, do not appear to have been called to the attention of, or been considered by, the learned district judge, who declared a maritime lien in libelants' favor for the amount of said drafts, less the \$2,000, remitted to the drawers out of the proceeds of the draft of December 11, 1888, for \$6,500, as above explained. In reaching a conclusion adverse

to the right of libelants to any maritime lien upon said steamer or its proceeds, either on said drafts, or for the proceeds thereof received by the master and owners of the steamer, it is a source of gratification that the amount involved is sufficient to enable libelants to have that conclusion reviewed by a higher tribunal.

3. That if libelants could be considered as having made advances to the master for the purpose of paying the steamer's crew, and for supplies furnished her, constituting maritime liens, their right of recovery, under the facts and circumstances of this case, would be limited to the amounts actually used by the master in discharging such liens. If they did not see the memoranda made by the boat's clerk, showing the items for which the money was wanted on February 12, 1889, three of which—sundries, \$500; for Capt. Williams, \$2,000; and for Capt. Patterson, \$1,000—were not lien claims, they made no inquiry as to the items or particular objects for which the master desired funds. A party lending to a master in a foreign port cannot shut his eyes to existing facts as they appear, or by reasonable inquiry could be made to appear, and deal with the master as a general agent of the vessel and owners, whose representatives he may trust and act upon without any diligence or inquiry on his part as to the extent of, and character of, the vessel's needs and necessities. Necessity creates the agency and confers the authority on the master to borrow or secure loans on the credit of the vessel, and that necessity equally defines the limits to which he may rightfully go, and the lender treating with him must make inquiry and judge for himself; and at his own risk, whether the desired advance is a matter of such necessity as to bring it within the master's agency and authority. The cases on this subject, which it is not deemed necessary to review, do not, in my opinion, establish the proposition contended for by counsel for libelants, and announced in the opinion of the district judge, that a lender in a foreign port can act alone upon the master's representation as to the purpose for which the loan is wanted, and, if such expressed purpose is maritime in its character, thereby acquire a maritime lien on the vessel for the full amount of the advances made. When funds are advanced to the master to discharge valid existing maritime liens, and are so used, the lender may properly and equitably stand in the place of the lienholders, whose demands have been discharged with funds furnished by him. It seems to me that the weight of reason and authority supports this position, especially in the case of a lender who makes no inquiry, but shuts his eyes as to the necessary wants of the vessel. I think it the safer and the sounder doctrine to follow the intimation, if not the point actually decided, in the cases of *The A. R. Dunkap*, 1 Low. 350; *The Tangier*, 2 Low. 7-15; *The Guiding Star*, 9 Fed. Rep. 521, 18 Fed. Rep. 264; *The Cumberland*, 30 Fed. Rep. 453; *The Dora*, 34 Fed. Rep. 343; *The Wyoming*, 36 Fed. Rep. 494; *The Augustine Kobbe*, 37 Fed. Rep. 701,—that where funds are advanced to the master on the credit of the vessel, otherwise than upon bottomry bond, to enable him to pay off maritime liens, and the funds are so used or applied, the lender acquires a lien of equal rank and standing to those discharged with the funds so advanced; that money

borrowed to pay a bill stands in the same relation to the vessel as the bill paid. If that was a lien, so is the new debt created by the loan, but not otherwise.

But, without dwelling on this question, which is controlled by the second conclusion of law finding that libelants acquired no maritime lien on said steamer J. B. Williams by reason of said draft transactions, it follows that the intervening claimant, I. D. Risher, as mortgagee, has the better right to the proceeds of said steamer, to the extent of his mortgage lien thereon. It is accordingly ordered and adjudged that the decree of the district court declaring a lien upon and directing payment out of the proceeds of said steamer in libelants' favor, to the extent of said drafts for \$9,000 and \$6,500, less the \$2,000, as aforesaid, be, and the same is hereby, reversed, and the libel in respect to said claims covered by the third and fourth articles thereof, together with the amended libel filed in this court is dismissed, at libelants' costs. The proceeds of the vessel, to the extent of his mortgage, are awarded to the claimant, I. D. Risher, and a decree will be entered accordingly.

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CONGDON *et al.* v. THE ELEANOR.

(District Court, D. South Carolina. June 8, 1890.)

**SALVAGE—COMPENSATION.**

The schooner *E.* went ashore, and, failing in its efforts to get off, sent for the tugs *C.* and *B.* The master of the *C.*, which first arrived, refused to do anything because of the danger, but promised to come with the other tug the next morning. Both tugs came down, and the *E.*, having again made efforts to get off and failed, was towed into deep water, and into port. The weather was calm during the whole time, and the *E.* was not in imminent danger, but a gale would have exposed her to great danger. The tugs were at no time in danger. The *E.* was valued at \$14,000, and her cargo at \$4,000, and the tugs at \$20,000 and \$15,000, respectively. *Held*, that this was salvage service, and the tugs were each entitled to \$900, to be assessed *pro rata* on the vessel, cargo, and freight.

In Admiralty. Libel for salvage.

*Smythe & Lee*, for libellant.

*I. N. Nathans*, for claimants.

SIMONTON, J. This is a libel for salvage. The *Eleanor*, a three-mast schooner, between three and four hundred tons burden, went ashore on the ocean beach of North island, on the night of 21st February, 1890. North island is on the northern side of the Georgetown bar. The weather was perfectly calm, and so continued for the whole period of her stay on the beach. She lay quietly all night. The next morning, as the hour of high tide (10 o'clock) approached, efforts were made to get her off with a kedge anchor. She could not use her heavy anchors. Those efforts failed. They were renewed at the succeeding high tide, with the same result. On that afternoon the master of the schooner had requested a person who told him that he was on his way to Georgetown to send to him the tugs Congdon and Brewster, the only sea tugs in that port. The

Congdon did not get the message, but came down of her own accord, and stopped at the landing on the inside beach of North island. Her master walked across the island; saw the master of the schooner; refused his request to pull the schooner off that night, as it was too dangerous; and promised to come down the next morning with his tug and the Brewster. He went back in his tug to Georgetown. On the next morning the efforts on the part of the schooner to get off were renewed. The two tugs came to her. The Eleanor sent a small boat to the Congdon, and got a 100-fathom line, which was attached to her. A line was passed from the Congdon to the Brewster. Both tugs pulled straight ahead, and in about 15 minutes the schooner got into deep water, was carried over the bar, and towed to Georgetown. The Eleanor, when pulled off, was lying on a beach open to the Atlantic. At dead low water, she was dry. The high tide came all around her. She could use only her kedge anchor, and had made two unsuccessful attempts to get off. An easterly wind put her on a lee shore. A westerly wind lowered the tide, which began to neap at that time. She was not in immediate or imminent danger, but at any time a gale would expose her to great danger. This was a salvage service. The tugs going to her rescue went out over the main entrance of Georgetown bar after sunrise. When out at sea, they steamed around, and got opposite to the Eleanor. Where she was, the beach sloped gradually, until it got into deep water. The chart put in evidence shows a shoal, between which and the schooner ran a slue. At this point the water in the slue had good depth, 19 and 15 feet, shoaling, however, as it approached the bar. The Congdon and Brewster, avoiding the shoal, entered the slue, and the former approached the schooner, stern foremost. She was under perfect command, and, at the suggestion of danger of striking bottom, at once and easily got away. Her line was passed to the Eleanor in the latter's boat. The tugs pulled straight ahead,—that is, away from the beach,—and the Eleanor floated in the deep part of the shore without serious difficulty, if any difficulty at all. So, although this was salvage service, it was rendered without exposure of life, and with a minimum of danger to property. Indeed, with the skillful master and the pilots on the Congdon, she was at no time in danger, and the Brewster ran no risk at all. It is true that the tugs were in a slue scarcely, if ever, used by tugs. But they were not in the shoal part of the slue, which rendered it dangerous for vessels of their draught. The Eleanor is valued by libellant at \$16,000; by her master, at \$6,000 or \$8,000. She is 12 or 14 years old. Her cargo is estimated at \$4,000. The Congdon is worth, say, \$20,000, and the Brewster, \$15,000. Taking all these facts into consideration, let the tugs each have \$300, to be assessed *pro rata* on vessel, cargo, and freight. If the parties cannot agree as to the rate, upon application made I will refer it. The libellants who own the tugs, on the day following the rescue, stated the price they wanted. It was large; but the respondent gave no answer until the Saturday following, when he refused, and offered a very much smaller sum. His schooner was then ready for sea. Libellants had no course open but this suit. Respondents must pay the costs. Let an order be entered accordingly.

*In re BEINE. In re JOCKHECK. In re SCHMIDT. In re DEISHER. In re ZINN. In re COPP. In re YOUNT. In re SICHER. In re TUCHMAN. In re RAHRER. In re BELL.*

(Circuit Court, D. Kansas. June 14, 1890.)

**INTOXICATING LIQUORS—ILLEGAL SALE—ORIGINAL PACKAGES—HABEAS CORPUS.**

The laws of Kansas prohibiting the sale of intoxicating liquors within the state being void, as in contravention of the interstate commerce clause of the federal constitution, in so far as they apply to sales by an agent of an importer outside of the state of liquor in the original packages in which it was brought into the state, without regard to the size of such packages, an agent imprisoned for such sales is deprived of his liberty in violation of the constitution of the United States, and will be discharged by the circuit court on *habeas corpus*.

*Habeas Corpus.*

*Wheat, Chesney & Curtis, David Overmeyer, Hazen & Izenhart, Eugene Hagan, J. M. Sheafor, Wm. Warner, and H. M. Call, for petitioners.*

*A. H. Vance, R. B. Welch, and T. F. Garver, for respondents.*

CALDWELL, J. Eleven persons have separately petitioned this court for writs of *habeas corpus* to relieve them from alleged imprisonment in violation of the constitution of the United States. The cases were heard together; and, while there is some difference in the minor details, the material and controlling facts are the same in all the cases. Prosecutions were instituted against the petitioners charging them with selling liquor in violation of the laws of this state. They were arrested, and, failing to give bail, were committed, and thereupon filed their petitions in this court alleging that they were imprisoned, in violation of the constitution of the United States, in virtue of criminal prosecution commenced against them severally in the state courts of Kansas for selling liquor in that state in alleged violation of its constitution and laws; that the liquor for the selling of which they were prosecuted and imprisoned was shipped by its owners, who were citizens and residents of the state of Missouri, from that state into this state, and sold by the petitioners, as agents of such shippers and importers, in the original packages in which it was shipped by its owners into this state; that they sold liquor in no other manner; and that, so far forth as the constitution and laws of this state make such sales of liquor a crime, they are in conflict with the commercial clause of the constitution of the United States, and void.

The uncontradicted evidence supports the allegations of the petitions, namely, that certain persons and firms residing and doing business in the state of Missouri owned and shipped from that state into this state distilled liquors and beer, and that the petitioners, as agents for said shippers and importers, sold said liquor in this state in the original packages in which it was shipped into the state by its owners, and sold liquor in no other manner.

With an exception not material to be considered in this case, the constitution and laws of this state make it a crime for any person to sell liquor in this state. The constitution and laws of the state make no dis-

inction between the importer who sells in the original packages, and one who sells in broken packages or by the glass. The law inflicts the same penalty on both. Every question of law raised in these cases has been decided by the supreme court of the United States. That court in a recent decision [*Leisy v. Hardin*, 10 Sup. Ct. Rep. 681] says:

"That ardent spirits, distilled liquors, ale, and beer are subjects of exchange, barter, and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress, and the decisions of courts, is not denied. Being thus articles of commerce, can a state, in the absence of legislation on the part of congress, prohibit their importation from abroad, or from a sister state? Or, when imported, prohibit their sale by the importer?"

These questions the court answered in the negative, and that answer is conclusive on this and all other courts in this country; the court, referring to the laws of Iowa, which, like the laws of this state, make it unlawful for the importer to sell, said:

"The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer which they sell in original packages, as described. Under our decision in *Bowman v. Railway Co.*, 125 U. S. 507, 8 Sup. Ct. Rep. 689, 1062, they had the right to import this beer into that state; and, in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure or any other action in prohibition of importation and sale by the foreign or non-resident importer." "The legislation in question is to the extent indicated repugnant to the third clause of section 8, art. 1, of the constitution of the United States."

It was then no offense for these petitioners to sell liquor in the original packages as agents for the non-resident importers and owners. Having a right to make such sales under the constitution of the United States as construed by the supreme court of the United States, any imprisonment of them for doing that act is, in the language of the *habeas corpus* act, "in violation of the constitution" of the United States, and illegal; and this court has the jurisdiction, and it is made its duty, to discharge any person so illegally held in custody. *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 734; *Cunningham v. Neagle*, 10 Sup. Ct. Rep. 658; *Ex parte Kieffer*, 40 Fed. Rep. 399; *In re Barber*, 39 Fed. Rep. 641, 10 Sup. Ct. Rep. 862. A question was raised in the argument as to whether the smallness of some of the packages sold by some of the petitioners did not deprive them of the protection given to vendors of original packages. Single bottles of beer and whisky, packed and sealed or nailed up in boxes made of pasteboard or wood, were shipped and sold in that shape. The boxes containing one bottle were not packed in any other box, but shipped singly and separately as so many distinct and separate packages. It is not perceived why, in the absence of a regulation by congress to the contrary, the importer may not determine for himself the form and size of the packages he puts up for export. The idea that small packages of liquor cannot be treated as original packages,

because they are small, springs from the conviction back of it that liquor in any form, or in any sized package, is not a legitimate subject of commerce. That question is put at rest by the decision of the supreme court of the United States until congress shall act. As long as packages of liquor in any form or size may lawfully be sold by the importer or his agent in a prohibition state, the size of the package is not of much consequence. Whether the packages be large or small, the practical effect will be to seriously impair the efficacy of all laws intended to protect society from the evils of the liquor traffic. It was foreseen that this would be the consequence of the decision of the supreme court. Mr. Justice GRAY, in his dissenting opinion, anticipated as a result of the decision of the court the very state of things now confronting the people of this state. He says:

"If the statutes of a state restricting or prohibiting the sale of intoxicating liquors within its territory are to be held inoperative and void as applied to liquors sent or brought from another state, and sold by the importer in what is called 'original packages,' the consequence must be that an inhabitant of any state may, under the pretext of interstate commerce, and without license or supervision of any public authority, carry or send into and sell in any and all of the other states of the Union intoxicating liquors, of whatever description, in cases or kegs, or even in single bottles or flasks, despite any legislation of those states on the subject, and although his own state should be the only one which had not enacted similar laws."

The answer of the court to this suggestion is that congress, and congress alone, can provide a remedy for the evil so forcibly stated by the minority of the court. The court said:

"The responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

I do not sit here either to make or to disregard the law, but to enforce it regardless of my own views of its policy or justice. It is to the legislative, and not to the judicial, department of the government that the people of this and all other states must look for relief against the evils of the sale of liquor in original imported packages by the importer or his agents. The several petitioners must be discharged. Let a prayer for appeal and its allowance be entered in each case. The stenographer will file with the clerk the testimony in all the cases; and the testimony relating to each case will be filed and attached to, and made a part of, the record in the case.

**TUCHMAN v. WELCH, County Attorney.****YOUNT v. SAME.***(Circuit Court, D. Kansas. July 16, 1890.)***1. CONSTITUTIONAL LAW—SUITS AGAINST A STATE—INJUNCTION.**

Comp. Laws Kan. 1885, c. 35, § 13, provides that the county attorney of any county in which a liquor nuisance exists may maintain an action in the name of the state to abate and perpetually enjoin it, and that "any person violating the terms of any injunction granted in such proceedings shall be punished as for contempt." *Held*, that a suit to restrain the county attorney from instituting proceedings for contempt against one who has violated such injunction, is not a suit against the state, within the meaning of Const. U. S. amend. 11, which in effect prohibits suits against a state, without its consent, in the United States circuit court.

**2. SAME—PROCEEDINGS IN STATE COURT—CONTEMPT.**

Nor is an injunction against the institution of such contempt proceedings an injunction against the proceedings of a state court, which, by Rev. St. U. S. § 720, the federal courts are forbidden to grant, except in cases of bankruptcy.

**3. SAME—INTOXICATING LIQUORS—ORIGINAL PACKAGES.**

Since a state law prohibiting the sale of intoxicating liquors by non-resident importers, in the same packages in which they were brought into the state, is void as being in contravention of the interstate commerce clause of the federal constitution, where a state court has enjoined such sales an injunction will lie from the federal courts against the institution of contempt proceedings by the county attorney for the violation of the state injunction under Comp. Laws Kan. 1885, c. 35, § 13; since Rev. St. U. S. § 1979, provides that any person who, under color of any state law or statute, subjects another to the deprivation of any rights, privileges, or immunities secured by the constitution of the United States, shall be liable to the injured person in an action at law or suit in equity, to be prosecuted in the federal courts.

**In Equity. On bill for injunction.**

This litigation grows out of substantially the following state of facts: The supreme court of the United States having recently decided, under the prohibition law of the state of Iowa, that non-resident manufacturers or vendors of liquors, wines, and beer had the right to import such articles or commodities into the state of Iowa (*Leisy v. Hardin*, 10 Sup. Ct. Rep. 681,) and, as a consequence of the right of importation, the further right of making sales of those commodities in the form of the original packages in which they were shipped, anything in the state law to the contrary notwithstanding, the Anheuser-Busch Brewing Association, a corporation of the state of Missouri, imported from its business house in the city of St. Louis, Mo., quantities of beer, consigned to the petitioner Bernard Tuchman, as its agent, at the city of Topeka, in the state of Kansas; the said Tuchman also being a citizen of the state of Missouri. The Joseph Schlitz Brewing Company, a corporation of the state of Wisconsin, imported therefrom into the state of Kansas large quantities of beer, consigned to the petitioner Landis Yount, as its agent; the said Yount being also a citizen of the state of Wisconsin. And, as claimed by said petitioners, the said agents sold said beer in the state of Kansas in the original packages in which they were imported, and not otherwise.

As these two cases involve substantially the same questions of law, the case of Tuchman will here be considered. While complainant was thus



engaged, on the 28th day of May, 1890, the respondent, Welch, acting as county attorney of Shawnee county, in which the petitioner was conducting such business, filed in the district court of said county an information charging the petitioner with selling intoxicating liquors in violation of the prohibitory law of Kansas, and caused the arrest and confinement in jail of the petitioner; from which arrest and imprisonment the petitioner was delivered on proceedings by a writ of *habeas corpus* sued out of the United States circuit court for the district of Kansas, (*ante*, 545,) presided over by the Honorable HENRY C. CALDWELL, circuit judge. Said discharge was made, after a full hearing of the facts, on the ground that the petitioner was pursuing a lawful business under the constitution of the United States, as declared by the recent decision of the supreme court of the United States in the said Iowa case; that the beer had been imported into Kansas from Missouri, and was being sold in the original packages, and not otherwise, by the petitioner, as agent of the said brewing company, and therefore his restraint under the warrant of arrest was in violation of his constitutional rights as a citizen of the United States.

On the same day of his said arrest, the said Welch also commenced an action, authorized by the state statute of Kansas, against petitioner, in the district court aforesaid, to enjoin the petitioner from prosecuting and carrying on his said business as agent of said corporation. The bill of complaint herein charges that: "Said Welch then well knew, as he now knows, that the petitioner was so selling beer for said brewing company imported into the state in the original packages in which the same was imported, and not otherwise." That said Welch caused to be issued from said district court an order of injunction, without notice to petitioner, and without indemnifying bond, enjoining him from selling such beer, which injunction proceeding was predicated of the same facts as those upon which the arrest was made, and for which this court held he was not liable to prosecution in the *habeas corpus* proceeding. That, notwithstanding the petitioner's said discharge by this court, upon the resumption of his business, as he was thereby authorized to do, the said Welch, under color of the prohibitory law of the state of Kansas, which, as respects the said business of the petitioner, is in conflict with the constitution of the United States, subjects the petitioner to the deprivation of his right to sell the said beer, as the agent of said foreign corporation, in the original packages, as aforesaid. That he has caused the said business of the complainant to be closed up and suspended for a long time, and that he designs and threatens to continue to deprive petitioner of his said rights by wrongfully and unlawfully contriving to worry and oppress said petitioner in his lawful business, and to that end he threatens and is about to proceed to obtain from said district court process for contempt of said injunction order, and to have this petitioner arrested thereunder, confined, and imprisoned, and thereby subject him not only to the interruption and destruction of his business, but also to great expense and trouble in defending said prosecutions, and necessitating further writs of *habeas corpus* for his discharge, to his great

and irreparable injury. He therefore asks for a temporary restraining order, and for an injunction, upon final hearing, restraining the respondent from the further annoyance, harassment and prosecution of the petitioner for the same and like causes.

Before FOSTER and PHILIPS, JJ.

*David Overmyer*, for complainants.

*L. B. Kellogg*, Atty. Gen., and *R. B. Welch*, Co. Atty., for defendant.

PHILIPS, J. By order of the circuit judge, I assisted the district judge in the hearing, and submit the following views of the questions involved:

1. This application is met at the threshold with the objection that it contravenes the eleventh amendment of the federal constitution, which in effect denies the right of a citizen to sue one of the states without its consent. The law is now well settled that the state without its consent cannot be sued in the circuit court of the United States by one of its own citizens, or a non-resident citizen, even upon the suggestion that the case is one arising under the constitution and laws of the United States. *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. Rep. 504. If, therefore, this action can be rightly considered as a suit in equity commenced or prosecuted against the state of Kansas, it must fail, and any further discussion of the many questions raised in this controversy would be supererogatory. The question as to what in law fixes and determines the fact as to when a suit is against a state has undergone rigid investigation by the federal courts. In the early rulings of the supreme court it was held that, where jurisdiction depends on the party, it is the party named in the record. *Osborn v. Bank*, 9 Wheat. 738-857. In *Governor v. Madrazo*, 1 Pet. 110, where the action was brought against the governor in behalf of the state, it was held that in legal effect it was against the state, because "the demand made upon him is not made personally, but officially. The decree is pronounced, not against the person, but the officer. \* \* \* In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant." In *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. Rep. 292, 609, it was held that, in those cases where it is manifest upon the record that the state is an indispensable party to enable the court to grant any relief, it would refuse jurisdiction. In other words, when it is clear that the party proceeded against has no individual interest in the controversy, and the state alone is to be affected by the judgment, and the decree would be inoperative unless against the state, it may be deemed as a proceeding against the state. This question underwent thorough discussion in *Re Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, where it was held that, although the matter out of which the controversy arose was against Ayers as attorney general and other offi-

cers of the state in their official capacity, yet, as the real purpose was to enforce a right founded in contract to which the state was a party alone, and any judgment the court might render could be effectual only as against the state, the state was a necessary party, and in the case under review was constructively present by its officers. "In such a case," says Mr. Justice MATTHEWS, "though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still in substance, though not in form, a suit against the state." The learned justice then confronts the very issue presented by the bill of complaint now under consideration. He says:

"It may be asked, what is the true ground of distinction, so far as the protection of the constitution of the United States is invoked, between the contract rights of the complainant in such a suit and other rights of person and of property? In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied."

He then proceeds to show that the acts alleged to be threatened by Ayers and others are in violation of the contract made by the state of Virginia, which it alone could perform, and the acts of defendants are but the acts of the state, and nothing done or said by them constituted a breach of the contract, the breach of which constitutes the whole *gravamen* of the action; and as the judgment sought would bind the state, if effective, and not any individual act of the defendants, it should be deemed the act of the state. The opinion then very pertinently proceeds as follows:

"But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity, either to arrest or direct their official action by injunction or *mandamus*, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. \* \* \* Nor need it be apprehended that the construction of the 11th amendment, applied in this case, will in any wise embarrass or obstruct the execution of the laws of the United States in cases where officers of a state are guilty of acting in violation of them under color of its authority. The government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction, as individuals owing obedience to its authority. The penalties of disobedience may be visited upon them, without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the constitution and laws of the United States which can shield or defend him from their just authority; and the extent and limits of that authority the government of the United States, by means of its judicial power, interprets and applies for itself. If, therefore, an individual acting under the assumed authority of a state, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the conse-

quences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

The separate opinion of Mr. Justice FIELD shows quite clearly the true line of demarkation:

"There are many cases—indeed, they are of frequent occurrence—where officers of the state, acting under legislation in conflict with the constitution and laws of the United States, may be restrained by the federal courts, as where those officers attempt, by virtue of such legislation, to take private property for public use without offering compensation, or in other ways to deprive one of the use and enjoyment of his property. I do not understand that the opinion of the court is against this doctrine; but, on the contrary, that it is recognized and approved. There is a wide difference between restraining officers of the state from interfering in such cases with the property of the citizen, and restraining them from prosecuting a suit in the name of the state, in her own courts, to collect an alleged claim."

See, also, *Hagood v. Southern*, 117 U. S. 70, 6 Sup. Ct. Rep. 608. The court maintained that the *ratio decidendi* of the *Ayers Case* was consistent, when the facts of each are understood, with what was uttered in *Davis v. Gray*, 16 Wall. 203.

"Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind as the real party in interest."

The state of Kansas is not a party to this record, nor can the injunction, if granted, affect or bind the state as such. The order of restraint would operate upon the respondent, Welch, *in personam*, to stay him from taking any further action looking to the employment of the instrumentalities of the state to enforce against the complainant a dormant interlocutory decree of the state court, which he is not required to invoke, because its enforcement would be violative of the constitutional rights of the petitioner. No obligation in law or morals rests upon the respondent to do that which would be violative of the supreme law of the land; and no right or interest of the state can be invaded or impaired by restraining the respondent from an act which, if done, would at once be nullified by this court by discharging the prisoner from any arrest under the threatened proceeding. This court having already discharged the petitioner from the arrest under the criminal proceeding out of which the temporary injunction granted by the state grew, as an ancillary proceeding, on the same essential facts, a like discharge would inevitably follow under any proceeding for contempt. For any action taken by respondent after the adjudication in the *habeas corpus* case, looking to the further prosecution and punishment of the accused on the same character of facts, would be a trespass upon the petitioner's constitutional liberty, inviting an action for malicious prosecution, in which the respondent could take no shelter behind the state, and for which the state would in no wise be answerable. The section of the Kansas statute (section 13, c. 35, Comp. Laws 1885) under which the respondent instituted the injunction proceeding simply provides that "the attorney general, county attorney, or any citizen of the county

where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceedings shall be punished as for contempt by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment in the county jail not less than 30 days nor more than six months, or by both such fine and imprisonment, in the discretion of the court." This proceeding is not mandatory on the county attorney. He may or may not invoke it. Any citizen, as well as he, may put it in motion at his option. Being advised, as he is, by the decision of the supreme court of the United States in the Iowa case, as also by the decision of the United States circuit judge, that the proceeding against the petitioner is in the face of the supreme law of the land, he can be under no possible obligation of official duty or good citizenship to make further attempt to enforce the dormant order of injunction; and his threatened purpose to do so, in this view, is a seeming defiance of law, and a menace to the liberty of the petitioner, and of his right to pursue a lawful business. In such conjecture, it seems to me, it would be unjust to the state that it could be deemed a party to be restrained from such wanton and unauthorized prosecution.

2. It is next objected that this action is interdicted by section 720, Rev. St. U. S., which declares that the writ of injunction shall not be granted by any United States court to stay proceedings in any state court except where authorized in cases of bankruptcy. This statute is quite comprehensive. It extends to all proceedings first instituted in the state courts, and protects both the court, as such, and the parties to the pending action in the state court. *Peck v. Jenness*, 7 How. 625; *Haines v. Carpenter*, 91 U. S. 254; *Dial v. Reynolds*, 96 U. S. 340; *Wagner v. Drake*, 31 Fed. Rep. 849. It must be kept in mind, in this discussion, that neither the court nor the parties are here sought to be enjoined. It must also be kept in mind what the threatened acts are about to be committed by respondent which are sought to be restrained. The complaint is that while petitioner is in the peaceable pursuit of a commerce recognized by the constitution of the United States, recently affirmed by the highest tribunal of the nation, the respondent, under color of his office as county attorney, in disregard of the said right of the petitioner, and of the recent decision of this court through its circuit judge, (*ante*, 545,) instigated by a purpose to harass the petitioner by repeated vexatious prosecutions, to the injury of his business and the interference with his personal liberty, threatens to proceed with and prosecute further said injunction, thereby compelling him to incur expense and trouble in defending the same. None of the imputed acts threatened by respondent is he required by any valid law to do. As already stated, the state statute under which he obtained the writ of injunction is but permissive to him. He is not required to appeal to it. No proceeding threatened has been instituted. No proceeding of the court is asked to be restrained;

only the unwarranted, voluntary, pernicious interference of the respondent. The information lodged by him with the district court is in the ordinary form under the state law as against any retail liquor dealer violating the local prohibitory law of the state. There is nothing on the face of the information to advise the state court that the accused was acting as the agent of a non-resident importer, or that the liquor was shipped by the manufacturer from another state, and was being sold by the agent in the original package. On the face of the complaint, therefore, the injunction order was properly issued by the state court, if the statute authorizing it be in this particular constitutional. The whole wrong, therefore, done the petitioner was instigated and brought about by the respondent. And while it is not to be imputed that the state court, after the discharge of the petitioner by this court under the writ of *habeas corpus*, would proceed further in such injunction, if advised of the facts as they appear on the face of the bill of complaint herein, yet the danger to which the petitioner is exposed is that, before any hearing can be accorded him on the merits, the respondent threatens and may on the facts stated in his said information, and the injunction obtained therein, cause his arrest, fine, and imprisonment, and injury of his property interest, because the court in the contempt proceeding might only look to the fact as to whether or not its order had been disobeyed without more.

It is but just, in this connection, to respondent, to state that he has, in addition to his demurrer to the bill, filed his affidavit in which he disclaims any purpose to oppress or injure the petitioner, and protests that he is actuated solely by a sense of official duty, and in no spirit of rebellion against the decisions of the federal courts. But it is difficult to read his affidavit as a whole, and observe its repeated asseverations that he proposes to proceed only according to law, without receiving the impression that his position is equivocal and disingenuous. He does not state what law he proposes to pursue, whether the law as construed by the supreme court of the United States and this court, through his honor, Judge CALDWELL, or the law of the state of Kansas, under which he holds his office, and acts; and the course of argument pursued at this hearing indicates that he does not yield a willing obedience to the law, in so far as it is in conflict with that under which he holds his office. Unquestionably, if he claims and can show that the petitioner is not the agent of a foreign importer, or is not selling in the original packages in which the beer was shipped, or that he is making his house of business a mere tipping concern for the rendezvous of disorderly people, bringing it within the police power of the state to declare it a nuisance, he has a perfect right to proceed in the state court, and this court should not, and would not, interfere. But on this preliminary hearing, accepting the demurrer as confessing the facts alleged in the bill, we are confronted with this anomalous state of affairs: The supreme court of the United States has decided that under the constitution of the United States the non-resident manufacturer or merchant has a right to import beer and liquors into the state of Kansas, and to sell them as thus

packed in said state, any law or regulation of the state to the contrary notwithstanding. This is no new doctrine to me. The supreme court of the state of Missouri, 32 years ago, in *State v. Shapleigh*, 27 Mo. 344, and in *State v. North*, Id. 464, applied this doctrine in all its force to the case of the importation of boots and shoes from Boston to Missouri, which the state law, by unfriendly legislation, sought to exclude; and as shown in that opinion, as also by that of the supreme court of the United States, it has been the law of the land, as declared in *Brown v. State*, 12 Wheat. 419, for 60 years past. As applied to the constitutional aspect of the question, there can be no difference between shoes and beer. For thus exercising this constitutional right, the respondent caused petitioner's arrest under the conflicting state law of Kansas, and had him imprisoned. The prisoner appealed to this court for his discharge, by the writ of *habeas corpus*, and on a full, free hearing the court of competent jurisdiction discharged him, and he resumed business as theretofore. *Ante*, 545. Then, under the injunction granted contemporaneously with the said warrant, and in aid of it, the respondent proposes to continue to pursue the accused as for a contempt for doing that which the order of discharge, in its legal consequence, authorized him to do.

Impotent indeed must be the government whose judicial branch is without the power to challenge such repetitious infractions of the citizen's personal liberty and constitutional right to pursue a lawful avocation. If arrested for such contempt, this court would in duty feel bound to discharge him on *habeas corpus* proceeding on the admitted facts. But the respondent could again have him arrested under the same injunction as often as he might be so discharged, and resume the prosecution of his business. If a case could ever arise to call into action the powers of a court of chancery to prevent the multiplicity of suits, and the harassment and persecution of the citizen, this certainly presents the strongest appeal to such protective power.

Under the act of congress of 1867 authorizing the citizen, when restrained of his liberty contrary to the constitution, to appeal to this court for a writ of *habeas corpus*, the party so holding him is allowed three days in which to make his return. And, as experience shows, in all the writs of *habeas corpus* which have recently be applied for in this court the respondent has claimed his three days in which to make return for the sheriff; so that the applicant, guilty or innocent, is kept in jail during this period before he can have a hearing and secure his liberty. So that, if he is to be remitted to that remedy which is the most expeditious known to the law side of the court, it is most inadequate. The fourteenth amendment to the federal constitution recognizes the fact, and declares that all persons born or naturalized in the United States are citizens of the United States, as well as of the state wherein they reside. Having thus proclaimed their citizenship, the government recognizes its obligation to extend protection where it expects allegiance. So the first section of the amendment declares:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

This is a direct restraint on the powers of the state, and, of consequence, on its officers and ministerial agents, through whom it might attempt any of the forbidden deprivations. *In re Ah Lee*, 5 Fed. Rep. 902. Mr. Justice FIELD, in the *Railroad Tax Cases*, 18 Fed. Rep. 722, shows that, while the amendment in question had its origin in the purpose to secure to the newly-made citizens the full enjoyment of their freedom and rights, yet "the generality of the language used extends the protection of its provisions to persons of every race and condition against discriminating and hostile state action of any kind. Its effect in preserving free institutions, and preventing harsh and oppressive state legislation, can hardly be overstated. \* \* \* Its authors, seeing how possible it was for the state to oppress without relief from the federal government, placed in the constitution an interdict upon their action, which makes lasting oppression of any kind by them under the form of law impossible." Then, discussing the causes which led up to the enactment of the thirteenth, fourteenth, and fifteenth amendments, and the scope of their operation, he says:

"Had the population of the United States continued as sparse as when the constitution was formed, and the means of more rapid intercourse between the states had not been invented, it is possible that further amendments would not have been demanded. But the immense development of the resources of the country, the great increase of population, the constant intercourse between the states by steam, railway, and telegraph, changed the business and commercial relations of the states to each other, and led the people of one section to seek a closer union, and to desire a greater authority to be exercised by the central government, while the peculiar institutions of the other section, and the different industries they developed, led its people to desire to limit, rather than strengthen, the central authority. Differences of opinion in matters of internal policy, and the estrangement engendered by controversies growing out of the existence of slavery in some of the states, ultimately culminated in civil war. Men then saw that danger was to be apprehended in a direction opposite to that which led to the original amendments. Restraints upon the power and action of the states were therefore suggested; and to impose them, and abolish slavery,—the great cause of the civil conflict,—the new amendments \* \* \* were adopted."

In the case of *Life-Stock, etc., Ass'n v. Crescent City, etc., Co.*, 1 Abb. (U. S.) 388, Mr. Justice BRADLEY expressed the same view. He said:

"It is possible that those who framed the article were not themselves aware of the far-reaching character of its terms. They may have had in mind but one particular phase of social and political wrong which they desired to redress. Yet, if the amendment as framed and expressed does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional enactment, it is to be presumed that the American people, in giving it their *imprimatur*, understood what they were doing, and meant to decree what in fact has been decreed."

Further on he observes:



"The legislature has an undoubted right to make all police regulations which they may deem necessary (not inconsistent with constitutional restrictions) for the preservation of the public health, good order, morals, and intelligence; but they cannot, under the pretense of a police regulation, interfere with the fundamental privileges and immunities of American citizens. The question has its limits in both directions; and whilst we are to be specially careful not to do anything that may trench upon the vast and almost limitless field of legislation, where the will of the people is supposed to be most freely and powerfully expressed, it is nevertheless our duty, with a firm and unflinching hand, to prevent the invasion of any clear and undoubted individual rights of the citizen which are secured to him by the constitution."

It is true that in *Slaughter-House Cases*, 16 Wall. 36, by a divided court, it was held that the provisions of the fourteenth amendment did not apply to the facts of that case, on the ground that the privileges and immunities secured thereby pertained to such as were the peculiar, inherent rights of citizens of the United States, as contradistinguished from those of the citizen of the state; and that, as the act of the state legislature came within the police power of the state, it was not in contravention of the federal constitution. But the learned judge concedes (page 72 of the opinion) that, while the newly-enfranchised negroes were uppermost in the minds of congress in framing the amendments, yet this language is so comprehensive as to extend its limitation to other rights assailed by the states, though the party interested may not be of African descent. Mr. Justice SWAYNE, in his separate opinion, makes this pungent indisputable declaration:

"Life, liberty, and property are forbidden to be taken 'without due process of law,' and 'equal protection of the laws' is guaranteed to all. Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner."

In the *Live-Stock, etc., Ass'n Case*, *supra*, Mr. Justice BRADLEY had at first reached the conclusion that the civil rights bill as it then existed did not apply to the case in hand, and that, inasmuch as congress had not then legislated to carry into effect the provisions of the fourteenth amendment, he felt constrained to apply the provisions of said section 720, Rev. St., to the case, and refuse the injunction, in so far as it sought to restrain the state officers from proceeding in the case then pending in the state court. After a night's rest and deliberation, he delivered a supplemental opinion, in which he said:

"While we still hold that the act is not intended to enlarge the privileges and immunities of white citizens, it must be construed as furnishing additional guaranties and remedies to secure their enjoyment; and this is probably the reason why congress has neglected to pass an additional law for carrying the 14th amendment into effect, the civil rights bill being regarded as having already supplied the necessary provisions for that purpose."

This opinion was delivered at the April term, 1870, of the Louisiana district court. And this brings us to a most significant matter. After

this discussion, on the 20th day of April, 1871, congress passed an act entitled "An act to enforce the provisions of the fourteenth amendment to the constitution of the United States, and for other purposes." 17 St. U. S. 13. The first section of this act is as follows:

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the state to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication,' and other remedial laws of the United States which are in their nature applicable in such cases."

This is as comprehensive as it is explicit. It applies to any person, no matter who, officer or layman, who, under color of any law, statute, etc., of any state, shall subject, or cause to be subjected, any person within the whole jurisdiction of the federal government to the deprivation of any right, privilege, or immunity secured by the constitution, and declares that he shall, notwithstanding any law, statute, regulation, etc., of the state, be liable to the party aggrieved in any action at law, suit in equity, or such proper proceeding for redress. And it throws wide open the doors of the federal courts as the altar of justice for his refuge. This section is carried forward into the Revised Statutes by section 1979. Can it be doubted that, if this statute had been before Mr. Justice BRADLEY in the *Live-Stock, etc., Ass'n Case*, he would have hesitated to apply it, and grant the injunction? It is true, the act does not unconditionally repeal said section 720; but the seventh section declares "that nothing herein contained shall be construed to supersede or repeal any former act or law, except so far as the same may be repugnant thereto." So, while section 720 remains operative and applicable in other matters and respects as heretofore, yet, if it be repugnant to any of the provisions of the later act of April 20, 1871, so as to prevent the redress and the remedies designed by it to the party whose constitutional rights and privileges are obstructed by any adverse state action, it is in so far superseded and inapplicable.

Suppose the state of Missouri should enact a law prohibiting any colored citizen from exercising the right of suffrage, and provide for his arrest and criminal prosecution for voting, with the auxiliary proceeding that the proper county attorney might also apply for an injunction, and perpetually enjoin him from exercising his constitutional privilege; that, under such law, he should be arrested and enjoined; and, after he had been discharged from arrest by the writ of *habeas corpus*, the said officers should threaten to proceed against him as for contempt, under such injunction, for renewing the effort. Would it be questioned that the

United States court could entertain a bill in equity under the act of 1871 to restrain such officer, especially so under circumstances indicating a settled purpose on the part of such officer to harass and oppress the voter, and possibly to drive him from the state? The constitution and the law recognizes no distinction as to color or equality of right. The right to liberty and property, and the equal protection of the laws in the pursuit of a lawful avocation, are alike sheltered under the broad *ægis* of the constitution, and congress has placed at the command of the citizen every weapon in the whole armory of justice for the protection of such constitutional rights. The equitable remedy of injunction for the protection of rights and property, and the prevention of wrongs, is affirmative, as well as negative. Pomeroy, in his work on Equity Jurisprudence, (volume 3, § 1338,) declares that:

"Wherever a right exists or is created by contract, by the ownership of property, or otherwise, cognizable by law, a violation of that right will be prohibited, unless there are other considerations of policy or expediency which forbid the resort to this prohibitive remedy. The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise."

The equity jurisprudence to prevent the commission of wrong is only limited to the instance where a tort may not be adequately compensated in damages. It is too palpable to admit of debate, as already shown, that the remedies by law, and the usual course of procedure thereunder, would afford no adequate protection in this case, assuming the allegations of the bill to be true.

It is urged with much force by the learned counsel for petitioner that so much of said section 13 of the Kansas statute which authorizes a temporary injunction to issue without bond, and without any notice to the party sought to be restrained, is not due process of law. On the contrary, it is insisted by the attorney general that this objection is disposed of in the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273. The conclusion apparent to my mind to be drawn from what Mr. Justice HARLAN said respecting this statute is that he assumed that under such a proceeding notice would be given, and a full hearing had in the matter of declaring such a nuisance. The statute itself, it is true, does not provide for a preliminary notice before the temporary injunction is granted; but the court evidently assumed that in such a proceeding, before the property rights of the defendant should be affected, notice would be given; whereas the bill of complaint here alleges that without any such notice the court granted the preliminary injunction, the effect of which would be to close up the defendant's place of business, without bond of indemnity, until such time as a hearing might be had finally upon the merits. It is a principle of universal law, in the administration of justice, that no step can be taken by a court affecting the life, liberty, or property of the citizen without first giving him notice thereof. "The law loathes a judgment without a hear-

ing." *Smith v. Taylor*, 11 Ga. 22. FORTESCUE, J., in *Rex v. Chancellor, etc.*, 1 Strange, 557, said:

"The laws of God and man both give the party an opportunity to make his defense, if he has any. \* \* \* Even God himself did not pass sentence upon Adam before he was called upon to make his defense."

Mr. Justice FIELD, in the *Railroad Tax Cases*, 13 Fed. Rep. 751, says:

"It conflicts with the great principle which lies at the foundation of all just government that no one shall be deprived of his life, his liberty, or his property without an opportunity of being heard against the proceeding. The principle is as old as *Magna Charta*, and is embodied in all the state constitutions, and in the fourteenth amendment of the federal constitution. The provision in this amendment is in the form of an interdict upon the states,— 'nor shall any state deprive any person of life, liberty, or property without due process of law.' \* \* \* It must give to the party to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but due process. If it touched life or liberty, it would be wanton punishment, or, rather, wanton cruelty. If it touched property, it would be arbitrary exaction."

It does seem to me that it is no answer to the want of notice in this case that an opportunity will be given the petitioner at the final hearing as to whether the injunction shall be made perpetual; for in the preliminary proceeding, without notice, and without an opportunity, by affidavit or otherwise, to enter his protest, and to bring to the attention of the court tangible, palpable facts, or the opportunity to be heard by counsel, an order of restraint is laid upon the party accused of levying a nuisance, and his place of business summarily closed up, and his business for the time may be interrupted, and seriously, if not irreparably, injured. But I will not press this matter beyond these suggestions.

A most earnest appeal is made by respondent to this court to leave unmolested the officers of the state in this controversy to proceed through the customary channels of the state courts, leaving the petitioner his remedy, after final decision in the court of last resort in the state, of appealing to the United States supreme court. We sensibly recognize the importance of the rule of comity invoked, as essential to the preservation of the harmony and peaceful operation between the courts of the two jurisdictions; but I feel sure that in the coming time of dispassionate consideration and calmer reflection, when the feverish excitement of popular local sentiment shall give way to reason and a broader national spirit, the intelligence and patriotism of counsel will pronounce judgment for his constituents acquitting the federal judiciary in this controversy of the imputation of unduly interfering, when they are executing the high behests of the federal constitution. Is it not, rather, the respondent and his abettors who should recognize this rule of comity? The supreme court of the United States has declared so much of the law of Kansas as prohibits the importation of liquors, etc., into the state, and their sale therein in the original package, as unconstitutional. The United States circuit judge, in obedience to his oath of office, has reaffirmed and applied that decision to these prosecutions. Until congress

shall interpose, and confer upon the state the right to regulate this matter, loyalty to the supreme law of the land, and the obligation of good citizenship, demand that the state and its ministerial officers should forbear to provoke the occasion for the federal judiciary to assert their jurisdiction to see that the federal constitution is recognized and obeyed. The most august thing in government is law, and the highest duty of citizenship is obedience to and respect for the law. My opinion is that sufficient appears to entitle the petitioner to the temporary writ of injunction.

FOSTER, J., concurs.

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M. SCHANDLER BOTTLING Co. v. WELCH *et al.*

(Circuit Court, D. Kansas. July 18, 1890.)

**INTOXICATING LIQUORS—SALES IN ORIGINAL PACKAGES—CRIMINAL PROSECUTION—INJUNCTION.**

Though a court of equity has no jurisdiction to enjoin purely criminal proceedings, injunction will lie against proceedings by a prosecuting attorney to prevent the agents of a non-resident importer from selling intoxicating liquors in the original packages in which they were imported, under a state law which, in so far as it prohibits such sales, is in violation of the interstate commerce clause of the federal constitution, since such proceedings are an interference with complainant's property rights under the constitution, for which, as provided by Rev. St. U. S. § 1979, an action at law or suit in equity may be maintained.

**In Equity. Bill for injunction.**

The complainant is a corporation of the state of Missouri. The respondents are residents of the state of Kansas. The respondent Welch is the acting county attorney of Shawnee county, in Kansas, and the respondent Wilkerson is the acting sheriff of said county.

The bill alleges that complainant is engaged in the business of a wholesale and retail liquor dealer at the City of Kansas, in Missouri; that it owns and has in possession a large amount of whiskies, wines, and beer, and other articles of merchandise, in said last-named city, and sells the same to various customers in other states as merchantable commodities; that on or about the month of May, 1890, it established an agency at the city of Topeka, in Kansas, for the sale of such articles, and engaged and employed as agents, at said place, Carl Jockneck and J. R. Deisher, to receive and sell for it at said point such merchandise as it might ship to them for said purpose; that said agents were and are also citizens resident of the state of Missouri; that in establishing such agency the complainant invested a large sum of money at said city of Topeka, and shipped to said agents large quantities of such liquors, wines, beer, etc., amounting to several thousand dollars; that said articles were shipped by express and otherwise, at great expense, securely packed and sealed, in packages consisting of several hundred in number, each of which packages was securely boxed up, sealed, and numbered, in distinct, separate

packages, and shipped from Kansas City, Mo., the business point and house of complainant, consigned to said agents, to be received by them, and sold for and on behalf of complainant, in the original packages in which they were so shipped, and not otherwise; and that said goods were being so sold by said agents in the original packages, and not otherwise, as they had a right to do under the constitution of the United States.

The bill then charges that said respondents, after the said shipment of said goods, and the beginning of said agents to so make sales of the same, conspired and confederated together to unlawfully oppress, impede, and obstruct the complainant and said agents in conducting said business, and to drive them out of the county and state aforesaid, and prevent them from conducting said business therein; and, in pursuance of said conspiracy, the respondents, under the garb and color of their said offices, were to cause the arrest, imprisonment, and prosecution of said agents, and, as often as they might be released from such arrests, they would cause their rearrest and imprisonment, and by exacting, or causing to be exacted, exorbitant and unreasonable bail, compel their confinement in jail, and, as often as discharged therefrom by the writ of *habeas corpus*, to prefer in different form apparently new, but, in effect, the same, charges against them, for so conducting said business seemingly in violation of the state law, although said respondents well knew their said business was lawful under the laws and constitution of the United States. That accordingly said Welch caused certain criminal proceedings to be instituted against them in the district court of said Shawnee county, under which they were arrested by said Wilkerson, and a bail-bond of \$3,000 demanded and required of them, which bond was wholly unwarranted by the character of the alleged offense, oppressive, and unconstitutional. That at the same time, and as a part of said conspiracy and criminal proceeding, they caused to be filed and instituted against said agents an injunction suit to prevent them from selling said articles as they had a right to do under the constitution of the United States. That said order of injunction was served on said agents at the same time they were so placed under arrest in said criminal proceedings, which said order was issued without any previous notice to said agents, or opportunity to be heard thereon. Thereupon, said agents applied to the United States circuit court for their discharge from said arrest under the writ of *habeas corpus*; and, after full hearing and investigation of the law and facts, said United States court did discharge them under such writs. *Ante*, 545. That said officers, under the garb and color of their said offices, propose and threaten to continue to so harass and vex said agents with like trumped-up charges and prosecutions for continuing to so sell such goods in the original packages in which they were imported as aforesaid. The object of said prosecutions and persecutions is to prevent said agents and complainant from pursuing said lawful business in said county, and to break up its trade, and destroy its property. That said charges and prosecutions are to be made before the said district court of Shawnee county, on the ground and under the pretext that said acts of said agents are in violation of what is known as the "Prohibitory

Liquor Law of the State of Kansas," and is in fact designed to prevent the importation of such goods into the state from other states, and their sale in the original packages in which they are shipped.

The prayer of the bill is for a provisional injunction temporarily restraining and prohibiting respondents, their deputies, assistants, etc., from instituting or prosecuting civil or criminal actions against said agents, and preventing them from receiving and selling such goods so shipped to them in the original packages to such persons as may apply for the same, and from molesting them in their said business so conducted, and for a perpetual injunction, if, upon a full hearing, the facts shall so appear as alleged, and for all proper relief.

At the preliminary hearing of this application the respondents appeared, and demurred generally to the bill. The cause was heard by Judge PHILIPS, of the western district of Missouri, under order of the circuit judge, in conjunction with Judge FOSTER.

*E. Hagan*, for complainant.

*L. B. Kellogg*, Atty. Gen., for defendants.

PHILIPS, J., (*after stating the facts as above.*) The objection made to this proceeding, that it is practically a suit against the state, has been considered by us in the case of *Tuchman v. Welch*, *ante*, 548, in the opinion just filed. See, also, *Hagood v. Southern*, 117 U. S. 70, 6 Sup. Ct. Rep. 608. The remaining question, not disposed of in that discussion, is whether or not this suit is obnoxious to the objection that a court of equity never extends its jurisdiction to the enjoining of criminal proceedings. This is, unquestionably, a well-settled general rule of equity jurisprudence. *Railway Co. v. Kansas City*, 29 Mo. App. 89, and *loc. cit.* This question underwent extended discussion in *Re Sawyer*, 124 U. S. 200, 8 Sup. Ct. Rep. 482. Mr. Justice GRAY, who delivered the majority opinion, said, *inter alia*:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors. \* \* \* To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, \* \* \* is to invade the domain of the courts of common law."

Without stopping here to consider whether this general rule is limited to criminal proceedings already begun in the court of criminal jurisdiction, it is sufficient to the matter in hand to say, as indicated in the quotation above made, that the rule has its exceptions. One of these is where a threatened criminal proceeding is hostile, vexatious, and unwarranted, and involves the wanton destruction of or injury to property interests of the accused; and especially so under circumstances where, if permitted to proceed, the party injured would have no adequate remedy at law for restitution. Mr. Justice GRAY recognizes this. He quotes from *Sheridan v. Colvin*, 78 Ill. 237:

"It is elementary law that the subject-matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of

property, and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property."

Again he says:

"No question of property is suggested in the allegation of matters of fact in the bill, or would be involved in any decree that the court could make thereon."

So Mr. Justice FIELD, in his concurring opinion, said:

"In many cases, proceedings criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity."

In the case of *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217, Lord Justice TURNER observed:

"I agree that the jurisdiction of this court in a case of this nature rests upon injury to property, actual or prospective, and that this court has no jurisdiction to prevent the commission of acts merely criminal or merely illegal, and which do not affect any right of property; but I think there are here rights of property quite sufficient to found jurisdiction in this court. I do not agree to the proposition that there is no remedy in this court if there be no remedy at law, and still less do I agree to the proposition that this court is bound to send a matter of this description to be tried at law. The highest authority upon the jurisdiction of this court, in enumerating the cases to which the jurisdiction extends, mentions cases of this class, where the principles of law by which the ordinary courts are guided give no right, but, upon the principles of universal justice, the judicial power is necessary to prevent a wrong, and the positive law is silent."

In *Spinning Co. v. Riley*, L. R. 6 Eq. 558, the vice-chancellor said:

"The jurisdiction of this court is to protect property; and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable for use or occupation."

In *Lottery Co. v. Fitzpatrick*, 3 Woods, 222, the court was called upon, in the exercise of its equity jurisdiction, to meet and counteract the attempt of the state, through unfriendly and hostile legislation, to drive the obnoxious concern and its business from the state, through penal enactments and criminal prosecutions. The court says:

"Nor is there anything in the fact that the defendant is an officer, and supposes he is performing an official duty, which would constitute a reason for withholding the exercise of this jurisdiction. The jurisdiction is conservatory, and is employed where a wrong is attempted under color of law, and with an appearance of right, to inflict permanent and incurable mischief. The remedies of law are not generally adequate to defend persons from violence and lawlessness. The unoffending citizen is entitled to be protected by the state through its punitive laws. But when the state itself errs, and its legislature visits by a law constantly recurring penalties upon all the officers and agents of a corporation, it gives rise to a question of the rightfulness of the law, viewed in its operation upon franchises,—upon property; for, since a corporation is an artificial being, and can only act through its representatives, any law which forbids, under penal sanction, every conceivable corporate act of officers and agents, must assail the value and existence of its privileges, and, if the law



be unauthorized, its operation may be restrained, and property which is by the constitution exempted from this power may be protected by the proper process of the courts."

Again he says:

"The officers of every state of the United States, whether executive or judicial, owe to the constitution of the United States a fealty and homage and obedience surpassing that which they owe to their constituents of the state. The people of the United States, composed of all the peoples of the separate states, have adopted the constitution, and have ordained that the terms of that instrument, and the laws and treaties made pursuant to it, shall have obedience, anything in the constitution and laws of any state to the contrary notwithstanding." Citing *Gibbons v. Ogden*, 9 Wheat. 1; *Dodge v. Woolsey*, 18 How. 331.

In the latter case, the circuit court of the United States for the district of Ohio having granted an injunction upon the officers of the state from enforcing the state enactments, the supreme court said:

"The jurisdiction of chancery extends to inquire into and enjoin, as the case may require to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or a denial of a right growing out of it, for which there is not an adequate remedy at law."

So in *Osborn v. Bank*, 9 Wheat. 738, the court say:

"The counsel for appellants are too intelligent, and have too much self-respect, to pretend that a void act can afford any protection to officers to execute it. The circuit court of the United States has jurisdiction of a bill brought by the United States for the purpose of protecting the bank in the exercise of its franchises which are threatened to be invaded under the unconstitutional laws of the state."

And in that case the order of restraint went against the officers threatening the injury to the franchise.

It is scarcely needful to be observed that the courts would not any the less extend their protecting arm over the property rights of the individual citizen than over those of a corporation.

In *Live-Stock, etc., Ass'n v. Crescent City, etc., Co.*, 1 Abb. (U. S.) 388-406, Mr. Justice BRADLEY, while, as shown in the opinion in *Tuchman v. Welch*, *supra*, declining to restrain proceedings already instituted in the state court, under his conception of the civil rights bill as it then existed, not obviating the applicability of section 720, Rev. St. U. S., proceeded to enjoin and restrain the defendants "from commencing or prosecuting any other suits upon their act of incorporation than such as are now pending against the said complainants, or either of them, from doing or performing any act expressed in the declarative clause of this decree, or from suing for any fine or penalty imposed in said act, or from doing or performing any of the acts aforesaid, and from interfering with them in the prosecution of their lawful occupations as live-stock dealers or butchers, or as vendors of animal food or animals."

The declared object and purpose of the respondents is to obstruct and prevent the right of complainant and its agents to pursue a lawful avocation and business in commerce between the states. In short, in intent

and in effect, to destroy complainant's said business, and expel his property, imported into the state for mercantile purposes, from the state. Certainly, such condition of affairs call into activity the equity powers of the court to protect the property rights of the complainant, secured to him by the constitution of the United States. Such an emergency, we think, is provided for by section 1979, Rev. St. U. S., which declares that—

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Nothing, of course, here said or enjoined, is to be construed as extending to any prosecution to which the complainant or its agents may be lawfully subject for selling such articles otherwise than as importers, in the original packages in which they may be imported, within the protecting terms of the federal constitution, as interpreted by the supreme court of the United States. With this limitation, the temporary writ of injunction should be granted.

FOSTER, J., concurs.

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WOOLSTEIN *et al.* v. WELCH.

(Circuit Court, D. Kansas. July 18, 1890.)

**INJUNCTION—PROCEDURE—PARTIES—MISJOINDER.**

Persons who have been separately indicted for the sale of intoxicating liquors in the original packages in which they were imported, and separately enjoined from making such sales, cannot maintain a joint suit for an injunction against such proceedings, though they are, respectively, the agent and subagent of the same importer.

**In Equity. Bill for injunction.**

The complainant M. Wollstein is a citizen of the state of Missouri, engaged there in the business of a wholesale liquor dealer, and since the 13th day of May last past has been engaged in shipping from said state, into the state of Kansas, such liquors, in original packages. Said liquors were shipped to Topeka, Kan., consigned to the co-complainant Sicher, as his agent, to sell the same in the original packages in which they were so shipped. Said Sicher, being empowered by said principal to employ any subagent, to assist in and about the said business, did on the 20th day of May, 1890, employ the other complainant, Schmidt, as such subagent or assistant. The said Sicher and the said subagent received said packages, and proceeded to sell the same at Topeka. On the 28th day of May, 1890, the respondent, Welch, acting as county attorney of Shawnee county, in which said sales were being made, caused

the arrest, on separate informations, of said Sicher and Schmidt, for violating what is known as the "prohibitory" law of the state in so selling such liquor. At the same time the said Welch filed separate petitions in the state district court against the said Sicher and Schmidt, charging that the place where such business was being so conducted was a nuisance, and asking for an injunction closing the same up, and enjoining defendants from further conducting said business thereat. On these petitions the court, without indemnity bond or notice to defendants therein, made a temporary order enjoining the parties, as prayed. Upon the arrest and imprisonment of the parties under said criminal charge, they applied to the United States district court for a discharge under a writ of *habeas corpus*. Upon hearing therein, they were discharged therefrom, (ante, 545,) on the ground that, under the commercial clause of the federal constitution, the said Wollstein had a right to import said goods into the state, and the said agents had a right to sell the same in the original packages, as they had done, any law of the state to the contrary notwithstanding.

The petition charges that, notwithstanding the premises, the said respondent, instigated by the purpose to prevent the said agents from making such sales of such liquors in said state, threatens to continue to so prosecute and imprison said agents, and to have them arrested, on contempt warrants from the said district court, for violating said injunction order in like sales made since their discharge under the writ of *habeas corpus*. The prayer of the petition is that respondent be restrained from carrying into execution his said threat, and further molesting the complainants in the peaceful and lawful pursuit of said business. Respondent has demurred generally to the bill on a hearing for preliminary injunction.

*Wheat, Chesny & Curtis*, for complainants.

*L. B. Kellogg*, Atty. Gen., for defendant.

PHILIPS, J., (after stating the facts as above.) There is some confusion in parties complainant, and mingling of distinct claims for relief, in the bill of complaint, which, even under the flexible and versatile rules of equity pleading and remedies, are hardly permissible. Wollstein, the non-resident importer, is joined as co-complainant with his agent, Sicher, and the subagent, Schmidt. The only interest, recognizable in equity, Wollstein is shown to have, is that, as an importer, his property rights and interests may be affected by the threatened acts of the respondent. But the other co-complainants are not so interested therein as to authorize their joinder, or entitle them to any relief on that ground. It is a general rule of equity pleading that no person should be made a party who is not interested in the subject-matter of the suit, and for or against whom no decree can be made. It is on this ground that agents, as a rule, are not joined with the principal. Story, Eq. Pl. § 231. As to the threatened prosecutions against Sicher and Schmidt, either criminally or civilly, under the contempt proceeding for violating the injunction order of the state court, it would be wholly personal as to them, as affecting

their liberty, and their right to pursue, unmolested, the business of their employment. As to the matter for which Wollstein could alone ask for relief, the bill does not seem to be framed on such a theory; and the averments in this respect, we think, are not sufficient to warrant such relief. It is competent for a court of chancery to grant relief to some of the co-complainants, and not to others, and it can give different relief in character and extent to different complainants. 1 Pom. Eq. Jur. § 115. So, if the other two complainants present grounds for joint relief, it may be granted them. On the other hand, if their interests in the subject-matter be several, the temporary injunction should not be granted, as it would be dissolved at the hearing on motion or demurrer. *Jones v. Del Rio*, Turn. & R. 297.

In *Hudson v. Maddison*, 12 Sim. 416, a bill by several occupants of houses to restrain the erection of a steam-engine, which would be a nuisance to each of them, it was held that each occupier had a distinct right of suit, and consequently could not sue jointly. This was placed on the ground "that, as each of them has a separate nuisance to complain of, that which is an answer to one may not be an answer to the other; and if, upon such a bill, a decree were to be pronounced, it must be a decree which would provide for five different cases." So if we should apply to the facts of the case as disclosed by the bill, the ruling in *Tuchman v. Welch*, ante, 548, (opinion filed of this date,) holding that complainants are entitled to the relief prayed for against the threatened proceedings in the contempt warrant, in the nature of an ancillary proceeding in the several cases, we are confronted with this formidable difficulty: It appears from the petition, as also from the exhibits thereto, that the suits in the state court in which the temporary orders of injunction were granted were separate actions, and separate restraining orders were issued against Sicher and Schmidt. The action against them was not joint. The breach of the order would be the individual act of each, and the contempt warrant would be issued separately in each case, or might issue against one and not the other, as one might violate it and the other not; and the answer which one might make the other might not. The parties were separately indicted or informed against, and separately enjoined. Both being servants of Wollstein, or, at least, Sicher being such servant, and Schmidt his subagent, each is responsible to the law of Kansas for his own act, and not that of his fellow-servant or principal. While they might jointly make a sale, and by that common act violate the order of injunction, yet, as the matter stands, the respondent could only proceed against them separately for contempt. The joint suit to enjoin against the threatened action, in our opinion, is improper.

The remaining matter sought to be enjoined is the threat of respondent to continue to harass Sicher and Schmidt with other criminal prosecutions for any future like sales. As each could be separately prosecuted for his act, and as the joint sale of a package would be an act so improbable, we perceive no propriety in a joint proceeding of injunction. In other words, as mere employes, servants of the importer, with no community of interest in the property, presumably receiving separate

wages, each having a personal accountability to the employer, and a several personal liability to a criminal prosecution, there is every good reason for disallowing, and no sufficient reason is apparent for indulging, a joint suit.

In view of this conclusion, we omit any discussion of the right to relief sought in a proper form of action. It follows that the writ of injunction is disallowed.

FOSTER, J., concurs.

### JAFFREY *et al.* v. BEAR *et al.*

(Circuit Court, E. D. North Carolina. May 14, 1890.)

#### 1. EQUITY JURISDICTION—REMEDY AT LAW—SETTING ASIDE SETTLEMENT.

Where a creditor has received a portion of his claim in full settlement, but has given no release under seal, a bill in chancery to set aside the settlement will not lie, since he still has the right to sue at law for the residue of his claim.

#### 2. SAME—STATUTE OF LIMITATIONS—FRAUD.

The fact that a creditor has been induced by the fraud of his debtor to defer bringing suit until his claim is barred at law by the statute of limitations does not give a court of chancery jurisdiction of the cause of action.

In Equity.

*E. S. Martin, M. Bellamy and T. Strange*, for plaintiffs.

*D. L. Russell and George Davis & Son*, for defendants.

SEYMOUR, J. The plaintiffs allege that in October, 1881, defendants' firm became indebted to them in the sum of \$3,206.53, and that in November of the same year it made an assignment giving preferences to creditors, or alleged creditors, other than plaintiffs, to the amount of \$75,000; that upon their own investigation and representations of defendants to the effect that the debts secured in the deed of trust were *bona fide*, they compromised at 25 cents on the dollar; that they have since discovered a considerable part of the amount so secured to have been wholly fraudulent, and made up of fictitious debts inserted in the deed of trust for the purpose of inducing creditors, among them plaintiffs, to accept less than was due them. While more than three years have elapsed since their cause of action accrued, they aver that less than that time has passed since they have discovered the fraud practiced upon themselves and the other creditors of Sol Bear & Co. They claim that though they may be barred by the state statute of limitations, both at law and in equity, in the courts of North Carolina, as has been decided in *Jaffray v. Bear*, 103 N. C. 165, 9 S. E. Rep. 382, they can yet maintain an equitable action in the United States courts. For this they cite several decisions of the supreme court, and in particular *Kirby v. Railroad Co.*, 120 U. S. 130, 7 Sup. Ct. Rep. 430. In that case Mr. Justice HARLAN states, what has long been the settled rule in the United States

courts, viz., that, "while the courts of the Union are required by the statutes creating them to accept as rules of decision in trials at common law the laws of the several states, except where the constitution, laws," etc., "of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the local statutes of the different states in which they sit." He therefore holds that the New York statute of limitations does not affect the power of the circuit court of the United States, following the settled rules of equity, to adjudge that time does not run in favor of defendants charged with actual concealed fraud until after such fraud either is, or with due diligence ought to be, discovered.

The case at bar is not one in which the plaintiffs are entitled to equitable relief, unless the fact that they have lost their remedy at law by not suing in apt time, by reason of defendants' fraud, gives them a right to equitable relief. This will appear from the following considerations:

The prayer of the bill is—*First*, that the compromise and settlement between plaintiffs and defendants be declared null and void; and, *second*, for a judgment for the balance due plaintiffs, with interest. This is not a creditors' bill. It is not founded on a judgment and unsatisfied lien on defendants' property. It is not an action to set aside the alleged fraudulent assignment, for if such an action could be maintained by a simple contract creditor, before reducing his debt to judgment, issuing execution, and having a return made of *nulla bona*, it would not lie in this case, because the bill avers a reconveyance to defendants of the property conveyed by the deed of trust; nor would it lie on this bill, because no such relief is demanded. It cannot be sustained as an action to set aside a release, because no release is averred or exists. Plaintiffs simply aver that defendants agreed to accept \$842.87 in compromise and settlement, etc., and that the same was paid them. There is nothing in their receipt of such sum to prevent them from maintaining an action at law for the balance still unpaid. In *Skilbeck v. Hilton*, L. R. 2 Eq. 587, in which a release was set aside, there was a release under seal, and jurisdiction was taken on the ground of mistake in executing it. Here there is no release, and nothing but the act, said to have been induced by fraud, of accepting a portion of the amount due in lieu of the whole. Nor is this a case like that of *Daniel v. Board of Commissioners*, 74 N. C. 496, where a court of equity would not allow a defendant to plead the statute of limitations on account of his own agreement not to do so. In that class of decisions equity enforces a contract on the ground of no adequate relief at law for its breach.

Having shown that this case is not cognizable in equity on any of the ordinary grounds for equitable relief, it will be well to state clearly what the action is, and why it is contended that a court of equity will entertain it. It is a suit for money due for goods sold and delivered. At law it would be an action of *assumpsit*. The plaintiff sues in equity because he is barred at law, and claims that as he is barred at law by reason of having failed to bring suit in time, and, as his failure to bring suit in time was caused by the fraudulent conduct of defendants, he is entitled to be relieved in equity. The fraud charged is collateral to the plaintiff's cause

of action, and not the foundation of the suit. The plaintiff's contention must be, then, that in every case of purely legal cognizance, in which a party to a contract has been guilty of a fraud collateral to the contract, the result of which has been that the obligee has failed to sue, and has thereby allowed the statute of limitations to run against him, equity acquires jurisdiction. The principle asserted would extend very far beyond the facts of this case, and would effectually nullify the salutary policy of the legislatures of our various states and of the United States in their legislation against stale claims. It would cover every case of misrepresentation, whether oral or acted, by which a debtor might induce his creditor not to sue. It would extend to an oral statement to a creditor that he would gain nothing by suing, to a concealment by a debtor of the amount or value of his property. In short, wherever a debtor has by word or act falsely asserted that his creditor could not obtain his debt by legal process, and has thereby prevented the creditor from suing until the lapse of the time fixed in the statute of limitations, the creditor who is barred at law may, upon the theory of this case, collect his debt in equity, if he can show that he has subsequently ascertained that the debtor's representations were false, and that he was, without laches of his own, deceived by them.

I know of no adjudicated case taking this ground. The two sections cited by counsel from Story (Eq. Jur. §§ 1521, 1521a) evidently refer to cases where equity has jurisdiction independently of the collateral fraud, and intend to state that, in such cases, the court, in exercising its concurrent jurisdiction, will not allow such fraud to have the effect of barring relief. If it could be construed to go further, it would be unsupported by authority. If such a ground of equitable jurisdiction existed, it would doubtless be covered by a line of cases based upon it. The fact that this is, concededly, a case of first impression, shows that no such principle exists.

I have not considered it necessary to discuss the question of whether or not plaintiffs have sufficiently shown want of laches in not sooner discovering the fraudulent character of the fictitious claims alleged to exist in the assignment in trust. No reason is given why the inquiries made within the last three years, which resulted in the discovery that the Manning debt was fictitious, might not as well have been instituted earlier. I prefer, however, to rest my decision upon the grounds before stated, believing them abundantly sufficient. Judgment for defendants for costs.

## GIBSON COUNTY v. PULLMAN SOUTH. CAR CO.

*(Circuit Court, W. D. Tennessee. April 28, 1890.)***1. CONSTITUTIONAL LAW—TAXATION—INTERSTATE COMMERCE—SLEEPING-CARS.**

Where Pullman sleeping-cars are run wholly within a state, the business may be taxed as a privilege.

**2. SAME—PROPERTY OWNED OUTSIDE THE STATE.**

The only restriction upon this power must be found in the state and federal constitutions, since every state may tax all property found within its borders, whether owned by its own citizens or foreigners, although considerations of amity and comity usually secure the exemption of property only temporarily situated within the state, while our federal constitution forbids discriminations against citizens of other states of this Union.

**3. SAME—DISCRIMINATION—EXEMPTIONS.**

Where it does not appear whether sleeping-cars owned by the railroad company are exempt from taxation, an act of the legislature will not be held to make a discrimination, because they are not specifically taxed as a privilege, like those run independently by others than the railroad company, because they may be otherwise equally taxed along with other property of the railroad company, or lawfully exempt under charter privileges.

**4. SAME—CONSTRUCTION OF ACT—COUNTIES.**

The act of the legislature of Tennessee of 1877 (chapter 16) does not impose, when properly construed, a privilege tax for counties upon sleeping-cars run wholly within the state, but is confined to one privilege tax for the state.

**5. SAME—COUNTIES—PRIVILEGE TAX.**

There is in Tennessee no statute, either in the Code or elsewhere, which authorizes counties, generally, to levy always, if they choose, the same privilege tax which is provided for the state. It depends upon each taxing statute and its amendments whether the county has this power. It is generally conferred, but not always, and was not in the several acts taxing sleeping-cars as a privilege.

**6. SAME—TITLE OF ACT.**

The Tennessee constitution, (article 2, § 17,) which provides that no bill shall become a law which embraces more than one subject, that subject to be expressed in its title, does not require a taxing act to name in the title all the objects of taxation, nor confine the act to one general class of property, if the title be broad enough to cover other classes. The tax on sleeping-cars levied by Acts 1877, c. 16, and Acts 1881, c. 149, is not void because of any defect in the title, which expressed only the one subject of "taxation" with which the acts dealt.

**In Equity.**

This bill was filed by Gibson county, Tenn., to recover of the Pullman Car Company a privilege tax of \$50, and \$75 on each of its sleeping-cars run through Gibson county on the Louisville & Nashville and the Mobile & Ohio Railroads, for the years 1877 to 1883, inclusive, amounting, with interest and penalties, to \$5,102.50. The tax was levied under authority of the Code of Tennessee, which it was claimed authorized all counties in the state to levy the same privilege taxes as were levied by the state by the acts of March 9, 1877, c. 16, and of April 7, 1881, c. 149. Afterwards, the claim was abandoned as to all sleeping-cars run from another state into Tennessee, or from that state into another; and the bill was amended to demand it only for the two cars run daily between the cities of Memphis and Nashville, and wholly within the state, and through Gibson county, upon which the state had levied and collected the tax prescribed by the acts of the legislature. The agreed statement of facts showed that the defendant's two cars passed daily through Gibson county, taking up and putting off at the stations within that county all such passengers as wished sleeping-car accommodations, issuing upon the train



such tickets as were required, or taking such fares as were charged. The sleeping-car company kept no agents at the stations, and only did business as above described. There were other facts, some of which were not agreed upon, but the foregoing were stated by the court as sufficient for disposing of the case.

*James R. Deason*, for plaintiff.

*William Burry*, for defendant.

HAMMOND, J. The trouble about this case has been that, while it has been submitted upon bill, answer, exhibits, and an agreed statement of facts, the parties have not come to an agreement as to all the facts, and have been somewhat disagreed about them, which disagreement has not been settled by the proof, nor the pleadings, as the court understands their force and effect. Nevertheless, the court will now dispose of it solely upon the facts that have been agreed in their relation to the pleadings.

It must be conceded that the state of Tennessee had the right to tax the two sleeping-cars engaged in business between Nashville and Memphis, wholly within the state, and that, so far as the federal authority is concerned, that power of taxation is plenary. The authorities need not be cited here, since it is not necessary to support the concession made to the plaintiff on that point, and the cases in the supreme court upon the subject of state taxation, in its relation to interstate commerce, are far too numerous and well known to require any especial application of them to this case. The very latest of them cites the others, and fully establishes this ruling. *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472, 10 Sup. Ct. Rep. 161. It may be well enough, however, to remark in this connection that we start out, always, with the foundation principle that every state, exercising the sovereign power of taxation, may tax all articles of property found within its borders, and all business carried on there, whether owned and done by its own citizens or foreigners. The protection given while within the state is the consideration received for the contribution by taxation to the exchequer of the power that protects, and the fact that the same property or business may be taxed by the home power of the foreigner, because of its authority over him and his property wherever situated, does not impose any restriction on the taxing power of the state where the property is situated or the business carried on by him. That fact, and other considerations of amity and comity among nations, induce each to withhold, generally, any taxation of articles or business done which are merely in transit through the territory, or temporary in character; but such exemption is purely voluntary and gracious, except so far as mutual benefits derived from civilized international intercourse may influence it. The only restrictions upon this plenary power of the state of Tennessee must be found in its own constitution and that obligation of obedience it owes to the constitution of the United States. There being no discrimination, in the statutes involved here, against the property or business of the citizens of other states, and the business of running cars to furnish sleeping and other comfortable

accommodations to passengers between Nashville and Memphis, wholly within this state, being domestic, and not interstate, commerce, there cannot be said to be any violation of the federal constitution in exercising the taxing power by them.

It is urged against these statutes that this tax discriminates against the defendant in favor of the railroads, because their sleeping-cars are not also taxed; and, under a similar act and a similar constitution, it was so held in Texas. *Car Co. v. Texas*, 64 Tex. 274. The act took this form, probably, because it had been so repeatedly held that cars run independently of the railroads, as these were, could not be included in a taxation of the railroad property; and, if similar cars belonging to the railroad company or used by it were also taxed as the defendant is, it would be double taxation. But the fact does not appear here, and the court does not know how it may be, whether sleeping-cars belonging to or otherwise used by a railroad company, and engaged wholly in domestic commerce, have been otherwise taxed or not, or whether they have been otherwise equally taxed, or whether, if not taxed, the exemption be the lawful exercise of some power to exempt from taxation. Therefore our opinion is reserved on this point, and we are content, for the purposes of this case, to accept the ruling of *Car Co. v. Gaines*, 3 Tenn. Ch. 587, which was, possibly, approved by the supreme court in *Robbins v. Turing Dist.*, 13 Lea, 309.

We do not think the objection to the title is well taken. Wise as the provision of our constitution may be, that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title," it is not wise to tie the hands of the legislature, and embarrass its reasonable freedom of action by subtile distinctions as to subject-matter which shall make almost all legislation impossible. Const. Tenn. art. 2, § 17. By a kind of metaphrastic process of interpreting the words used by a body of men dealing with language in its ordinary meaning among practical men, not given to technical distinctions, and by hypercritical holding to subtile discriminations in physical and other sciences, learned or astute minds may bring "more than one subject" into almost any act of legislation, and, more easily still, may not always find the subject-matter accurately "expressed in the title," and thus defeat every displeasing or unsatisfactory statute. All that can be required is a reasonable observance of the rule that there shall be only one subject, whether general or special, and this shall be expressed in the title. *Hyman v. State*, 87 Tenn. 109, 112, 9 S. W. Rep. 372.

Whether a revenue act be one with the widest scope upon the general subject, or one for a very special and limited purpose, the subject is raising revenue by taxation; and when the title is "An act declaring the mode and manner of valuing the property of telegraph companies for taxation, and of taxing sleeping-cars," that title expresses the subject, and the act does not "embrace more than one subject,"—that of "taxation," namely. Act 1877, c. 16, p. 26. It has two objects in view, no doubt, but not two subjects. Its purpose is to tax two different things, but the subject-matter of consideration by the legislators was that

of taxation expressed in the title. The fact that this subject was considered in its especial relation to telegraph property and sleeping-cars did not impose any further or other restriction on the legislature as to subject-matter and title than would have existed if it had been considering a general revenue law under that title, and had associated these two objects of taxation with innumerable others, as learned counsel seem to concede might have been done. Our supreme court has so decided, at all events. *Cannon v. Mathes*, 8 Heisk. 504; *State v. Whitworth*, 8 Lea, 594. The case of *Hyman v. State*, 87 Tenn. 109, 9 S. W. Rep. 372, only decides that, if the legislature adopt a special title, and deal only with a branch or subdivision of some general subject comprehended within the special title, that title so limited will not embrace and support an amendatory act enlarging the legislation to include another branch of the same general subject, wholly different from that contained in the original act. That is to say, the legislature might not enlarge its objects of taxation by ingrafting on this act of 1877, for example, under this same title, other and distinct objects of taxation; but that is not saying that, this title being special, the act cannot unite the two branches or subdivisions of the same subject-matter contained in it, both being covered by the special title. The principle is that the title must be broad enough to cover the subject-matter and all its subdivisions included in the act. If the legislature chooses to limit the title, it must limit the act within the title; but if it enlarges the title sufficiently it may take in all that which the title comprehends, if it be upon the same general subject, which must be only one subject. The title must be broad enough to cover the whole subject of the act in all its divisions, but there need not be a separate act for each subdivision. It is only the application of the rule that the less does not include the greater to the art of giving titles to statutes, under our constitution; but this decision does not conflict with the others. The rule to be learned in that act from them all is to use broad titles for the statutes, and not to endanger them by too great particularity of expression, lest we take the subject of the act out of the title, rather than put it within.

But we do not think this Act of 1877, c. 16, conferred upon the county plaintiff the right to impose the taxes claimed by the bill upon the defendant company, nor did it have that authority under any general law. The contention for this depends, confessedly, upon an implication that whenever the state declares a privilege, and taxes it as such, the county may do likewise. There is no statute declaring this rule, and no decision has been cited which sustains it. Neither *Cannon v. Mathes*, 8 Heisk. 512; *Wilson v. Benton*, 11 Lea, 51; nor *Dun v. Cullen*, 13 Lea, 202,—so decides. In the first the suit included taxes for county purposes, no doubt, but this question was not even mooted, and, if it arose at all, was passed *sub silentio*. Upon examination, it will be found that the act referred to of July 7, 1870, c. 74, was only one increasing a rate before that levied by a revenue statute passed February 25, 1870, c. 81, which in terms applied to "taxation for all state and county purposes" by its first section. The later act was only an amendment of the older one,

and therefore the statutes involved in that case in their terms applied to counties. The same thing is true precisely of the Act of 1879, c. 79, referred to in *Wilson v. Benton*, 11 Lea, 51; and in *Dun v. Cullen*, 13 Lea, 202. The very act, upon the face of it, is for county purposes as well as state, and its second section specifically levies the county taxes on property, and by fair implication a similar tax is authorized on privileges, when it is taken in connection with its companion act, immediately preceding it, for the assessment of taxes "for state, county, and municipal purposes," the forty-sixth section of which declares the privileges, the act relied on by counsel here being only a supplemental act, passed the same day, fixing the rates of taxation. Act 1883, c. 105; Act 1883, c. 106, pp. 103-135. So it appears that neither of these cases, nor any of these acts, justifies the assumption of counsel in argument that "unless there is a restriction in the act itself, it will apply to county revenue," and this notion is the whole basis of the assessment by the county plaintiff of the taxes claimed by this bill. The argument is founded on the assertion that whenever a tax act, as this act of 1877, under review, imposes a privilege tax for the state, the counties may each and every one, and so the municipalities of lesser degree may likewise, impose a privilege tax, not exceeding the state tax, unless the act itself forbids it; because the general Code has enacted that "the polls, property, and privileges that are taxable or exempt from taxation for county purposes are the same that are taxable and exempt from taxation for state revenues." Thomp. & S. Code, § 483; Mill. & V. Code, § 562. But this section was only a Code declaration of the subjects of taxation by counties, as the revenue laws then were, and, as the subsequent sections in the next chapter of the Code and many others show, was not in itself an authority to levy taxes on those taxable articles there enumerated. In other words, that section of the Code was not a general authority to counties to levy taxes, but only that part of the revenue laws indicating generally what was liable to taxation. The legislature was not by that section exercising its power, under section 29 of article 2 of the constitution, to authorize the several counties and towns to impose taxes by directing that, whenever the state levied a particular tax, the county or town might also do the same, unless excluded especially by the act. It had no such purpose in view. The Code itself, which embodied the revenue statutes of that day, otherwise levied county taxes, in other places, as will be seen by following the index on the subject. I have not examined all the tax laws of Tennessee, but I have very carefully examined many of them, old and new, and do not find anywhere in the legislative habit any warrant for this assumption of counsel. I do not say that the authority of a county to levy a particular tax is always found in the very act which levies it for the state, and that it may not arise by necessary implication, as in other cases of implied legislation; but it will be found that the implication does not depend on the absence from the act of any words excluding the county, and a general law authorizing the county in all cases to tax where the state taxes, but on the fact that the particular act is only a part of a general system of many acts constituting revenue legis-

iation which at the foundation had an act applying the law to counties at the same time as to the state; towns and cities being generally left to their special charters, though they are sometimes mentioned.

It is undoubtedly generally true that, whenever the state levies a tax, the counties are authorized to levy a similar tax, not exceeding the state tax or that especially fixed by the act, and this is always so, I think, in a general revenue law. There is no nicely adjusted system of revenue laws, and of all subjects of legislation these are the most characterized by want of uniformity and system, and are irregular and slipshod in habit, not to say slovenly; yet it will be seen that there is a habit about it that precludes that which the county assumes in this case, which is that once in a while a general revenue statute, or a pair or several of them, will be attempted, wherein taxes are authorized for state and county purposes, the county being always specially mentioned, and all other acts are repealed. Then commences the process of patching and tinkering, often unskillfully done and creating more confusion, but the general law remains the foundation of the amendatory legislation until the confusion becomes so great that a new start is made by another general law, to be put through the same process of amendment as before. These amendatory acts do not always couple the county with the state, but sometimes do, and the authority of the county depends upon the original act, as often the state levy does; also notwithstanding the amendatory act. But this is an entirely different habit from that urged here in behalf of the county, that the Code confers a general power, and nothing excludes it but special exclusion of the county in the particular act. So far as these revenue laws are concerned, the Codes are as transitory as the other tax laws are found to be, and only embody the general foundation act in existence at the time the Code happens to be enacted. There is not an intention by a fixed Code statute to give the counties general power of taxation to operate somewhat like a constitutional power would act, and only to be withdrawn by special exclusion of the counties, but they must, like the state, take their chances in the constantly changing revenue enactments, and depend upon them for whatever authority they give when construed altogether. It might be a very useful and beneficial power for the counties to possess to be comparatively exempt from changing authority, and thus have a right to tax, absolutely, whenever the state taxes, unless forbidden; but such is not our law nor our habit of legislation as any one will see upon careful investigation, historically and critically made. This fallacy lies at the foundation of the claim set up in this bill. Neither the act of 1877, nor that of 1881, particularly authorized counties to levy a privilege tax on sleeping-cars passing through their territory, and taking up therein such travelers as might board the train in that county. The state might possibly authorize the counties to tax as a privilege, to the extent of \$50 or \$75, each sleeping-car so passing through a county; and under *Dun v. Cullen*, *supra*, this would mean a privilege tax for the state in each county of that sum as well as for that county; but it has not done this in terms, and by all the rules of law governing implications of legislative intention it will not, by con-

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struction only, be held to have levied so preposterous, unjust, and oppressive a tax. Just think of it. These cars—2 of them—run daily through 12 counties; and under *Dun v. Cullen*, *supra*, this would be a yearly tax on each car of \$1,800, which is, as I calculate it, something over 12 per cent. of its gross revenues, if it carried on every day a full complement of 20 sleeping passengers, at \$2 a berth, between Nashville and Memphis; and if it should run through the whole length of the state, and touch, as it would, over twice as many counties, the tax would be more, unless the charges for accommodations should likewise be more than doubled. This kind of taxation would amount to prohibition, and especially when we know the cars often run nearly empty, and this, too, when the fares taken up in Gibson county would not possibly amount to the tax in any given year. No court will imply an intention which presents such results, unless forced to it by a necessity that knows no denial. It might be a possible implication, if the legislative habit were such as counsel claims, but, in view of the habit, we have endeavored to point out it is impossible. The original sleeping-car tax was a special and fixed tax, not found in a general revenue law, nor intended as an amendment extending the county tax to that subject of taxation. It was a loose and evidently ill-considered bit of legislation in not making the intention more manifest; but in the very nature of the case, in view of the business taxed, it probably never occurred to the draughtsman or the legislature that running a sleeping-car across a county a few minutes each day was such a doing of business in that county as would justify its taxation, as a privilege, by counties. It was so incongruous in its relation to county taxation that it did not occur to the legislature that such a construction could be claimed for it. And, really, no business is carried on in Gibson county when the car rolls through it, possibly in 60 minutes or less, and taxable county privileges are those where the business is located and done in the county. To use the illustrations of the counsel for the plaintiff, the peddler, although in one sense transitory, really is, for the time being, located in Gibson county, and sells quite exclusively to its population while there; and so the circus shows almost exclusively to them for the time being; but the sleeping-car, while it may take up a Gibson county man now and then, or sell a ticket at its stations to him who enters the cars, can hardly be said to be doing business in that county in such a sense as would justify taxing it as a privilege by counties, while as to the whole state it might be fair and well enough to tax the privilege, as has been done by these acts. It is in the light of such considerations as these that we arrive at the legislative intention; certainly, when we are asked to imply it, in the absence of all express declaration to that end which is contrary to all sense of justice. The fact that in 1883 the counties were precluded by the tax-act itself from levying this privilege tax on sleeping-cars shows, in the view we have taken, rather that the original intention was to exclude, than to authorize, it. Dismiss the bill, at the plaintiff's cost.

## MCDONALD v. UNION PAC. RY. Co.

(Circuit Court, D. Colorado. June 18, 1890.)

## 1. NEGLIGENCE—EVIDENCE—BURNING SLACK PILE—PERSONAL INJURIES.

The defendant dumped the slack coal from its mine in a space 400 feet long, and 60 feet wide, between the mine and a town 500 yards distant, containing 600 inhabitants. The slack pile took fire by spontaneous combustion, and, slack being constantly deposited, burned continuously. The slack-pile was not fenced, as required by a law of the state. The children, and others, living in the town, and strangers, were in the habit of visiting the mine by a rough, irregular, and narrow path leading from the town to the mine, which ran along the edge of the burning slack-pile. In clear, calm weather the slack-pile emitted no smoke or steam, and, the surface or top being covered with ashes and other incombustible matter, the fire could not be seen, and persons having no previous knowledge of its existence could not detect its presence. The plaintiff, a boy under 13 years of age, who was a stranger in the town, and who had no knowledge of the fire in the slack-pile, having gone from the town to the mine to witness its operation, was frightened by some of the workmen, and, in running towards the hotel in the town where he and his mother were stopping, ran into the burning slack-pile, and was severely burned. Held, the defendant was guilty of negligence, and liable in damages to the plaintiff for the injuries he sustained.

## 2. SAME—DAMAGES—PROVINCE OF COURT AND JURY.

It is the province of the jury, having due regard to the instructions of the court applicable to that issue, to assess the damages for a personal injury; and this is one of the functions of a jury which the court has no right to invade or interfere with, except where it has reason to believe that the verdict is the result of passion or prejudice, or of a misunderstanding of the instructions, or a disregard of them; and for a judge to substitute the damages he would assess, acting himself as a jury, in the place of the damages the jury have assessed, for no other reason than that he thinks he is a better judge of the facts than the jury, is an invasion of the province of the jury, and a violation of the constitutional right of the suitor to have his cause tried by a jury, and the questions of fact in it determined by their verdict.

(Syllabus by the Court.)

At Law. For opinion on demurrer to complaint, see 35 Fed. Rep. 38.

The following are the provisions of the Colorado Statutes in regard to fencing piles of slack coal referred to in the charge of the court:

"Section 1. That the owner or operators of coal mines from which fine or slack coal is taken and piled upon the surface of the ground, in such quantities as to produce spontaneous combustion, shall fence said ground in such manner as to prevent loose cattle or horses from having access to such slack-piles."

"Sec. 3. Every person violating sections one (1) and two (2) of this act shall be deemed guilty of a misdemeanor, and shall be fined in a sum not less than twenty (20) dollars, nor more than one hundred (100) dollars, to be collected as other fines are collected, and shall be further liable to any party injured thereby in the amount of the actual injury sustained."

J. W. Mills, for plaintiff.

Teller & Orahoad, for defendant.

CALDWELL, J., (*charging jury*.) The foundation of the plaintiff's action is the charge of negligence against the defendant. Negligence is the omission to do something which the law enjoins, or which a reasonably prudent man would do under like circumstances, or the doing of something which a prudent and reasonable man would not do under the

particular circumstances. The alleged negligence of the defendant consists in erecting and maintaining a burning bed or pile of slack coal at a place and under conditions which made it dangerous to persons not having previous knowledge of its existence, and neglecting to fence the same, as required by the statutes of this state. There is no controversy about the leading facts of the case. The defendant was operating a coal mine. The main track of its railroad ran near the mouth of the mine or pit, and parallel to the main line, and 100 feet more or less from it ran a side track or switch. The road-bed of these two tracks was six or eight feet higher than the intervening space between them, and into this intervening space the defendant dumped the slack coal from its mine, which ignited by spontaneous combustion, and burned continuously. The dumping of the slack, and its burning, continued during the several years the defendant operated the mine. The length of the slack-dump pile was four or five hundred feet, and its width varied, being 68 feet at the north end, near where the path crossed the intervening space between the two tracks. The mine and machinery to work it was on the east side of the railroad tracks mentioned. On the west side of the tracks, and opposite to the mine, and only five or six hundred feet from it, was the town of Erie, containing five or six hundred inhabitants, and about 500 feet south of the mine was the railroad depot. Persons going from the town to the mine were accustomed to cross the space between the two tracks by a rather rough and uneven path, which ran on a shale and rock-dump very near the edge of the burning slack-pile. In clear, calm weather the burning slack emitted no smoke or steam, and, the surface or top being covered with ashes or other incombustible matter, the fire could not be seen, and persons having no previous knowledge of its existence could not detect it by any other sense than that of feeling, and to detect it by that sense they would have to come into actual contact with it. It was not dangerous in appearance, and there was nothing visible from which a stranger could detect its dangerous character. The children, and others, living in the town, as well as strangers, were daily in the habit of going to the mine to witness its working, and for other purposes, and in doing so crossed the space between the two tracks by the path before mentioned. The defendant did not prevent or prohibit persons from visiting its mine. The law of this state required defendant to fence its slack-pile. This it did not do, nor did it do anything to advise the public of the dangerous character of this slack-pile, or to prevent persons or stock from getting into it. In this state of things the plaintiff, then less than 13 years of age, visited Erie with his mother, who stayed at the hotel of the village. While there he went over to this mine out of curiosity and a desire to see the mode of operating it. While at or near the mouth of the mine some miners, men or boys, in their mining costumes, came out of the pit, and in sport or in earnest, it is immaterial which, said something about blacking or greasing him, probably advancing on him at the same time. Thereupon the plaintiff ran towards the village, and in crossing the space between the railroad tracks



missed the path, ran into the slack-pile, and was burned in the manner detailed in the evidence.

It is not claimed the plaintiff had any notice or knowledge of the fact that there was any fire in the place where he received his injury, or that by the exercise of reasonable care and diligence he could have seen or discovered the fire. The law made it the duty of the defendant to fence its slack-pile, and, if it did not do so, and as a result of its negligence in failing to comply with its legal duty in this regard the plaintiff received the injuries complained of, the defendant is liable. Persons are entitled to the protection which would accrue from a compliance with the statute, and the plaintiff had a right to presume the space between the railroad tracks was not a burning slack-pile, because it was not fenced. It was the legal duty of the defendant to fence the burning slack, and its omission to do so was negligence.

The defendant being guilty of negligence, your next inquiry will be whether the plaintiff was guilty of any such negligence as will prevent him from recovering; for it is a principle of law that one injured by the negligence of another cannot recover damages for such injury if by his own negligence he contributed to the injury. Upon the undisputed facts of the case, it was not an act of negligence for the plaintiff to visit the defendant's coal mine as he did, and he was not a trespasser there in a sense that would excuse the defendant for the acts of negligence by which he was injured, and which I have heretofore adverted to. Nor was it an act of negligence for the plaintiff, under the circumstances, to run away from the miners. A boy may lawfully run to avoid injury, or when frightened or in play, and the fact that the plaintiff was running on the occasion of his injury does not constitute negligence on his part. He undoubtedly had a right to run towards the hotel where his mother was stopping. Nor was it negligence in him when he did run not to follow exactly a rough, irregular, and narrow path leading from one railroad track to the other. There was nothing in the surroundings to inform him, or any other person having no previous knowledge of the facts, that he would incur any risk or danger in not keeping in the path in crossing the space between the railroad tracks. And if you find he did not see the fire, and could not, with the exercise of reasonable diligence, discover it, and did not know it was there, and that the surface of the slack-pile apparently presented a safe footing and passage, then he was not guilty of any negligence in attempting to run across it.

The disputed issue in the case is the question of damages,—what damages you shall award. And first, gentlemen, you will compensate the plaintiff for the pain and suffering he endured by reason of the injuries he received on this occasion. If a man takes from you your horse, there is a measure for your damages in that case, because you can call witnesses who have some knowledge of horses and their value, and prove the value of your horse. If a man takes from you a hundred bushels of wheat, there is a measure of computing the damages. In that case you do not even have to call witnesses to do it. You may take into court the price-list or price-current, as it is called, and show

what the value of wheat was in the wheat market at the time your wheat was taken, and that settles it. But there is no price-list, there is no price-current, for pain, for human suffering. You do not have to put a witness upon the stand. You cannot put a witness upon the stand, and ask him the value of suffering for an hour, for a day, for months, or for years. You do not have to call any witness for that. The value that shall be put upon pain and suffering is left to you, gentlemen; to your own good common sense and experience; you value that—that is, award damages for it—from your own knowledge, and upon your own judgment, unaided by any witness; for the law cannot call a witness to aid you.

And that is one item of the plaintiff's damages. He is entitled to compensation for the pain and suffering he endured immediately after the injury, at the time of the injury, and afterwards, down to the present time, and any pain or suffering that you find from a preponderance of the evidence that he may have to endure in the future. He is entitled, as another item, to compensation for any expenses that he may have been put to on account of this injury, and which have been proven to you by the evidence. He is entitled to compensation for the loss of time, and the value of that time, whatever the evidence shows, if anything, resulting from this injury; not only the loss of time from the time he received the injury down to the present time, but his loss of capacity, if any, to earn, by the ordinary pursuits of life open to a young man of his knowledge and condition in life, a living in the future, if these injuries are permanent. If you find, by a preponderance of evidence, that they have resulted in the infliction of permanent injuries, which impair his capacity or ability to work or earn wages in the future, you will take that into account.

These are the items of damages you take into consideration. You take all the circumstances, all the facts proven; his age; the character of the injuries with reference to their being permanent or not; and, if permanent, what is the degree of disability imposed by them; and all like considerations you will take into the account when you come to determine the compensation that you will award to the plaintiff for these injuries. The plaintiff's attorney has said to you, gentlemen, that he claimed and that you ought to award more than a compensation. He is not content with compensatory damages; that is, the damages you shall find and award to him for his pain and his suffering, for his expenses, for his loss of time, for the disability that he sustained, if any. He says those are not elements enough, but that in addition you should award him damages as a punishment to this defendant for not having complied with the statute. That you cannot do, gentlemen. That claim is not supported by the law. It is, moreover, in the very teeth of the statute of the state under which it is claimed; for that statute in terms says that the persons or the corporations neglecting to fence these slack-pits shall be liable to any party injured thereby "in the amount of the actual injury sustained,"—thus in terms cutting off exemplary damages.

Now, gentlemen, I need scarcely say to you that you will decide this case precisely as you would if two of your neighbors were the parties, and in no other light or sense; that you will give to the plaintiff nothing because he is a natural person, a youth or a boy, just for that reason, out of sympathy for him; and you will add nothing to his verdict because the defendant is a corporation. You will decide this case as though it was a case between two natural persons. The law, gentlemen, is an utter stranger to sympathy, and an utter stranger to prejudice; and the court or the jury that lets either sympathy or prejudice creep into their minds in the decision of a cause submitted to them commits a very grave mistake. You are the sole judges of the facts. Consider all the testimony, and in the light of all the testimony on the subject of these injuries, and their extent, determine what is a fair, just compensation to the plaintiff for the injury he has sustained. That will be the amount of your verdict.

*Mr. Teller.* I suggest the question to which I called your honor's attention as to what, at least, the character of the evidence would show about the impairment of his powers. I think they ought to be instructed somewhat on that.

*The Court.* I think not. I think the general instruction covers the ground. I say to you again, gentlemen, you are the judges of facts. You give such weight to the testimony of each witness as you think it entitled to. It is from that evidence you must determine for yourselves the character of these injuries, and the amount plaintiff is entitled to recover.

#### ON MOTION FOR NEW TRIAL.

CALDWELL, J. This case has been submitted on a motion for a new trial. The grounds assigned for the motion are misdirection of the jury as to the law, and excessive damages. The facts in this case which determine the legal liability of the defendant were not controverted at the trial, and are not controverted now. There is no ambiguity or conflict in the evidence relating to the question of the defendant's negligence. The controversy turns on the rules of law applicable to the uncontradicted facts, and as to whether the jury were warranted by the evidence in assessing the plaintiff's damages at the sum of \$7,500. The law applicable to the facts of the case was correctly expressed in the charge to the jury. *Bennett v. Railroad Co.*, 102 U. S. 577; *Railroad Co. v. Stout*, 17 Wall. 657, 2 Dill. 294.

As to the damages, it was quite clear to my mind upon the evidence, and from an inspection of the plaintiff's head, hands, and arms on the witness stand at the trial, that the injuries he received were not slight or superficial, but that they were serious, and had resulted in permanent impairment of his sight, permanent injury to his urinary organs, and permanent loss of strength in his hands and arms, and, probably, a permanent affection of his whole nervous system. The court was asked to instruct the jury that there was not sufficient evidence to warrant them in finding plaintiff's injuries were permanent. That instruction was re-

fused, because I believed there was sufficient evidence to warrant such finding, and that the fact was so. I did not, however, indicate to the jury that such was my opinion, but left the question to their determination upon the evidence.

What damages shall be awarded a plaintiff entitled to recover in this class of actions is a question of fact for the jury. As to some of the items of damages in such cases, much is necessarily left to the knowledge, judgment, and experience of the jury, and their sense of justice and right. There is no fixed measure of damages for some of the items which are to be taken into the account in such cases; and men of equal intelligence and fairness often vary widely in opinion as to what would be a just compensation in a given case. The assessment of the damages is one of the functions of the jury which the court has no right to invade or interfere with, except where the court has reason to believe that the verdict is the result of passion or prejudice, or of a misunderstanding of the instructions, or a disregard of them. It is not contended that any of these things can be justly charged upon the jury that tried this case. The most that is claimed is that they erred in judgment, and the court is asked, in effect, to convert itself into a jury, and ascertain the damages it thinks ought to be assessed in the case, and reduce the verdict of the jury to that amount, or grant a new trial.

It is my observation and experience that a jury of intelligent, fair-minded men, familiar with the practical affairs of life,—and the panel that tried this case, I think, may fairly be said to come up to this standard,—are better judges of such a question of fact than the judge on the bench. But, whether better judges or not, it is their exclusive province to determine the question; and for a judge to substitute the damages he would assess, acting himself as a jury, in the place of the damages the jury have assessed, for no other reason than that he thinks he is a better judge of the fact than the jury, is an invasion of the province of the jury, and a violation of the constitutional right of a suitor to have his cause tried by a jury, and the questions of fact in it determined by their verdict. In this case the damages are not in my judgment excessive, in the sense that the jury could not upon the evidence fairly find that sum. It boots nothing that, if the cause had been tried before me, I would have found a somewhat less sum.

It is said that the former verdict in this case for \$2,500—a much less sum than the present verdict—was set aside by Judge HALLETT, because he considered it excessive. This argument suggests these observations: *First.* It is conceded that on the former trial the statute requiring the defendant to fence its slack-pile was not brought to the attention of the court, and hence it was a doubtful question whether the defendant had been guilty of any negligence, and this doubtless influenced the jury in making up their verdict, and the court in setting it aside. *Second.* There is nothing to show that the evidence was the same on both trials. From the fact that the court set aside the first verdict on the ground that the damages were excessive, it is fair to presume that the plaintiff strengthened his case on this head at the second trial by additional proof

as to the severe nature of his injuries, and their permanent character. And, *thirdly*, if the proof was the same at the two trials, it only shows the widely different conclusions that men of equal intelligence and equal opportunities will draw from the same state of facts. I should feel very much like deferring to my learned Brother HALLETT on a question of law, but when we go outside of the law, and put ourselves in the place of a jury to pass upon the facts, in this kind of a case, I think a good, intelligent jury knows better how to do that than either or both of us. And if this case, on the evidence I heard at the last trial, had been submitted to Judge HALLETT and myself, sitting as a jury, and he had thought \$2,500 an excessive verdict, there would have been a hung jury.

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KEATOR *et al.* v. ST. JOHN.

(Circuit Court, D. Minnesota. July 2, 1890.)

JUDGMENT—RES ADJUDICATA—IDENTITY OF POINT AT ISSUE.

On the plea of *res adjudicata* in an action by a principal against his agent for the purchase of land, to recover \$18,000 alleged to have been received by the agent of the moneys paid by plaintiffs to his vendor, it appeared that in a former action by the principal against the agent for fraudulent representations as to the value of the land, a judgment was recovered against the agent, but it did not appear that any issue was raised as to the \$18,000 received by the agent, or that at that time plaintiffs had any knowledge of it. *Held*, that the former suit was not a bar to the second.

At Law.

*Flandrau, Squires & Cutcheon and Searles & Gail*, for plaintiffs.  
*Clapp & McCartney and C. D. O'Brien*, for defendant.

MILLER, Justice. This is an action brought by Keator against St. John on the ground that, while St. John was his agent for the purpose of purchasing some pine lands, he (St. John) received some \$18,000 from the other side, which he converted to his own use, and which was paid in fact by the present plaintiff in the case. If that was so, it undoubtedly was a good foundation for an action, and as the case is presented on this motion that much is conceded. But St. John presents to the court as a defense a former trial and a judgment in the state court, which is alleged to be for the same subject-matter between the same parties, in which a judgment was rendered against him for \$5,000, which stands unreversed, and which, he claims, is a bar to the suit now before us. If that were so, if that were for the same cause of action, and between the same parties, it would be a bar. The defendant states that at the introduction of the record of the former suit he asked the court to tell the jury, not that it was a bar, but that they must find a verdict for the defendant on that ground. There is no assignment of that as an error, because the court was not bound to say to the jury: "These are the same parties, and the facts proved in the state court are the same facts proved in this court."

That was a matter it was his duty to leave to the jury. He had a right to do so, and there is no error in that ruling. But there were instructions asked upon the part of the defendant with regard to that matter, which, if it was a good defense, ought probably to have been given; and the question is whether, as we see it now, as it is with the record of both cases before us, it is such a defense as the court ought to have instructed the jury that he could and ought to have relied upon as a defense against the present case. The doctrine on that subject has undergone some modification, and has always been liable to some divergence of opinion in different courts at different times. Perhaps the doctrine as now established, and as acted on by the supreme court of the United States, is best stated in the case of *Cromwell v. Sac Co.*, 94 U. S. 351, which was cited here the other day. It had been held in the case of *Aurora v. West*, 7 Wall. 82, that not only would what was actually decided in the first suit be a bar to a second suit for the same cause of action, but that whatever might have been decided under that issue was a bar to any further prosecution for the same similar cause of action. In *Cromwell v. Sac Co.* it was held that the rule in *Aurora v. West* was a *dictum* not necessary to the case; that to be a bar to a subsequent suit the matter must either have been actually tried and decided, or it must have been inferentially decided; that is, it must be proven as an actual fact that it was submitted to the first court or jury, or it must be an inference from the state of the pleadings that the judgment rendered must have been considered in the trial court. I think that is the solid foundation on which the doctrine of *res adjudicata* rests. Applying these principles to the present case, it is very true there is a liberal statement in the first action against Mr. St. John about his committing frauds on the plaintiff, and about the fraud concerning the purchase of this same land; and it is barely possible that under the first declaration the present fraud of the defendant, having received \$18,000 from the other side while acting as the agent of the plaintiff, might have been presented and considered. But it does not appear that it was proved. I do not understand that the exact truth as it appeared on this trial, confessed by Mr. St. John himself, that while acting as the agent for the present plaintiff in the purchase of the land from Gillespie he got \$18,000 of the money that Gillespie got from the plaintiff, was so fairly set forth that the plaintiff knew such was the fact; that it was an issue in that case. But after that case was decided the present plaintiffs became aware of that fact. They were able to trace the notes he took which were paid in the bank, so that on the second trial there was this decided issue about the \$18,000 received by St. John. Without elaborating the case any further, we are of the opinion that the judge of the circuit court was right in refusing to hold that the first suit was a bar to the second action. The frauds were different, any way. The first fraud for which a recovery was sought was for false representations made to the plaintiff by St. John as to the value of the property. You who live in this part of the country among pine lands know that their value depends upon the quantity of pine timber that is upon them, and that is a mat-

ter of calculation and knowledge, to be obtained by inspection. Mr. St. John professed to have that knowledge, and made false statements about it, for which the jury held him liable in the sum of \$5,000. That was totally different from the \$18,000 which he actually received as his reward from Gillespie for helping to sell this land. I am of the opinion that the motion for a new trial should be denied. Ordered accordingly.

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*Ex parte* ULRICH.

(District Court, W. D. Missouri, W. D. June 23, 1890.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—FORMER JEOPARDY.

Since it is a principle of the common law that no one shall be twice placed in jeopardy for the same offense, the trial and commitment of one who has already been tried and acquitted of the same offense is depriving him of his liberty "without due process of law," within the meaning of Const. U. S. Amend. 14.

2. SAME—DISCHARGE OF JURY—FORMER ACQUITTAL.

Where, after a person has pleaded not guilty, and been put on trial for a felony, and evidence has been introduced by the state, the judge adjourns the case to take up the trial of another set for that day, and on the adjournment day, on the ground that he is unwell, discharges the jury without the prisoner's consent, the discharge is equivalent to an acquittal; and he cannot be again tried for the same offense.

3. SAME.

Const. Mo. § 23 of the bill of rights, providing that "no person, after having been once acquitted by a jury," shall again be put in jeopardy, but, if the jury "fail to render a verdict, the court before which the trial is had may, in its discretion, discharge the jury, and commit the prisoner for trial at the next term of the court," etc., does not give the court a right to commit a prisoner for a second trial after discharging the jury without legal cause.

4. SAME.

Const. U. S. Amend. 14, providing that no "state" shall deprive any person of life, liberty, or property without due process of law, applies equally to the act of a state judge.

At Chambers. On *habeas corpus*.  
*Crittenden, Stiles & Gilkeson*, for petitioner.  
*A. R. Strother*, for the State.

PHILIPS, J. This application for writ of *habeas corpus* grows, substantially, out of the following state of facts: The petitioner was indicted by the grand jury in the state criminal court of Jackson county, Mo., for the crime of bigamy. He was arraigned, and entered a plea of not guilty. The case coming on for trial on the 21st day of April last past, a jury was duly impaneled and sworn to try the case. The opening statement of counsel was made to the jury, and the state introduced and examined one witness for the prosecution on that day. The trial of the cause was then adjourned to the usual hour of the following day. On the 22d of April the trial was resumed in the forenoon, and a number of witnesses examined on the part of the state, when certain record evidence was offered by the state, which would have about concluded the evidence on its part. Discussion arose as to the admissibility of this record evidence about the noon hour. On suggestion by counsel

that the court might then adjourn until after dinner, the court observed that there was a matter of small importance; or something of that tenor, to come up that afternoon, which would probably occupy a few hours, and said he would adjourn the further trial of the case until next morning at 10 o'clock, which was so ordered without objection. Although the prisoner was under the usual bond for his appearance, the court, according to what seems to be its practice, after the trial of an accused on bail has begun, ordered the prisoner into the custody of the marshal, who placed him in jail. On the following morning, the 23d, counsel for the prisoner appeared in court at the designated hour of said adjournment, expecting to proceed with the trial of said cause, when they discovered for the first time that, on the afternoon of the day preceding, another case, *State v. Wheeler*, had been taken up for trial before a jury before another judge specially selected therefor, and was then in progress. The regular judge of the court was not then present, nor was the prisoner brought into court. The prosecuting attorney announced to the jury and witnesses that they need not attend court further in the case of *State v. Ulrich*, until 2 o'clock P. M. of that day, whereat jury and witnesses dispersed, without more. About 3 o'clock P. M. of that day the judge of the court appeared, and, the trial of the *Wheeler Case* yet being in progress, announced that the case against Ulrich would not be called until the following morning. This was repeated until Saturday morning, the 26th day of April. The *Wheeler* trial was concluded on the evening of the 25th of April. During all these acts and adjournments the prisoner was not present, and was confined in jail, and gave no consent to the proceedings. On the morning of the 26th the court announced that he was not feeling well enough to proceed with the trial, and ordered, against the objection of the prisoner's counsel, that the jury in the case be finally discharged therefrom, and the cause be continued for further trial until the 26th day of May, following, before another jury; and the prisoner was remanded to jail. The evidence shows that, after the court made the foregoing order, it remained in session an hour or so, transacting other business, and then adjourned court until the 5th day of May following. On the 26th day of May, the day the *Ulrich Case* was set down for another trial, counsel for prisoner appeared, and filed motion in the nature of a plea in bar, asking that the defendant be discharged on the ground that he had already been placed in jeopardy, and, in legal effect, acquitted, by the former proceedings in the case. This motion was overruled, and the defendant again put to trial before another jury. He was found guilty, and sentenced to a term of imprisonment in the state penitentiary for two years. After an ineffectual motion in arrest and for new trial, the prisoner has presented to this court his petition for discharge by the writ of *habeas corpus*, on the ground that his imprisonment is in violation of the fifth and fourteenth amendments to the federal constitution.

By Act Cong. approved Feb. 5, 1867, jurisdiction is conferred on United States district courts, and judges thereof, "to grant writs of *habeas corpus* in all cases where any person may be restrained of his or



her liberty in violation of the constitution, or of any treaty or law of the United States." To bring the application, therefore, within the terms of the act, it must be made to appear that the petitioner is restrained of his liberty in violation of the constitution of the United States. Assuming for the present that the first submission of the petitioner's case to the jury, and the jury's discharge by the court, was, in legal effect, a discharge or acquittal of the defendant therein, is the further confinement in jail violative of any right of the petitioner secured by the constitution of the United States? The fifth amendment to the federal constitution provides that—

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury. \* \* \* Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb. Nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property without due process of law," etc.

It is the settled construction of this amendment that it was not designed to operate as a limitation upon the state governments in reference to their citizens, but was adopted exclusively as a restriction upon federal power. *Barron v. City of Baltimore*, 7 Pet. 243; *Fox v. Ohio*, 5 How. 434; *Twitchell v. Com.*, 7 Wall. 321. The fourteenth amendment declares that—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

This is an express limitation upon the powers of the state government. It opens with the suggestive declaration of the dual citizenship of all persons, native and naturalized, and then, in recognition of the maxim of free governments that the obligation of allegiance is correlative with the duty of protection, it declares that no state shall by any law abridge any of the privileges or immunities secured to the citizens of the United States, nor shall the citizen be deprived of life, liberty, or property without due process of law. What is the purport of the term "due process of law?" Kent, in his Commentaries, says:

"It may be received as a proposition universally understood and acknowledged throughout this country that no person can be taken or imprisoned, or disseised of his freehold or estate, or exiled, or condemned, or deprived of life, liberty, or property. \* \* \* unless by the law of the land. \* \* \* The words 'by the law of the land,' as used originally in *Magna Charta*, in reference to this subject, are understood to mean due 'process of law.' \* \* \* The better and larger definition of 'due process of law' is that it means law in its regular course of administration through courts of justice." Volume 2, p. 13.

So the supreme court of the United States, in *Murray v. Improvement Co.*, 18 How. 272-276, speaking of this process, said:

"The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave congress free to make any process due process of law by its mere will. To what principles, then, are we to resort to ascertain whether this process enacted by congress is due process? To this the answer must be twofold. We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

As there is, confessedly, nothing in the constitution itself in conflict with the idea that the citizen cannot be twice placed in jeopardy for the same criminal offense, in following the direction of the supreme court, we will find no principle of the common law, grounded upon the great rock of the *Magna Charta*, more firmly rooted than that no man shall be twice vexed with prosecutions for the same offense. That was as much "the law of the land" as that he should not be tried or condemned without process of law, and the judgment of his peers. Mr. Justice MILLER, in *Ex parte Lange*, 18 Wall. 163, said:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. \* \* \* The principle finds expression in more than one form in the maxims of the common law. \* \* \* In the criminal law the same principle, more directly applicable, \* \* \* is expressed in the Latin, '*nemo bis punitur pro eodem delicto*,' or, as Coke has it, '*nemo debet bis puniri pro uno delicto*.' \* \* \* The common law not only prohibited a second punishment for the same offense, but it went further, and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

Then, quoting the language of MILLS, J., in *Com. v. Olds*, 5 Litt. (Ky.) 137, as follows:

"Every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration. \* \* \* To prevent these mischiefs the ancient common law, as well as *Magna Charta* itself, provided that one acquittal or conviction should satisfy the law, or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our constitutions the clause in question."

And responsive to this same authority, and in recognition of the universality of the principle in question, the learned judge in *State v. Cooper*, 13 N. J. Law, 361, said:

"Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. \* \* \* And all who are conversant with courts of justice \* \* \* must be satisfied that this great principle forms one of the strong bulwarks of liberty."

So the supreme court of the United States says:

"It is contrary to the nature and genius of our government to punish an individual twice for the same offense." *Moore v. People*, 14 How. 21.

That this rule of universal justice and law owes not its origin to constitutional declarations, but was designed only to emphasize and preserve it, see *Lee v. State*, 26 Ark. 260; *State v. Snyder*, 98 Mo. 555, 11 S. W. Rep. 1036; *Ex parte Snyder*, 29 Mo. App. 261. And Cooley, in his work on Constitutional Limitations, (section 36,) says:

"We must not commit the mistake of supposing that, because individual rights are guarded and protected by them, [constitutions,] they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed."

As expressive of how deeply rooted this principle of the common law has ever been in the minds and convictions of the American people, as their common, inestimable, heritage of liberty from the institutions and usages of the mother country, the colonists, long before the adoption of the constitution, incorporated the provision respecting due process of law, or the law of the land, in all their local governments; and there has not been a constitution, state or federal, adopted on this continent, which does not contain the provision against double trials and punishments, or punishment after acquittal. It is imbedded in the very bone-work of our political and judicial system. Compelled, as the learned counsel for the state is, to admit this historic truth, he ingeniously sought on the argument of this cause to maintain the proposition that the term "due process of law," as employed in the fourteenth amendment, was not designed by its framers to extend to and embrace the instance of a double jeopardy in a criminal prosecution, for the reason that the same provision found in the fourteenth amendment also appears in the fifth amendment, in which is the clause prohibiting the placing of the citizen in jeopardy twice for the same offense; and he relies upon the statement of Mr. Justice MATTHEWS in *Hurtado v. California*, 110 U. S. 534 *et seq.*, 4 Sup. Ct. Rep. 111, 292, to the effect that the term "due process of law" is employed in the fourteenth amendment in no different sense from that in the fifth amendment, and that, if "it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the fifth amendment, express declarations to that effect." The contention of counsel is that, by parity of reason, inasmuch as the fifth amendment contained also an express provision against again vexing the citizen with prosecution after having once been in jeopardy, it would have been superfluous and repetitious to cover the same right under the clause respecting due process of law. It must be confessed that some expressions of the learned justice in this connection give color to such inference. But a closer examination of the context, as well as the whole debate on the question involved in that case, can leave little doubt that such first impression is quite superficial. A brief review of the California case, we think, will make this clear. The constitution of the state of California authorized the prosecution of persons on information. *Hurtado* was accordingly, on information, prosecuted and convicted of the crime of murder. He applied to the supreme

court of the United States to review the judgment of the state court, on the ground that the trial and conviction was not due process of law, within the meaning of the fourteenth amendment. The argument of Mr. Justice MATTHEWS, who wrote the majority opinion of the court, was to show that the presentment or indictment of a grand jury in cases of felony was not so established and fixed in the common law of England, as it existed at the time of the adoption of the federal constitution, that it could be regarded as a part of the law of the land, within the meaning of "due process of law." The opinion reviews the history of *Magna Charta*, and the comments thereon by Coke and other English authorities and judges, to show that presentment and indictment were not a part of the law of the land as secured by *Magna Charta*, and interwoven by usage in the practice of the courts of common-law jurisdiction; and for that reason, although the fifth amendment provided that no person could be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, it was not included within the terms of "due process of law," as employed in the constitution, as due process of law is process according to the law of the land as it existed by immemorial usage in England, and was transplanted by the colonists on this continent as a part of our heritage of liberty. Then, *arguendo*, the justice says:

"The natural and obvious inference is that, in the sense of the constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the constitution and procedure of a grand jury in any case. The conclusion is equally irresistible that, when the same phrase was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense, and with no greater extent."

And then, as evincive of the fact that it was in the mind of the court to exclude the right to a presentment by indictment from the term "due process of law," because such right was not a part of the law of the land in England, the opinion proceeds:

"Due process of law in the latter [the fifth amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

The opinion then proceeds to show that, by the term "due process of law," it was the design of the amendments to irrevocably secure the citizen or community against "arbitrary power enforcing its edicts to the injury of the persons and property of its subjects," as "essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions." The opinion then quotes with approbation the language of the supreme court of Mississippi in *Brown v. Levee Commissioners*, 50 Miss. 468:

"The principle does not demand that the laws existing at any point of time shall be irrevocable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law.'"

The opinion then, in express recognition of the true import of due process of law, concludes by saying that that proceeding is due process of law "which regards and preserves those principles of liberty and justice" which have come to us from immemorial usage as safeguards of personal liberty. If the contention of the state here be correct, that Mr. Justice MATTHEWS intended to assert the proposition that a second prosecution for the same offense after acquittal, or that the right of presentment by grand jury, are not included within the term "due process of law," simply for the reason that in the fifth amendment these rights were expressly protected, and that nothing else named in said amendment, therefore, could be regarded as coming within the protecting arms of the guaranty of due process of law, it would have been sufficient to have merely so asserted, and that would have ended the case. On the contrary, the elaboration of the proposition that the presentment by indictment could not be regarded as the law of the land within the meaning of *Magna Charta*, and usage in the common-law courts, and for that reason did not come within the meaning of "due process of law," extending over 17 or 18 pages of the reported case, leaves no room for doubt that, in the mind of the supreme court, had the right in question been part of the law of the land as hereinbefore defined, the appeal of Hurtado would have been well taken under the fourteenth amendment. This conclusion is made irresistible by the dissenting opinion of Mr. Justice HARLAN, 4 Sup. Ct. Rep. 292, whose great effort was to demonstrate the proposition that the necessity of a presentment by grand jury in such an offense, before the accused could be put to trial, was a firmly rooted principle of the common law, and was the law of the land as understood and recognized by the colonists and the framers of the federal constitution. And, to reduce the principles maintained by the majority opinion to the *argumentum ad absurdum*, Mr. Justice HARLAN contends that the position taken by them ought to lead to the monstrous conclusion that the term "due process of law," as employed in the fourteenth amendment, would not cover the instance of putting a citizen twice in jeopardy for the same offense, which evidently the court would not desire to have imputed to it. It is furthermore quite apparent that, in the opinion of Mr. Justice MILLER in *Ex parte Lange*, *supra*, 172, such a violation of the rights of the citizen in question here would have been cognizable by the federal court. In alluding to the case of *Moore v. People*, 14 How. 13, he says:

"But it was also urged that the party might be subjected twice to punishment for the same offense, if liable to be prosecuted under statutes of both state and national legislatures. In regard to this, Judge MCLEAN said \* \* \* that 'the exercise of such a power by the states would, in effect, be a violation of the constitution of the United States, and of the respective

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states. They all provide against a second punishment for the same act.' 'It is contrary,' said he, 'to the nature and genius of our government, to permit an individual to be twice punished for the same act.'"

The case of the petitioner presents an instance of the most flagrant and reckless disregard of the rights of a citizen. He was arraigned, pleaded not guilty, and put himself upon a jury of the country. The state proceeded to lay before the jury much, if not the greater part, of its evidence. By the now well-recognized law of the land, the prisoner was then placed in jeopardy of his liberty, and was liable, without the power of retraction on his part, to conviction and infamous punishment. Cooley, Const. Lim. (5th Ed.) 399; *Ex parte Snyder*, 29 Mo. App. 256; *State v. Snyder*, 98 Mo. 556, 11 S. W. Rep. 1036; 1 Bish. Crim. Law, § 1045; *Pizano v. State*, 54 Amer. Rep. 511; *Roberts v. State*, 58 Amer. Dec. 536, and note; *State v. Redman*, 17 Iowa, 332; *State v. McKee*, 21 Amer. Dec. 499, and note. Instead of proceeding with the trial, the court, without disclosing the real purpose of the adjournment, adjourned the trial from noon until the following morning, and without the knowledge or consent of the prisoner, in his absence in jail, and in the absence of his counsel, the court permitted the trial of another cause to be taken up, which occupied four days of court, allowing the jury to separate at will, without any charge from the court; and the cause continued from day to day without the presence of the prisoner at any of these adjournments. Then, on the sixth day, the court, against the objection of the prisoner, discharged the jury which had partly heard the case, assigning as the reason therefor that he felt too unwell to proceed with the trial. He then ordered the case continued for a month, and again, against the plea of *autrefois acquit*, compelled the prisoner to submit to another trial before another jury, by which he was convicted. No authority of law can be shown for such a proceeding, and it is to be hoped it has no precedent under constitutional government. The discharge of the jury after trial begun, without legal necessity therefor, is in law tantamount to an acquittal. *Pizano v. State*, 54 Amer. Rep. 511; *Hilands v. Com.*, 56 Amer. Rep. 236; *State v. Calendine*, 8 Iowa, 292. In *Wright v. State*, 5 Ind. 292, the court say:

"Whenever a person shall have been given in charge on a legal indictment to a regular jury, and that jury unnecessarily discharged, he has been once put in jeopardy, and the discharge is equivalent to a verdict of acquittal. If a court has the right, during the trial, capriciously to discharge the jury, and continue the cause until the next term, \* \* \* he might at every term impanel, discharge, and continue, and thus rob the prisoner of his liberty by preventing a final investigation. \* \* \* We cannot regard the rule as wise or safe which places arbitrary or unguarded discretion in the hands of any one when it can be reasonably avoided."

In *Mitchell v. State*, 42 Ohio St. 383, the court say:

"If the jury be thereafter discharged without a verdict, where no legal ground of discharge is shown, the effect will be precisely the same as if a verdict of acquittal had been rendered."

In *Whitten v. State*, 61 Miss. 717, the court say:

"The power to dismiss a jury in prosecutions for a felony can never depend on pleasure. Such power is wholly dependent on necessity, either physical or legal. Where there is no necessity, there is no power."

Mr. Chief Justice GIBSON, in *Com. v. Chue*, 3 Rawle, 498, said:

"Why it should be thought that the citizen has no other assurance than the arbitrary discretion of the magistrate, \* \* \* I am at a loss to imagine. If discretion is to be called in, there can be no remedy for the most palpable abuse of it but an interposition of the power to pardon, which is obnoxious to the very same objection."

Likewise, Mr. Chief Justice BLACK, in *McFadden v. Com.*, 23 Pa. St. 12, said:

"A discharge of the jury in a capital case after the trial has begun is not a continuance of the cause. It is the end of it. And, for all purposes of future protection, it is the same to the prisoner as an acquittal, unless it was done with his own consent, or demanded by some overwhelming necessity."

The fact that another case had been set for hearing on a day which intervened during the trial of this petitioner created no legal necessity for an interruption of petitioner's trial, already begun. The case on trial had the right of way, and nothing short of some providential interference, like the continued sickness of the judge, the sickness of a juror, or some like legal impediment rendering it physically impossible or illegal to proceed, could have justified such an interruption of the trial, and discharge of the jury. The asserted indisposition of the judge after the termination of the *Wheeler Case* cannot be regarded as the legal necessity impelling the discharge of the jury. The evidence before me, as well as the history of the case itself when it was tried, leave no doubt but that the trial of the petitioner's case, had it proceeded, would have ended long prior to the intervening sickness of the judge, in addition to which the evidence shows that the court, when it did discharge the jury, adjourned court over to the 5th day of May, when it was again in session. So there was no necessity for the discharge of the jury even upon the score of the temporary indisposition of the judge, as all these adjournments were during the same term of court. If, merely for the accommodation and convenience of other persons and cases, the case on trial may be pretermitted at the will of the trial judge, any number of cases may be sandwiched between the commencement and conclusion of the trial, and thus the defendant be kept indefinitely on the rack, tortured with the natural anxiety and dread sense of uncertainty as to his fate. Such a course of procedure would be as violative of the genius of our institutions of government as of the better instincts of humanity. The provision of the bill of rights which guaranties to the accused a speedy trial is just as effectual after the trial begins as it is before; and this violation of the prisoner's rights was intensified after so long a delay, during which he was confined in prison, by the unnecessary discharge of the jury. The law will give him the benefit of the presumption that the first jury might have acquitted him, and it is responsive to this beneficent spirit that such first trial amounts to an acquittal.

It is contended, however, on this branch of the case, by the prosecut-

ing attorney, that, in the state constitution, (section 23 of the bill of rights,) nothing short of a verdict of acquittal by the first jury can prevent a second trial of the prisoner; and the case of *State v. Jeffers*, 64 Mo. 376, is cited in support. In that case the record showed simply the trial of the defendant, the final submission to the jury, and then the discharge of the jury by the court. The fact was that the jury disagreed, and the record failed to show this fact, which omission of the record was sought to be remedied at a subsequent term by an entry *nunc pro tunc*. The plea of the former acquittal was interposed in bar of the second trial. The supreme court held that the entry *nunc pro tunc* was inadmissible, for the reason that there was no minute or memorandum of record in the trial court by which such subsequent entry could be made; and it was further held that under the state constitution the facts of that case did not amount to acquittal. The said section of the bill of rights provides that—

"No person, \* \* \* after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty; but, if the jury to which the question of his guilt or innocence is submitted fail to render a verdict, the court before which the trial is had may, in its discretion, discharge the jury, and commit or bail the prisoner for trial at the next term of court, or, if the state of business will permit, at the same term."

It was in discussing this state of the record, and as applied to the facts of the case, that Judge NORTON observed that this provision of the constitution was intended in part to change the old common-law practice of confining the jury, to be fed on bread and water, until the end of the term, in order to compel a verdict, on pain of being transported in a cart around the circuit until a verdict was reached. "Strict as this rule was," says the opinion, "it was nevertheless within the power of the court to discharge a jury \* \* \* for causes which could not be foreseen, \* \* \* such as the sudden death of a juror during the progress of the trial. The provision above quoted declares in plain terms that nothing short of an acquittal by a jury shall prevent a second trial. This being its obvious meaning, we do not see how the trial court could have done otherwise than overrule the motion for the discharge of the defendant, as his right to a discharge \* \* \* depended upon his acquittal by a jury, which the record in the case does not show." This language, of course, must be understood in reference to the facts of that case, and the peculiar grounds of the motion, for the judge further observes:

"It cannot, certainly, amount to an acquittal by the jury; for an acquittal by them can only be evidenced by their verdict, and the record before us shows no such verdict, but only that they retired to consider of their verdict. After the jury retires for this purpose, there are three ways in which they might lawfully be discharged: *First*, by returning into court a verdict for conviction or acquittal; *second*, by being discharged, by an order of court, because of their inability to agree upon a verdict, or by consent of defendant, or some unavoidable cause, such as the sudden death of a juror; and, *third*, by the expiration of the term of the court in which the trial is pending."

The opinion then proceeds to show that there was no discharge of the jury either on the first or second counts, but the conclusion reached by



the court, from the facts in the case, and the statutory period of the terms of court, was that the term of court expired while the jury were out, and that authorized the court to make the discharge. The opinion then concludes with this significant observation:

"We express no opinion as to the effect of an arbitrary, unwarranted discharge of a jury in a case of felony. The power to discharge for certain causes undoubtedly exists; but it should be exercised with great caution, as the citizen whose life or liberty is given to the hands of a jury is entitled to fair consideration by them, of which he should not be deprived by the arbitrary action of the court."

Still more conclusive of the fact that the supreme court of the state does not place the construction upon the provision of the bill of rights that the person is not in jeopardy until once acquitted by a jury, in the sense contended for by the state's attorney, the later case of *State v. Snyder*, 98 Mo. 556, 11 S. W. Rep. 1036, need only be cited. There the rule of having been once in jeopardy was applied to the instance of a second trial after one conviction. In that case the court say:

"It was a maxim and practice of the common law that no man was to be brought into jeopardy more than once for the same offense. \* \* \* Where the jury was charged with the deliverance of the defendant,—that is, when they are impaneled and sworn,—the indictment being sufficient, and the court being possessed of jurisdiction, his jeopardy began."

But for the suggestion made by the state's attorney in the argument of this petition, it would scarcely be deemed necessary to say that the prohibition in the fourteenth amendment restricting the power of the state in the matter under consideration applies equally to the act of a state judge. It has "reference to the actions of the political body denominated a 'state,' by whatever instruments, or in whatever modes, that action may be taken. The state acts by its legislature, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exercised, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning when the state has clothed one of its agents with power to annul or evade it." *In re Ah Lee*, 5 Fed. Rep. 902.

I recognize, in all its compass, the wisdom and policy of observing with scrupulous regard the proper line of demarkation between federal and state authorities. It is safest and best that each should move within the orbit of its own rightful and limited jurisdiction. This is essential to avoid needless friction and conflict. By observing the spirit of comity between the respective courts, harmony of action is promoted, and the essential autonomy of each is conserved. So, when this petition

was first presented on the discharge of the first jury, I deferred action, suggesting to petitioner's counsel that nothing short of a sense of the supreme necessities of the prisoner's condition could induce my interference. I preferred that the petitioner should wait and see whether or not the state court would again attempt to put him to trial before another jury. When the court did so, I again postponed the writ until after the hearing of the motion for new trial, which is recognized by the supreme court of the state as the due and golden opportunity of the trial court, on calmer deliberation, to rectify its errors committed in the progress of the trial. True it is the remedy yet remains to the prisoner to prosecute an appeal or writ of error to the state supreme court. The supreme court would not, however, grant the prisoner the speedier relief by writ of *habeas corpus*, as in such cases it only takes cognizance by writ of error or appeal. At this juncture of the case, I recall the utterance of Homer, that "on the first day of his servitude the captive is deprived of one-half of his manly virtue." Each hour of the petitioner's illegal restraint is not only a degradation in its tendency, but it is a crime against liberty. The supreme court will in a few days adjourn until October next. Under the most favorable conditions, no relief in that direction can possibly come to the petitioner for four months. He may be unable to obtain bail. Must he lie in jail, and go to the penitentiary, in violation of his constitutional right to be set free? Being invested with plenary jurisdiction for his protection, to fail to exert the power from an overscrupulous regard of the course of procedure in the state courts would be as timorous as it would be indefensible. Under a solemn sense of official duty, I must, therefore, order the prisoner's discharge from further custody. If, in this action, I err to the injury of the state, it has its redress by appeal to the higher federal courts.

UNITED STATES v. MEANS *et al.*

(Circuit Court, S. D. Ohio, W. D. December 24, 1889.)

1. **NATIONAL BANKS—FALSE ENTRIES TO DECEIVE OFFICERS—DIRECTORS.**  
Directors of a national bank are "officers," within the meaning of Rev. St. U. S. § 5209, which makes it a misdemeanor for bank officers to make false entries in any book, report, or statement of the bank, with intent to deceive any of its officers.
2. **SAME—INTENT.**  
Under said statute, intention to deceive any one director or officer is as criminal as the intention to deceive all of them.
3. **SAME—OFFICERS AS ACCOMPLICES.**  
A conviction cannot be had under said statute where it appears that the officers alleged to have been deceived were accomplices in the speculation, to hide which the false entries were made.
4. **SAME—PRESUMPTION OF INTENT—REBUTTAL.**  
If such false entries had a natural tendency to deceive the bank officers, the fact that defendants deny having had any such actual intent cannot rebut the presumption of intent arising from the nature of the entries themselves.
5. **SAME.**  
In such case the fact that the officers in question were not actually deceived is not conclusive proof of the absence of intent to deceive.
6. **CRIMINAL LAW—EVIDENCE OF GOOD CHARACTER.**  
Proof of good character is no defense against crime actually committed, but is a circumstance in favor of the defendant, in cases where there is doubt as to commission of the crime.
7. **SAME—REASONABLE DOUBT.**  
Reasonable doubt is an honest misgiving, generated by the insufficiency of the proof.

At Law. Charge to the jury.

Indictment of William Means and John R. De Camp for a violation of Rev. St. U. S. § 5209, which provides that "every president, director, cashier, teller, clerk, or agent of any association \* \* \* who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association, \* \* \* or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, \* \* \* shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years, nor more than ten."

*John W. Herron and Henry Hooper, for plaintiff.*

*Charles W. Baker and Samuel F. Hunt, for defendant Means.*

*Jackson A. Jordan and Isaac M. Jordan, for defendant De Camp.*

HAMMOND, J., (*charging jury.*) Obviously, this trial has been one of grave concern to the people of Cincinnati. The defendants have each established, by the best proof, a reputation for honesty and integrity at the time of the transactions involved which is beyond all question. Naturally, this would be so; for, without such a reputation, one would not be allowed to occupy the place of president or vice-president of a national bank. Whether honest or dishonest in fact, one admitted to such places must have at least an assured reputation for integrity; and hence it is that the class of offenses denounced by the banking act of congress always

concerns men of the highest standing, for none others can become bankers, and employes of banks. This accounts, also, for the very severe penalties attached by congress to a violation of those laws, rules, and regulations made to protect the people of the United States in their use of that national banking system which they have established by law, and which is so useful to them. Congress departs from its usual custom in criminal legislation, and does not permit the court to determine the minimum punishment, but for itself declares that, if men of the high character employed in the national banks shall violate the laws made to protect the system from wrong-doing by those engaged in the trust imposed by it, they deserve, and shall receive, not less than five years' imprisonment. Congress feared that courts might yield to such influences as were improper, and lightly punish reputable men for doing the forbidden acts by which they would desert the important trusts which congress was determined to protect by these penalties. Therefore, to neither court nor jury has been left the power to condone these offenses by imposing nominal or slight punishment, as in other classes of our criminal laws. The act itself is a protest against allowing our sympathy for fallen pride to control our judgment in such cases. Wherefore, the court must caution you that, while we do not come "with the war-whoop and scalping-knife of savages," to use the language of counsel, nor without all charity for the misfortunes and mistakes of men, nor, indeed, without a participation in that profound sympathy which we observe pervades this city and shelters the defendants,—one of them, at least, to an extraordinary degree, because of his eminence in all the relations of life, and his connection with the good people of this city in high places of public and private confidence,—we do come to do our duty, and, in obedience to the oaths we have taken, "to administer justice without respect to persons, and do equal right to the poor and to the rich," and "a true verdict render, and a true deliverance make, according to the law and the testimony." This is the measure of our duty, and this alone. If these defendants are guilty, you must "a true verdict render," and say so; if not guilty, likewise "a true verdict render, and a true deliverance make," by saying so. That you will do this bravely and honestly, and with impartiality, this court does not in the least doubt. After all that has been said in the argument, and so well said on both sides, it is not necessary to go over this whole case, in its multitude of details, and to comment upon the testimony in all its bearings; and I shall not attempt that treatment.

The object of the statute, so often read in your hearing, about making false entries, or causing them to be made, is to secure at all times a truthful exhibit of the condition of the bank. The requirement of a report to the comptroller of the currency is intended to secure that supervision of the bank which the government assumes in the interest of the system, and of the people who resort to it on the invitation of the government, when it establishes the system, and promises to protect it by wise legislation. The object of making publication in the newspapers is to inform

the public of the exact and true condition of the bank. To falsely represent the facts, and to make a false publication of them, is, undoubtedly, a crime, under this act, no matter if it be done to save the bank. It is the very thing the banker is forbidden to do. That the public shall be truly informed, no matter how disastrous the truth may be to the bank itself, is the command of congress, made in the interest of the public. It is this publicity more than anything else which shall secure fidelity in the administration of the bank. It is the ruin that will come to the bank if mismanagement be published which is relied upon to secure the public, and those interested in the bank, against mismanagement; and therefore the fear of ruin to the bank is no excuse for falsely publishing its condition to the public, and cannot shield the banker from the crime of a false publication.

We are inclined to think also, that it is a crime, under this act, to make a false report to the comptroller, with whatever motive, because there inheres in that act, necessarily, an intent to deceive the agents appointed by him to inspect the bank, if he be not himself such agent, as it may be he is; just as there inheres in the very act of publishing a false statement to the public the statutory intent to injure "any other company, body politic or corporate, or any individual person," which phrase is used to mean the public itself; and no given company, body politic or corporate, or individual person need be named or proved as the victim of the injury, as no given "agent appointed to examine the affairs of the association" need be named as the victim of that particular deceit.

Referring, also, to a former clause of this act, we are inclined to think that, if anything is established by this proof, it is that the directors who entered into the syndicate to purchase the stock of the bank by stripping the bank itself of the money necessary to pay for it, under the circumstances shown here of taking the money under the guise of loans to themselves without any security, or upon inadequate security, were guilty of abstraction or willful misapplication of the funds of the bank. It was this desertion of their trust that brought upon them the dire necessity of making false reports and entries, no doubt; but it furnishes, certainly, no excuse for doing that thing, and makes the doing of it none the less a violation of this law. But, strange to say, neither these defendants, nor those who were jointly concerned in these violations of the statute along with them, have been charged by this indictment with any of the offenses which we have just named, but only with another offense, which, in relation to the facts of this case, is more difficult of proof, and will give you the most trouble. The guilty intention as to those other offenses grows out of the very facts themselves, beyond all question; but, as to that selected for this indictment, the guilty intention is fairly a matter of dispute, and that dispute you must settle here and now. It is about the only dispute in the case. All others are important only by relation to this, and the bearing they will have upon its solution by you. We must therefore caution you that you are not trying these defendants, upon the facts in proof before you, for any wrong-doing as to the funds

of the bank, nor any as to the public, by deceiving it by the publication in the newspapers, nor any as to the comptroller or his agents, however clearly, to your minds, the facts may establish those offenses. But you are to try only the question whether the false report or the false entries in the books which have been named in the indictment, and so often repeated to you in the argument, were made with intent to deceive any officer of the bank. The line of demarkation here must be clearly drawn by you; and you must not allow your verdict to convict the defendants of any other offense than that charged, however clearly you may see those other offenses in the facts of this case. With this necessary caution, we will now consider the case in its relation to the disputed intent as to the officers of the bank.

In the orderly consideration of the subject, your first inquiry would be, who are the officers of the bank referred to by this act of congress? By the rule of association of words in the statute, first clearly pointed out by Mr. Hooper, there cannot be much doubt that congress conceived that a teller is one of the officers of the bank; and this is, undoubtedly, the general understanding outside of banks, as shown by the definition of the word by lexicographers, laymen, and lawyers, and by the books on banking found in our law libraries. We think that the decisions of the supreme court of the United States also indicates that the word has been so understood by that tribunal. Yet congress was not organizing a bank by this statute, nor was it declaring who should or should not be the officers of the bank authorized by this banking act. On the contrary, by another section, the power is given to the board of directors to appoint "other officers," after having named the president, vice-president, and cashier as three of them that are fixed in the organization, and also power to define their duties, etc. We think, therefore, that it depends on the circumstances connected with the bank itself whether the teller is an officer, or only an employe or clerk. We find in the action of the board of directors and the by-laws of the Metropolitan National Bank no evidence that the teller was appointed or treated as an officer in that bank, but, on the contrary, that he was regarded as a clerk, and that the custom of banks is that way in Cincinnati. We wish to reserve any opinion whether or not this would be, if at all, a controlling consideration in construing this act, if some false entry were made with especial reference to the duties of the teller, under circumstances showing a well-defined purpose to deceive him to the injury of the bank. This question of being an officer or not—being an officer under this act, and under all similar acts—may depend on the very especial circumstances of each case. But, on the circumstances here, it is plain that Roth, the paying teller, had no duties or business relations connected with these false entries that would make a deception as to him either desirable or necessary; and this circumstance, taken in connection with all else that is in the case, negatives the idea that there could have been an intention specifically to deceive him, or generally to deceive a paying teller. And, since we would not support a verdict based on the facts in this case in

their relation to the paying teller, we may at once advise you to discard him from your consideration as one of the officers.

The facts might be submitted to you, so far as they concern the receiving teller, Reigel. He did have a necessary connection, in his capacity as receiving teller, with these transactions. Indeed, he made some of the very false entries under consideration, and it was through him, in that relation, that the falsity must get upon the books. Any deceit of his to accomplish that purpose might be criminal; for this relation of officer to the bank, under this statute, depends on the exigencies of the situation, and the functionary's particular duty in that business which is in hand. It is an elastic word; and, in aid of the general purpose of congress in the public interest, as involved in this legislation, the word may be made to include functionaries not generally considered officers in rank, but having duties to perform which in fact belong to the category of official acts, as indicated by the statute. *U. S. v. Trice*, 30 Fed. Rep. 490. And this is not a violation of the rule of strict construction for penal acts, of which we are not unmindful. *Id.*; *U. S. v. Huggett*, 40 Fed. Rep. 636. But the government does not claim that in this case there was any purpose to deceive Reigel, either generally or specifically; and, if it did, there is no proof of such general or special intent, as to him. He was a cheerful and ready accomplice in the nefarious business of promulgating a false report to deceive the comptroller and the public. It was only a question of method, not morals, with him. And we imagine that this proof raises a strong presumption that the same may be said of others involved in that business, of higher rank than Reigel, though it is not confessed upon the witness stand. But of this you are to be the judges, and not the court; though we are in duty bound to submit that question, with the rest, to you. There is not the least doubt, as to Reigel, that he had full knowledge, was not deceived in fact, and that there was not the least occasion or necessity for deceiving him with false entries in order to deceive the comptroller and the public. And so we may advise you to discard him also, in your consideration as to the officers of the bank; and this, whatever view you may take of the word "officer" in the statute.

As to the directors there is not the shade of doubtful construction of this act. They are not only officers, but managers, of our national banks. They come within every sense and meaning of the word "officer," and are within the rule of the association of words in the act already referred to, and of the decisions cited. This act is not like those construed in *Association v. Hayes*, 4 Abb. Dec. 183, and *Com. v. Christian*, 9 Phila. 556. The president and vice-president are only directors with official titles, and charged with doing in detail what the directors are charged with doing generally. They are only agents of the directory; and it is well enough that these cases should teach the directors of national banks that they cannot, by inactivity, neglect of duty, and inattention, shirk their responsibility or escape their share of blame for such wrong-doing as is displayed in this proof, in plain violation of this act of congress. They are

the managing officers of the bank; and this statute against false entries protects them against deceit, and was intended to do so. Hence, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendants, in the execution of their confessed purpose to deceive the comptroller and the public, found it necessary to deceive Roth, Duckworth, Gerke, Bonte, and Ryan, or any of them, and made the false entries with that intent, these defendants are guilty, and you should say so. Or, if you believe from the evidence, likewise beyond a reasonable doubt, that, in the execution of their confessed purpose, they found it necessary to deceive the cashier, Edwards, and made the false entries with that intent, then, also, are they guilty, and you should say so. Intention to deceive any one director or officer is as criminal, under the act, as the intention to deceive any number or all of them.

But if you believe from the evidence that these men were engaged in a common cause, were embarked in a more or less common enterprise of speculation, were involved in a more or less common peril, were impelled by a more or less common necessity to put forth a false report about the condition of the bank, of which they had full knowledge, and to make false entries of conformity upon the books,—we say, if you believe all this, you should not convict these defendants. Even common criminals, engaged in common enterprises, do not find it essential to deceive each other, except when they come to divide the fruits of crime; and we are of the opinion that offenders under the particular clause under which this indictment is drawn may so include all the officers of a bank, by combination among them, that all intent to deceive any officer by any one of the offenders would be quite impossible. It is for you to say whether that is the condition, as shown by this proof, or whether the facts are as the government insists they are: that these defendants had to deceive Edwards, Roth, and Duckworth, and the rest, in order to deceive the comptroller and the public. The district attorney does not claim, nor is there any proof, that Directors Ryan and Bonte were involved in the confessed wrong-doing, either as to the syndicate operations or as to the false entries; nor did the defendants rely upon any participation by them in the "enterprise," as they call it. The district attorney claims that they were deceived, necessarily, by the false report and the false entries in the books. It is for you to say if this be so beyond a reasonable doubt. Their duty of supervision was plain. Their power to check the wrong-doing, when coming to their knowledge, was undoubted. Now, did the defendants intend to deceive them in order to prevent the exercise of that power, or to procure their quiescence?

Too much stress on both sides of the argument has been put upon a bare, naked intent to deceive some person for the mere purpose of deceit. That is not what the statute means. It means a deception which has a purpose behind it to accomplish, an end to gain, a design to carry out, or an aim to be attained. That is the legal definition of "intent," as applied to an intention to deceive, as well as any other. Hence, when you consider this subject, as to Ryan and Bonte, for example, you may



determine whether the proof shows beyond a reasonable doubt that deceiving them was desirable, and an object to be attained, or whether it shows that they were inert, inattentive, and not actively watching affairs, because of illness, or for other cause, and, therefore, the defendants could not have intended to deceive them. Gerke was absent; and you may say how far that fact has any influence on the question of an intention to deceive him; and, as to all three, whether the conduct of the defendants in relation to them was of a kind to show an intention to deceive them by the false entries or not, and this beyond a reasonable doubt. It is to be determined by all the proof. Now, reasonable men are held to intend that which is the result of their conduct in the premises; and, if the false entry is calculated, under the circumstances of the case, to deceive, the defendants cannot say they had no such intention. They may even swear to its absence; but, if the circumstances show that the natural and probable consequences were the deceit which has been described to you, their assertion cannot prevail over this fact, in making up your verdict. It depends wholly on the peculiarities of the case, the character of the transaction, and the nature of the intent described by the statute, as to how you shall apply this rule. If congress had said that all false entries, willfully made, should be punished by imprisonment, as it might have said, and probably ought to have said, then the doing of the act or false entry would be in itself a crime; and the wrongful intent to violate the statute, to disobey the law, and bring about any natural and probable consequences, would be conclusively inferred by you as a fact, and no meritorious purpose could prevail against that inference. But congress has not said that all false entries shall be forbidden, but only, as applicable here, that these made with intent to deceive the officers shall be forbidden; such deceit as we have described, with a purpose and design behind it of accomplishing that deceit, possibly for some other purpose or design ulterior to the other, which is immaterial, except as a circumstance of evidence in showing whether the forbidden and criminal intent existed or not. There may be more than one intent in an act, and they may co-exist reasonably and fairly in the peculiar facts of the given case. On the other hand, on the given facts, the confessed intent may be of a kind to wholly exclude the forbidden intent.

It is not necessary to enter upon, or be confused, by the metaphysics of the subject. Practically, you are to judge, on the proof, whether the forbidden intent is an inexorable inference from the proven facts, or is excluded by them, or is a matter of reasonable doubt. *U. S. v. Jackson*, 25 Fed. Rep. 548. Let us illustrate this process of judgment, for your guidance. If Edwards, Roth, and Duckworth are found by you to have been men of that stern quality that under no circumstances would the one swear to a false statement known by him to be false, nor the others to attest that falsehood officially, when known by them to be a falsehood, does not the necessity of deceiving them into making the oath and attestation at once appear? Does the proof show this? It is for you to say. If this be true, as you find, would it not be a potential circumstance to

show that the defendants intended, and must have intended, to deceive them, and accomplished that intention? But if, on the other hand, the proof shows that they were willing and anxious, and under the same stress as the others, to deceive the public, for any purpose, is it not equally as plain that the fact of their willingness and stress of necessity excludes any intention to deceive them, at least? De Camp was a director; and he, too, attested the falsehood. Does the government claim, or can it claim, that the defendant Means had a design to deceive him? If not, why not? Was there any more occasion to deceive Roth or Duckworth than De Camp? It is for you to say, on the facts, how this may be. The defendants say these two and Edwards were as deep in the mire, in this transaction, as they, which inculcation these witnesses deny; and the proof is before you, not to convict them, for they are not indicted, but to determine whether the defendants are reasonably and fairly to be held to have intended to have deceived them by the false entries.

As to all these officers, the fact of deceit, in fact, is a circumstance of proof to aid you in determining the intention to deceive them, but not a conclusive circumstance; for one may be deceived when there was in fact no intention to deceive him. On the other hand, again, as to all these officers, the circumstance, if you find it so, that one as to whom the defendants intended deceit was not in truth deceived, is not conclusive against the intention to deceive; for one shall not escape because the design to be accomplished by an intended deceit failed of its purpose.

Thus it is, gentlemen of the jury. You go over the proof, in all its details,—all the proof,—and weigh it well, and determine this fact: Did these defendants intend to deceive the officers of the bank by these false entries, and are you satisfied of this, beyond a reasonable doubt.

Before we come to the law of reasonable doubt, let us say something as to the effect of proof of character, in your process of weighing the evidence and applying it to this issue. Character of the highest kind is no defense against crime actually committed. But where it is a matter of doubt, on the facts, whether any crime has been committed, character is a circumstance to turn the mind in favor of the defendant. If one occupying a room with you in the public inn leaves, in the night, with your money, and, with hue and cry, you follow, to find that he has appropriated it to his own use, no amount of good character, or number of witnesses to it, would save the culprit. But if you found the man with the money intact, and no incriminating circumstances, except its possession, and his having left you with it stealthily, his good character would naturally turn your judgment in his favor, and you would accept his explanation of somnambulism, or of practical jesting, or what not, as true, if not satisfactory. In other words, character will explain equivocal conduct in favor of innocence, but will not outweigh satisfactory proof of guilt.

But we have constantly said that you cannot convict unless you are satisfied of guilt beyond a reasonable doubt. What does this mean,—“reasonable doubt?” A reasonable doubt is an honest misgiving, gen-

erated by the insufficiency of the proof, which your reason sanctions as a substantial doubt. If, after you have weighed all the evidence, on your oaths to try the question of guilt according to the law and the testimony, and looking to all the proof, and only to the proof, you impartially and honestly entertain the belief that these defendants may be innocent of the offense charged against them, they are entitled to the benefit of that doubt, and should be acquitted. A doubt suggested merely by the ingenuity of counsel, or of your own, or one born only of a merciful desire to permit the defendants to escape the penalty of the law, or one not connected with the testimony, is not a reasonable doubt. It must be created by an inadequacy of proof, so great that you are not reasonably satisfied of the guilt of the defendants. It must grow out of the proof as being insufficient to convince you, or as being of doubtful quality, or both; and it may arise out of a total or partial want of proof, out of the bad character of witnesses, whose credibility you reasonably doubt, or out of any other infirmity in regard to it, whether the witnesses, or any of them, be of doubtful character or not. Cross-examination and adverse testimony is intended to develop any such infirmity; and you look to all the proof on both sides to determine the question of guilt or innocence, and must, upon the whole, have no-such doubt as has been described, or you cannot convict.

On request as to "jurors unknown," I say that this averment in the indictment does not mean that the officers of the bank were not known to the grand jury, but that which of them was deceived was not known so as to be specified.

THE BURCHARD.<sup>1</sup>DAVIS *et al.* v. THE BURCHARD.

(District Court, S. D. Alabama. June 18, 1890.)

## SEAMEN—WAGES—JURISDICTION—TREATY WITH GERMANY.

So long as the relation of seaman to a German vessel is not terminated, the courts of the United States cannot entertain a libel for wages, and construe the contract of shipment, but under the treaty of December 11, 1871, with the German Empire, must remit the whole matter to the German consul for adjudication.

In Admiralty. On libel for seamen's wages.

The Burchard is a German vessel, and the crew were shipped at Buenos Ayres before the German consul. Upon the filing of the libel at Mobile, the German consul entered a protest, claiming jurisdiction of the matter under the treaty of December 11, 1871, now in force between the United States and Germany. Public Treaties, etc., 258.

*W. D. McKinstry*, for libelants.

*Thos. H. Smith*, for claimant.

TOULMIN, J. Under the allegations of the libel in this case, it appeared that libelants were American seamen, and had been discharged by the master at this port; and that, therefore, their relations to the vessel as a part of its crew had been severed. If this was true, I was inclined to the opinion that the court had jurisdiction to hear and adjudicate the question of wages. The testimony, however, fails to show that they were discharged by the master. On the contrary, it shows that libelants claimed their discharge at this port on the ground that, by the terms of their contract, they were entitled to their discharge. The master denied their claim, whereupon a dispute arose between them as to what was the contract. The master told them to go ashore if they wished, and go to see the consul. For this court to undertake to settle the dispute between the parties, and to determine the question of libelants' right to their discharge under the contract, and hence of their right to wages, would require a consideration and construction of the contract by the court, which, under the treaty, the court has not the jurisdiction to do. And while I may be of opinion, as I construe the shipping articles produced, that under them libelants are entitled to be discharged at this port, still the court has, as I have said, no jurisdiction so to adjudicate, but must remit the matter to the consul. *The Elwine Kreplin*, 9 Blatchf. 439. It is therefore ordered that the libel be dismissed.

<sup>1</sup>Reported by Peter J. Hamilton, Esq., of the Mobile bar.

McCLASKEY *et al.* v. BARR *et al.*

(Circuit Court, S. D. Ohio, W. D. April 26, 1890.)

## 1. ADVERSE POSSESSION—LIFE ESTATE—PARTITION.

A tenant for life under a will made a deed purporting to convey the fee to the defendants' grantors, who during her life bought some of the interests in the remainder. At her death, in 1860, this had vested in the testator's brothers and sisters and their heirs, and since then the defendants and their grantors have been in exclusive possession, and made permanent and costly improvements, which the answer alleges to have been "in good faith, and without notice of the claims of the complainants or their ancestors." In 1858 the grantors of the defendants filed a petition stating that the tenant for life had conveyed to them all her interest, "being a life estate," and that it was necessary to perpetuate testimony to prove the names of the brothers and sisters and their heirs. In an ejectment by one of these, soon after the death of the life-tenant, the defendants' grantors joined in an agreed statement of facts, setting out that proceeding, and the names of the brothers and sisters and some of the children. After final judgment for the plaintiff in that action, they authorized trustees to buy in for them the outstanding title of three children of one of the brothers, which was done, and afterwards the interests of other heirs were also bought in. This is stated by the defendants to have been by way of compromise and buying the peace. In one of the deeds taken by the trustees, the number of the brothers and sisters, and their having the estate in remainder at the death of the life-tenant, are recited. *Held*, on a bill for partition by the complainants as heirs of one of the sisters, that it does not follow, as a matter of law from these facts, that the defendants have title by adverse possession, and a motion to stay proceedings until the complainants establish their right of possession at law is overruled.

## 2. SAME—LACHES.

While, in such case, it may be that a jury would be authorized to infer an actual ouster, this is cognizable in equity also, under the head of laches, and there is no reason why on that issue the case should be sent to a jury.

## 3. SAME—PLEADING.

An answer to a bill for partition, admitting the interest of one under whom the complainants claim by descent, but denying that they are the heirs, raises an issue of identity, rather than of title; and a suspension of proceedings until their right to possession is established at law is neither necessary nor proper.

## 4. SAME—REMOVAL OF CAUSES.

In a suit for partition, removed to a federal court, it will follow the state decisions holding that a right of entry in the plaintiff, without actual seisin, is sufficient.

**In Equity.** Bill for partition. On motion to stay proceedings until complainants establish their title at law.

This is a bill for the partition of 161.4 acres of land situate on Price hill, within the corporate limits of the city of Cincinnati. There are between two and three hundred defendants, but, the contested questions being common to all, they are to be heard upon the answers of William Henry Elder, archbishop of Cincinnati and trustee of Mt. St. Marys' Seminary, and of John Keeshan. The cause is now before the court upon the defendants' motion to suspend further proceedings until the complainants shall establish their title at law. The bill and its amendments contain the following averments of fact:

On the ——— day of May, 1816, William Barr, Sr., died, testate, and seised of the real estate above referred to, which he devised to his executors for the use of his son John M. Barr during his natural life, and after his death for the use of his wife, Maria Barr, (in the event of her survival,) during her natural life, with remainder in fee to his child or children and their heirs forever. John M. Barr died in August, 1820, leaving his wife, Maria, and one child, Mary Jane Barr, surviving him. In November, 1821, the daughter, Mary Jane Barr, died, leaving her mother, Maria Barr, (who afterwards intermarried with

John Bigelow,) surviving her. Subject to the life-estate of Maria Bigelow, said real estate descended, upon the death of Mary Jane Barr, by virtue of the laws of descent then in force in the state of Ohio, to the brothers and sisters of William Barr, Sr., then living, or the lineal descendants of those then deceased, and their descendants and heirs. The complainants are the descendants and heirs at law of Mary Grafton, deceased, who was a sister of William Barr, Sr. On the 26th day of July, 1838, Maria Bigelow conveyed by quitclaim deed the entire tract of land described in the bill, and all her right, title, and interest therein, in law and in equity, to Ephriam Morgan and Lot Pugh, their heirs and assigns, forever, with full covenants of seisin against incumbrances, and of special warranty. On the 13th of September, 1839, Lot Pugh quitclaimed his interest in said tract to his co-tenant, Ephriam Morgan, who on or about the 20th of September, 1839, entered into possession by virtue of said deeds, holding no other title whatever to said premises. Between the 1st of October, 1838, and the 16th of December, 1839, through the agency of his son-in-law Woods, Morgan procured from children of John Barr, one of the brothers of William Barr, deceased, to whom a portion of said tract descended, deeds for their interest therein, without specifying what that interest was. The bill sets out the different deeds, some 19 in number, all made to Woods, Morgan's agent, and his deed of the same on the 16th of December, 1839, to Morgan.

On the 10th of December, 1839, Morgan conveyed 74 acres of said tract to one Patrick Considine. This was six days before he acquired title from the children of John Barr. By sundry deeds, between the 18th of May, 1843, and the 5th of May, 1858, he conveyed to Adam Moore and others about 69 acres of said tract. The residue, being about 21 acres, Morgan held until his death, which occurred some time in 1873. On the 29th day of June, 1858, before the death of the life-tenant, Maria Bigelow, the said Morgan and Woods, and Morgan's grantees, who were at that time the tenants in possession of all of said tract of land, filed their petition in the court of common pleas of Hamilton county, being the county in which said land is situate, against John B. Ennis and others, setting forth, among other things, that on the 26th day of July, 1838, Maria Bigelow conveyed to Ephriam Morgan and Lot Pugh all her right, title, and interest, being a life-estate, in said 161.4 acres; and that it was necessary to take her deposition to establish and prove the names of the brothers and sisters of William Barr, deceased, and their heirs and legal representatives. A copy of the proceedings in said cause, together with the deposition of Maria Bigelow, which was taken therein, and filed with the papers in said proceedings, is attached to an amendment to the bill, and made part thereof. The bill further charges that, after said Woods had conveyed to said Morgan the titles so acquired by him, he purchased the interests of sundry other heirs of said brothers and sisters of William Barr, deceased, whose names are fully set forth in said bill. It is further averred that Woods died testate, seised of the interest so acquired, and that on the 15th day of September, 1857, his widow conveyed the same by special warranty deed to said Morgan.

The bill further alleges that said Morgan, and those claiming under him, continued in possession of said tract of land after the death of the life-tenant, as tenants in common with the complainants, and with the heirs of the brothers and sisters of William Barr, Sr. The bill further alleges that, shortly after the death of Maria Bigelow, life-tenant, Margaret R. Poor, claiming as heir of Mary Jane Barr, the tract of land aforesaid, filed in the circuit court of the United States for the southern district of Ohio her declaration in ejectment against Patrick Considine, Ephriam Morgan, and others in possession, including Archbishop John B. Purcell, (who was made a party subsequent to the filing of the declaration, and to whose office and title the defendant Arch-

bishop Elder succeeded,) seeking to recover possession of the whole of said tract of land. Judgment was rendered in favor of the defendants in said case by the circuit court, and affirmed by the supreme court, of the United States. The complainants further allege that, when said case was taken on error to the supreme court, a bill of exceptions was filed, embodying an agreed statement of facts wherein appears, among other things, a full statement of the facts relative to the filing of the petition aforesaid, on the 29th of June, 1858, in the court of common pleas of Hamilton county, by said Morgan and others, and a copy of the proceedings and order of the court therein; also the names of the brothers and sisters and some of their children, the heirs of said William Barr, Sr. The bill sets forth other particulars relating to said bill of exceptions, but it is not necessary to refer to them more particularly. On the 4th day of December, 1868, (which was after the decision by the supreme court of the United States of the case of *Poor v. Considine*, 6 Wall. 458,) Morgan, Considine, Archbishop Purcell, and others, being all the parties in possession, entered into a written agreement, authorizing and empowering T. D. Lincoln and Fayette Smith, as trustees, to buy in for their use the outstanding title of the several heirs of William Barr, John T. Barr, Margaret Barr Keys, who the complainants allege were children of Samuel Barr, who was a brother of William Barr, Sr. Complainants further allege that said trustees purchased and received deeds for titles of said parties in December, 1868, January and February, 1869, and also from sundry other persons, and afterwards conveyed the interests so acquired to the several parties to the said written agreement. The complainants further say that on the 1st of April, 1871, Samuel Barr and wife conveyed by deed to said Lincoln in trust, for the benefit of sundry parties, all their interest in said lands, in which deed it was recited, among other things, that Mary Jane Barr, the daughter of John M. Barr, was the owner in fee of said lands, subject to the life-estate of her mother, the said Maria Bigelow, and that on the death of said Mary Jane Barr an undivided fifth part of said property passed by descent to Andrew Barr, and upon his death to his children; and it was further recited in said deed that the interest so conveyed was the interest of said parties in said tract of land. The bill further avers that said Lincoln afterwards purchased the interests of several other parties, heirs in said lands, for the benefit of the parties to said written agreement, and conveyed to them all of the interests so acquired.

The separate answers of Archbishop Elder and of John Keshan deny the heirship of the complainants, and set up, among other things, that Ephriam Morgan entered upon the sole, open, notorious, and exclusive possession of said premises on the 13th day of September, 1839, claiming the sole title and ownership thereof in fee-simple, adversely to the complainants and each of them, and all the world. The answer of Archbishop Elder then sets up the conveyance aforesaid, in fee, by said Morgan to Patrick Considine, of 71 acres of said tract, and that Considine made sundry improvements of a permanent character upon the same, and collected and received all the issues, rents, and profits thereof, and appropriated them to his own exclusive use; that in May, 1847, by deed in fee-simple, he conveyed five acres of said tract to Archbishop Purcell, and said deed was on the 5th day of April, 1848, recorded in the public records of Hamilton county. It further avers that said Purcell immediately entered into the open, notorious, and exclusive possession of said premises, claiming the entire title thereto, adversely to the complainants and all the world, and shortly thereafter commenced the erection

thereon of a stone seminary and theological college building, which was completed at a cost of about \$30,000; that he proceeded to make other improvements for the purposes of said seminary, the cost thereof, up to 1871, being about \$50,000; that in May, 1858, said Morgan conveyed, by deed in fee-simple, to said Purcell, about 10 acres more of said tract; that subsequently said Purcell became the grantee, in fee-simple, of all the residue of said 71 acres, to-wit, 56 acres, of which Patrick Considine died seised, having devised the same to his brothers and sisters for life, with remainder in fee to said Purcell. The answer further sets forth an open, notorious, and adverse possession of this tract, and the making of costly and permanent improvements thereon.

Exceptions having been sustained to this answer, the defendant filed a further answer, in which he admits that William Barr, Sr., died seised of the real estate described in the bill. He admits the admission of his will to probate, and that the supreme court of the United States in the case of *Poor v. Considine*, 6 Wall. 458, decided that, upon the death of Mary Jane Barr, said real estate descended to the brothers and sisters of William Barr, Sr., or their heirs, as heirs at law of the said Mary Jane Barr; averring that he has no personal knowledge who the brothers and sisters were, and is therefore unable to answer whether they were the persons named in the second amendment. He denies, upon information and belief, that Mary Jane Grafton, under whom the complainants claim to derive title, was one of the sisters. He admits the conveyances from Maria Bigelow, from Ephriam Morgan, and Lot Pugh, as set forth in the amended bill, and the conveyances from Lot Pugh to Ephriam Morgan, and avers, on information and belief, that they entered into possession of the premises conveyed to them under said deeds, claiming adversely to the complainants and each of them and all the world. He denies that Morgan had no other title than that derived from Bigelow. He admits that Morgan, having entered into possession as aforesaid, was advised that the remainder in fee had descended, upon the death of Mary Jane Barr, to the brothers and sisters of William Barr, Sr., and their heirs, and that thereupon he purchased all the outstanding interest of all the heirs of said brothers and sisters in said remainder, as he then believed. He further admits the purchase from the different parties set forth in said amended bill, and that the conveyances were all in fee-simple, purporting to convey the entire interest of the grantors in said tract of land, but avers that he has no knowledge or sufficient information upon which to found a belief as to the relationship of the grantors to the said Mary Jane Barr. He admits the execution of the deeds from William Wood and wife to Ephriam Morgan, which are set forth in the amended bill; also the filing of the petition in the court of common pleas of Hamilton county, by Ephriam Morgan and others, for the purpose of taking the deposition of Maria Bigelow, as set forth in the amended bill; also the bringing of the suit of *Poor v. Considine*, and the agreed statement of facts as set forth in the bill, and the taking of the said case to the supreme court, and the decision of that court therein. He further admits the averments of the bill relating to the agreement between the parties therein



named and Lincoln and Smith, as set forth, but avers, upon information and belief, that when said agreement was made the parties thereto, who were then in possession of said premises, claimed to hold adversely to the Barr heirs, and that the purchases by Lincoln and Smith were made by way of compromise and of buying peace. He admits the other purchases by Lincoln and Smith set forth in the bill, and the deed by the heirs of Andrew Barr, but avers that they, too, were made to avoid litigation and by way of compromise. The answer further sets up that each one of the grantees under whom the defendant claims entered into the open, notorious, continuous, exclusive, and adverse possession of the premises occupied by him, and described in the bill, under recorded deeds in fee-simple, with covenants against incumbrances and of general warranty, paying full value, and relying upon other deeds as conveyances to them of the entire title to said premises; that they have, as has defendant, so exclusively occupied, and so claimed in good faith, and "without notice of the claim of these complainants, or their alleged ancestors in title, or either of them, and that said open, notorious, exclusive, and adverse possession has continued unbroken down to the present time." It is not necessary to set forth the details of the answer of John Keeshan. In every essential particular it raises the same questions and presents the same defenses as the answer of Archbishop Elder, and is subject to the same ruling.

For former reports, see 38 Fed. Rep. 165; 40 Fed. Rep. 559.

*Cowan & Ferris* and *Henry T. Fay*, for complainants.

*Lincoln, Stephens & Lincoln, Bateman & Harper*, and *F. J. Moorman*, for respondents.

Before JACKSON and SAGE, JJ.

SAGE, J., (*after stating the facts as above.*) The contention of counsel for the defendants in support of their motion, that a suit in equity for partition is not an appropriate proceeding to try title to property, and, when the complainant's title is legal and is disputed, the bill will be dismissed, or proceedings stayed until he establish his title at law, was recognized by this court in *McClaskey v. Barr*, 40 Fed. Rep. 563. That adverse possession ripens into title, and that in all cases the title vests as soon as the remedy against the adverse holder is barred by the statute of limitations, is so well established by decisions of the supreme court of Ohio, (*Kyser v. Cannon*, 29 Ohio St. 359; *Rhodes v. Gunn*, 35 Ohio St. 387,) and by the supreme court of the United States, (*Leffingwell v. Warren*, 2 Black, 605; *Crozzall v. Shererd*, 5 Wall. 289; *Bicknell v. Comstock*, 113 U. S. 152, 5 Sup. Ct. Rep. 399; *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. Rep. 209,) that it is not open to be disputed. The question to be decided is whether the answers present a good plea of the statute of limitations, or that the title is legal, and is disputed.

The will of William Barr, Sr., which it is admitted was duly probated in the probate records of Hamilton county, devised the real estate described in the bill to his executors for the use of his son, John M. Barr, during his natural life, and after his death in trust for his wife,

Maria Barr, afterwards Maria Bigelow, during her natural life, with remainder to the children of John M. Barr, and their heirs, forever. The conveyance by Maria Bigelow to Ephriam Morgan and Lot Pugh was the conveyance, not of a legal, but of an equitable, estate, of which the grantees by reason of the probate of the will were bound to take notice. *McArthur v. Scott*, 113 U. S. 405, 5 Sup. Ct. Rep. 652. The defendants admit that upon the death of Mary Jane Barr said real estate descended, subject to the life-estate of Maria Bigelow, to the brothers and sisters of William Barr, Sr., or their heirs, as heirs at law of the said Mary Jane Barr, but they deny that Mary Grafton was one of the sisters of said William Barr, Sr. It is insisted that, as the deeds to Morgan and Pugh, and the subsequent deeds by them to grantees under whom the defendants claim, purported to convey the fee-simple, that they gave at least color of title upon which an adverse possession could be founded. That a deed purporting to convey a fee, made by one not having title, is sufficient to give color of title, is true; but that conveyances made during the life of Maria Bigelow, the life-tenant, could be the foundation of a claim to adverse possession during her life-tenancy, is not true. By her deed she transferred all her interest in the property and her exclusive right to possession. So long as she lived there could be no possession adverse to the heirs of Mary Jane Barr, for the reason that their right of possession, as tenants in common, did not accrue until the death of Mary Bigelow. For that reason the deeds purporting to convey the fee, made during her life-time, could not operate as an ouster of those entitled in remainder. There was no co-tenancy then in existence. The estate in remainder was vested, it is true, but the right of possession, and therefore the co-tenancy, was postponed until her death. But it is claimed that the character of the improvements made under the deeds above referred to during her life-time may be referred to as indicating the intention of the parties in possession to exercise the rights of complete ownership of property, and as reflecting upon the character of their possession from and after her death. This proposition, properly guarded, as will be hereinafter indicated, is recognized as sound. The right of complainants to possession and partition sprang into existence upon the termination of the life-estate by the death of Maria Bigelow.

It is averred by the complainants, and admitted by the defendants, that, in 1838 and 1839, Morgan procured some 19 deeds from children of John Barr, Samuel Barr, and Jane McWhirter, conveying their interest in the entire tract of land described in bill. Upon the death of Maria Bigelow, which occurred, according to the averments of the bill, in August, 1860, Morgan's grantees, by virtue of these conveyances and subsequent conveyances to them, became co-tenants with complainants, and with the heirs of Mary Jane Barr, in the property. Now, what are the averments upon which the claim of adverse possession, subsequent to that time, is based? There are averments, already noticed, of continuous and exclusive possession, of receiving and retaining all the rents and profits, of paying taxes, and of making permanent and costly improvements, all claimed as indicating a holding adversely, and the as-

section of absolute ownership. But there is nowhere any averment of notice to the co-tenants not in possession, excepting as it is to be inferred from the acts above stated. On the contrary, the answer filed January 18, 1890, contains the averments that the open, notorious, continuous, and exclusive possession of said premises by the defendants and all their grantors was "in good faith, and without notice of the claims of these complainants or their alleged ancestors in title, or either of them."

*Zeller's Lessee v. Eckert*, 4 How. 289, is in point. There was in that case a devise of land to the son of the testator, with a provision that the widow should continue in possession and occupation of the premises until the son arrived at the age of 15 years. The supreme court held that her possession was not adverse to the heirs of the child during that period. So here the possession of Morgan and of his grantees, during the life-time of Maria Bigelow, was not adverse to the heirs of Mary Jane Barr. The supreme court further held that, as the possession "was originally taken and held in subserviency to the title of the real owner, a clear, positive, and continued disclaimer and disavowal of the title, and assertion of an adverse right, and to be brought home to the party, are indispensable, before any foundation can be laid for the operation of the statute." The court further said that—

"Otherwise the grossest injustice might be practiced; for without such notice he might well rely upon the fiduciary relations under which the possession was originally taken and held, and upon the subordinate character of the possession as the legal result of those relations."

And still further:

"The statute, therefore, does not begin to operate until the possession, before consistent with the title of the real owner, becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued, and notorious, so as to preclude all doubt as to the character of the holding, and the want of knowledge on the part of the owner."

It is urged that the purchase and procurement of the conveyances by Morgan above referred to, and the purchases by Lincoln and Smith as trustees on behalf of the defendants, subsequent to the death of Maria Bigelow, ought not to be treated as recognitions of the complainants' title, but rather as purchases of the outstanding interests, for the protection of the defendants' title, made to avoid litigation, and by way of compromise and buying peace. All the conveyances since the case of *Poor v. Considine* are averred in the answer to have been so made, and it is urged that they did not, therefore, interrupt the continuity of the adverse possession claimed on behalf of the defendants. All this may be granted for the sake of the argument, but without helping the defendants. The question is not whether those acts interrupted the continuity of possession, but how do they bear upon the question of notice to the co-tenants who were out of possession? Counsel say that the defendants did not claim title under any of these deeds, and that their possession and title are referred entirely to the deeds from Morgan to his grantees, and the derivations of title subsequently by defendants under those deeds. It is easy to see that if Morgan had made no purchases from the heirs

of Mary Jane Barr, and taken no deeds from them, the position of the defendants would be much stronger than it is. In that case, having no relation of co-tenancy with the complainants, their holding from the death of Maria Bigelow might well have been regarded as adverse. But one result of Morgan's taking those deeds was to put him in the relation of co-tenant with the complainants instantly upon the death of Maria Bigelow, and the question now is, has the subsequent holding by the defendants been accompanied by acts which amount to notice to the co-tenants of an adverse holding? How are we to reconcile with any such theory the agreed and recorded statement of facts which was embodied in the bill of exceptions in the *Poor and Considine Case*, or the written agreement authorizing and empowering T. D. Lincoln and Fayette Smith, as trustees, to buy in, for the use of the defendants or their grantors, the outstanding title of the several heirs of William Barr, John T. Barr, and Margaret Barr Keys, all grandchildren of Samuel Barr, who is alleged to have been a brother of William Barr, Sr.? Can any of these acts or transactions be construed as notice to the co-tenants of an adverse holding? Every one of them indicates, as far as the question of notice is concerned, as does the proceeding of record in which the deposition of Maria Bigelow was taken and filed, a holding in subserviency, rather than in opposition to the title and interests of the co-tenants; and we are of opinion that it is impossible to reconcile those acts, taken in connection with the other admitted facts, with the claim of an adverse holding. We are considering them solely and exclusively with reference to their bearing upon the question of notice to the co-tenants. It is not pretended that an actual notice was given. On the other hand, as has already been shown, the answer denies any knowledge even of the existence of the complainants. We are not controverting the proposition that if no such notice had been given, the defendants might, without prejudice, have taken deeds for outstanding interests of co-tenants, by way of compromise and to avoid litigation; but it has been held that where the possession was adverse, so as to amount to a disseisin, the disseisin would be purged by the purchase of shares of several of the heirs soon after, and the subsequent possession must be considered as the possession also of the other heirs, from whom title had not been obtained. *Parker v. Proprietors*, 3 Metc. 99. Now, regarding the fact that costly and permanent improvements were made by Archbishop Purcell in the time of the life-estate of Maria Bigelow, and the fact, also, that improvements of like character were made by him after her death, as indicating a claim to the entire estate, and intention to hold adversely, we must, in considering the question whether notice to the complainants can be reasonably inferred, take into account that the recorded deeds to the defendants by co-tenants of complainants amounted, in the absence of actual notice to the contrary, to notice that the defendants recognized the co-tenancy. These suggestions apply, with perhaps even greater force, to the subsequent deeds from co-tenants procured through Lincoln and Smith, trustees, and containing recitals recognizing in express terms the co-tenancy. The admitted facts, as they appear from the pleadings, cannot be reconciled

with the proposition that there has been an adverse possession, so open, continued, and notorious "as to preclude all doubt of the character of the holding or the want of knowledge on that part of the owner," which is what the supreme court in *Zeller's Lessee v. Eckert* declared to be necessary.

But it is urged that exclusive possession by a tenant in common for a great length of time, without interruption or claim by the other tenants, is evidence from which a jury would be authorized to infer or presume an actual ouster, and that on similar evidence a grant may be presumed. This is undoubtedly true as a general proposition, but it falls also under the head of laches, and is cognizable in equity. In *Hall v. Law*, 102 U. S. 461, long-continued possession of this kind was held to be sufficient to authorize a decree dismissing the bill, on the ground that the claim set up by the complainants was stale. There is therefore no reason why upon this proposition the case should be sent to a jury.

The answer denies that the complainants are descendants of Mary Grafton, and denies their heirship, and it is contended that this is a denial of title, and hence that the defendants' motion must be granted. It is urged that the asserted claim of the complainants depends wholly upon their heirship, which lies at the threshold of their case, and that upon it depends their whole title. The case of *Wilkin v. Wilkin*, 1 Johns. Ch. 111, is cited; but in that case whether the complainants were heirs of the person last seised, was only one of the questions in dispute. In this case it is admitted by the defendants that the land described in the bill descended in accordance with the provisions of the will of William Barr, Sr., to the heirs at law of Mary Jane Barr. The denial of the heirship of the complainants, therefore, raises a question of identity, rather than of title, and does not, we think, make it necessary or proper to submit the question to a jury.

The last objection which we think it necessary to consider is that the complainants are not in possession, and that it matters not for how short a time the adverse possession has been maintained, for 21 days is as good for this proposition as 21 years; and, if this adverse possession is established, the tenants do not hold together, and the plaintiff must try his title in ejectment before he will be in a position to sue in partition. But we have already seen that the admissions by the defendant in the pleadings are sufficient in themselves to defeat the claim that there has been an adverse possession. Moreover, this suit was brought in a state court, and removed to this court, and, as was held in *Tabler v. Wiseman*, 2 Ohio St. 207, a right of entry will entitle a party to the proceedings in partition, in Ohio, without the actual seisin required in some other states. The authorities are not uniform on this point. In some states it has been held that the complainant must allege that he is seised, which imports a present possession as tenant in common or coparcener, and that a mere right of entry, if shown, will not be sufficient. It has been so held in New York and in Vermont. In other states, as in Maine, Massachusetts, New Hampshire, Indiana, Minnesota, and Illinois, it has been held, on the other hand, that a disseised co-tenant may have partition.

This being the rule in Ohio, we think it should be the rule in this case. Recurring to the holding in *Lucas v. King*, 10 N. J. Eq. 280, cited in the ruling made by this court upon the exceptions to the answer, (40 Fed. Rep. 564,) that "if, when the titles are spread before the court upon the pleadings, the court can see that there is no valid legal objection to complainant's title, there is no reason why the court should not proceed to order the partition," (see, also, *Overton's Heirs v. Woolfolk*, 6 Dana, 374,) our conclusion is that the defendants' motion must be overruled.

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**BLACK et al. v. HENRY G. ALLEN Co., (No. 4,718.) SAME v. SAME, (No. 4,750.) SCRIBNER et al. v. SAME, (No. 4,719.)**

(Circuit Court, S. D. New York. June 26, 1890.)

**1. COPYRIGHT—INFRINGEMENT.**

A copyrighted book, published by the consent and license of the author as a part of a foreign encyclopædia, the remainder of which is the production of aliens not protected by the copyright laws of the United States, does not thereby become public property, and cannot be used without the consent of the author in a reprint of the encyclopædia.

**2. SAME—PUBLIC POLICY.**

That the alien publishers of the foreign encyclopædia procured copyrighted articles from citizens of the United States for the express purpose of preventing the work from being reprinted in the United States, does not affect their right to protect the copyright in the courts of the United States.

**3. SAME—ASSIGNMENT.**

An undivided interest in a copyright may be assigned.

**4. SAME—INJUNCTION—VERIFICATION OF BILL.**

A bill praying for an injunction, and which is not to be used as evidence, need not be verified at the time it is signed.

**5. SAME—EQUITY PLEADING.**

A bill which sets out the terms of the agreement between the author and his complainants, the publishers, and states that, if such agreement is not an assignment, it is an exclusive license, correctly pleads publishers' title to the copyright by thus alleging the facts, and stating the conclusions therefrom in the alternative.

**6. SAME—PARTIES—TITLE.**

When the legal and equitable owners of a copyright join in a complaint to enjoin its infringement, it is immaterial whether the equitable owners acquired their interest by instrument in writing or by parol.

**7. SAME—AFFIDAVIT TO BILL.**

Where the bill positively avers the infringement of the copyright, it is sufficient, though it is not stated to be within the knowledge of affiant.

**8. PARTIES—FOREIGN ADMINISTRATOR.**

An administrator appointed in one state cannot maintain an action in that capacity in another state unless he take out ancillary letters of administration in the latter, but such ancillary letters may be taken out after the bill is filed, and averred by amendment.

**9. COPYRIGHT—DIFFERENT PUBLICATIONS.**

Each map contained in a statistical atlas need not be separately copyrighted, for they are all protected by a copyright of the entire work.

**10. SAME—PAROL ASSIGNMENT.**

An inchoate right to a copyright may be transferred by parol prior to the taking of the copyright.

**11. INJUNCTION—PLEADING.**

It is proper to attach to a bill praying an injunction against the infringement of a copyright copies of the infringed and infringing maps.

**In Equity. On bill for injunction.**

*Rowland Cox*, for plaintiffs.

*James A. Whitney*, for defendants.

SHIPMAN, J. These are demurrers to the respective bills in equity for injunctions against alleged infringements of copyrights.

The important facts which are alleged in No. 4,718 are as follows: Four of the plaintiffs are members of the firm of Adam & Charles Black, of Edinburgh, Scotland; are aliens, and subjects of the queen of Great Britain. The fifth and remaining plaintiff is Francis A. Walker, a citizen of the state of Massachusetts and of the United States. The said firm, whose members I shall hereafter call the Messrs. Black, for the sake of brevity, are the publishers of the well-known work entitled "The Encyclopædia Britannica, Ninth Edition," which is made up of articles or books, each of which is, in a large number of instances, an independent book or treatise. Three of the articles contained in the twenty-third volume of the encyclopædia, hereinafter referred to, have been copyrighted in the United States. One of these articles, entitled: "United States. Part III. Political Geography and Statistics,"—was written by said Walker, who secured a copyright thereof, according to the provisions of the statutes of the United States, for the term of 28 years from February 13, 1888. In the several copies of every edition published the following words were inserted on the title page: "Copyright, 1888, by Francis A. Walker." On or about April 1, 1888, said Walker assigned and transferred to the Messrs. Black an interest in said copyright; "that is to say, the said Walker did assign and transfer to your orators, constituting the firm of Adam & Charles Black, the sole and exclusive right and liberty of printing, reprinting, publishing, copying, and vending, during the whole term of the said copyright, the said book, entitled: 'United States. Part III. Political Geography and Statistics,'—in connection with, and as a part of, their said twenty-third volume of their said encyclopædia, designated 'Encyclopædia Britannica, Ninth Edition,' and not otherwise; the said Walker retaining the right to print, publish, copy, and vend the said copyrighted book in every form and manner other than as a part of said Encyclopædia Britannica." The bill alleges that if said Walker did not, by said agreement, assign to the Messrs. Black an interest in said copyright, the said agreement was an exclusive and irrevocable license to them to print and sell, during the term of the copyright, the said book or article in connection with, and as a part of, said twenty-third volume. The copyrighted book was printed and sold in connection with, and as a part of, said volume. The whole of the copyright, except the right to use the subject thereof in the encyclopædia, has always remained in said Walker. The defendant has printed and sold, without the consent of the plaintiffs, said copyrighted article, in and as a part of its reprint of said encyclopædia, except that it has omitted the copyright notice upon the title-page, and threatens to continue to print and sell the same as part of its twenty-third volume. The bill alleges that the acts of the defendant are a great and continuing injury to each of the plaintiffs, and prays for an injunction, and an account of the profits arising to the defendant from the sale of said volume.

In No. 4,750, the Messrs. Black and John McAlan, a citizen of the state of New York, and administrator of the estate of the late Alexander Johnston, who was, when in life, a citizen of the state of New Jersey and of the United States, are plaintiffs. Mr. McAlan was appointed administrator by the surrogate for the county of Mercer, in the state of New Jersey. Prof. Johnston was the author of a book entitled: "United States. Part I. History and Constitution,"—and secured a copyright of the same according to the provisions of the statutes of the United States relating to copyrights. The other facts which have been stated in regard to the assignment of Walker's copyright, his title, and the acts of the defendant, exist in regard to Prof. Johnston; and the two bills are substantially like each other, *mutatis mutandis*. The difference between the cases is that in No. 4,750 a foreign administrator is the plaintiff.

The case stated in No. 4,719 is as follows: The two plaintiffs are citizens of the state of New York, and partners by the name of Charles Scribner's Sons. Two other persons, Hewes and Gannett, both citizens of the United States, were the authors of a book entitled "Scribner's Statistical Atlas of the United States," and, before depositing a printed title thereof with the librarian of congress, and before publication, assigned and transferred to the plaintiffs all their right in said book, and the right to copyright it; and the plaintiffs became the proprietors of said book. The plaintiffs printed and published the book, and on December 29, 1883, secured a copyright thereof in accordance with the provisions of the Revised Statutes, and gave notice of such copyright by inserting on the page following the title-page, in the several copies of every edition, the words, "Copyright 1883, by Charles Scribner's Sons." Afterwards the plaintiffs printed and published, and licensed others to print and publish, certain maps and charts which constituted a part of said book, but gave notice of the copyright by causing to be inscribed upon the face of each copy of every map or chart thus printed by themselves or others the words, "Copyright, 1883, by Charles Scribner's Sons." The defendant, since May 1, 1889, and without the plaintiffs' consent, published and sold a volume entitled the "Encyclopædia Britannica, Ninth Edition. Popular Reprint. Vol. 23,"—in which it printed eight maps which were copied from said copyrighted book. The bill prays for an injunction against selling copies of the book which shall contain in part said infringing maps, and for an accounting of profits.

The cause of demurrer in the two Black cases, which goes to the substance of the bills, is that they show no substantial right or equity in or on behalf of the plaintiffs, and that the acts of the defendant are not contrary to law. The point is this: Does the fact that the proprietor of a book copyrighted in this country has permitted an alien publisher of an encyclopædia to publish his book as a part of such encyclopædia enable another person, without other authority, to publish in this country the copyrighted article as a part of his reprint of such encyclopædia, the remainder of which is *publici juris*? It will not, probably, be seriously denied that a citizen of the United States who is the owner of a copyright can assign the whole of such copyright to a foreigner. "A non-resident



foreigner is not within our copyright law, but he may take and hold by assignment a copyright granted to one of our own citizens." *Carte v. Evans*, 27 Fed. Rep. 861. It is, however, contended that, while a copyright may be assigned as a whole by a written instrument, it cannot be subdivided, but is an entire thing, indivisible, and incapable of apportionment. The statute simply provides that the copyrights are assignable at law by an instrument in writing, and, obviously, the whole or an undivided part thereof may be assigned so that the copyright may become "the undivided property of joint owners." *Drone*, Copyr. 334. To what greater extent copyrights may be subdivided at law the statute does not declare, and in this case it is not necessary to inquire. Under section 4964, a license in writing, by instrument duly witnessed, may be given by the proprietor to any other person to the extent described in such license; and there is no restriction upon the power of the proprietor to assign or transfer, in equity, an exclusive right to use the copyrighted book in a particular manner or for particular purposes upon such terms and conditions as may be agreed upon. In such case the legal title remains in the proprietor; and a beneficial interest, to the extent which is agreed upon, vests in the other party, who has acquired an equitable right in the copyright, and who will be properly styled an "assignee of an equitable interest." *Curt*. Copyr. 225. In these two cases, as the Messrs. Black and the proprietors of the legal title are all made parties, and properly so, whether the Blacks are licensees, or are owners of an equitable interest in the copyrights, (*Goodyear v. Railroad Co.*, 1 Fish. Pat. Cas. 626; *Goodyear v. Allyn*, 3 Fish. Pat. Cas. 374,) I do not conceive it necessary to determine at this time by what name the publishers' interest in the copyright may be the more properly called.

The question is reduced to this: Does the fact that the copyrighted books were inserted by permission in an encyclopædia, as a part thereof, permit an unauthorized use of them in a reprint of such work? If a poem or an essay for which a copyright had been secured in this country by the author, a citizen of the United States, should be permitted to be inserted in a volume of poems or essays, a part of which was *publici juris*, it could not reasonably be claimed that the author had thereby abandoned his copyright, and that his book could be reprinted, by itself, without his consent, in this country. It cannot be contended that the defendant would have a right to reprint Walker's or Johnston's treatises in separate volumes without the consent of the respective proprietors. Can, then, the poem or essay be printed, without the consent of the author, as a part of an unauthorized reprint of the entire volume? The defendant takes the affirmative in these cases, because (1) the work as a whole is a foreign work, and the bulk of the volume is *publici juris*; and (2) because the insertion of Walker's and Johnston's articles in the twenty-third volume was for the manifest purpose of preventing citizens of the United States from reprinting that volume, which would have been, but for those articles, *publici juris*, and therefore was an attempt which will not receive the favor of a court of equity.

Upon the first point there is no vital difference, in regard to the in-

fringement of an author's copyright, whether it is printed in a separate volume, or in connection with authorized material. If the author has a valid copyright, it is valid against any unpermitted reprint of his book; and the fact that his book is bound up in a volume with 50 other books, each of which is open to the public, is immaterial. The argument of the defendant upon this part of the case is mainly directed in support of the second point, and is this: The *Encyclopædia Britannica*, as a whole, was the production of aliens, who could obtain no copyright in this country, and is a work of great value to the whole people. Except for the introduction of a few articles, which were copyrighted in the United States, it could have been reprinted here in cheap form; and the defendant, when he entered upon his undertaking, had good reason to suppose that it could be thus reprinted. The employment of citizens of the United States to write articles which were to be used in some of its volumes, and the purchase of an interest in the copyright of such articles, were an attempt to deprive the defendant, and other like-minded persons, of a privilege which they would have otherwise enjoyed, and were for the purpose of giving the foreign owners of the *encyclopædia* an advantage in the sales of the work in this country. The attempt contained an element of unfairness, because the book, if written by foreigners, could be reproduced here, and the complainants have only a color of copyright interest, and therefore should not receive the sanction of the courts. The statements in the preceding paragraph, with the exception that the effect of the plaintiffs' interest in the Johnston and Walker articles had an element of unfairness in it, are true, and present by themselves no adequate argument in favor of the defendant. The acts of Johnston and Walker were in accordance with the statutes of the United States. The acts of the Messrs. Black were for the purpose of making a use of the statutes which might assist them against pecuniary loss, and give them a more unobstructed field for their large commercial venture. The disputed point is whether there was an element of fraud or injustice in the scheme which would prevent a court from regarding it with favor. There was no impropriety in soliciting competent citizens of the United States to write upon its history, and I can perceive no unfairness or injustice towards the defendant company in the plaintiffs' use of the copyright laws for their pecuniary advantage, and as a weapon with which to repel a competition which is more enterprising than considerate. There was no trap set for the defendant, whose officers must have known that the ninth edition was in great part a new work, and that its contributors would not be confined to one country. It must be recollected that the question now to be considered does not relate to the extent of the decree, but whether the bills show a right to any decree; and it will be a subject for future consideration whether the prayer of the bill should be granted to its full extent.

Several objections of a more technical character are made to the bills. They are demurred to for insufficiency of the affidavits. Bills, in certain cases which are specified in the chancery text-books, are required to be verified by the oath of the party; and the New York chancery prac-

tice required that bills for injunction should be thus verified. In the federal courts, whenever a bill for an injunction is to be used as evidence either upon a motion for preliminary injunction, or in any other way, it must be verified; but there is no imperative rule requiring verification of a bill, at the time it is signed, which prays for an injunction. *Woodworth v. Edwards*, 3 Woodb. & M. 120; *Hughes v. Railroad Co.*, 18 Fed. Rep. 106.

The next alleged cause of demurrer is that the bills are uncertain and contradictory because it does not appear whether the alien plaintiffs claim as co-owners of the copyright or as licensees. The bills allege the terms of the agreement of assignment, and then say that if, by such agreement, an interest in the copyright was not assigned and transferred to the Messrs. Black, the agreement was an exclusive license. This is a correct form of equity pleading. The facts are stated, and the conclusions therefrom are stated in an alternative form.

The next point is that it does not appear that the agreements or assignments between the authors and the Messrs. Black were in writing. The bills declare, in substance, that the complainants are the only persons who have a legal or equitable title to the copyrights, and allege the nature and extent of the equitable title, and that it was acquired by assignment from the proprietors. It is further averred that the complainants are well seised of said copyright, and are the owners thereof. It is not necessary, when all the legal and equitable owners are joined, to state the formalities or the mode of conveyance by which the equitable interests became vested in the co-complainants; and, if the owner of the entire legal title is a complainant, it is immaterial whether the equitable owners became vested by an instrument in writing or by parol.

The eighth cause of demurrer is to the effect that the bill of complaint does not show that the ownership of the copyright is vested in any of the Messrs. Black. I have so fully remarked upon the theory of the bill, and of the law in regard to legal and equitable ownership of copyright, that it is not necessary to discuss this point further.

The seventh cause is that the charge of infringement is not made upon knowledge. It is made positively, as a fact, but the affidavit does not assert that the averment is within the knowledge of the affiant. The averment is sufficient, and the necessity of an affidavit has heretofore been considered.

The ninth, tenth, and eleventh points do not seem to me to require extended remark.

The defendant has also demurred in No. 4,750 upon a ground peculiar to that case, viz., that McAlan, being a foreign administrator, and never having taken out ancillary letters of administration in the state of New York, cannot sue in the courts of that state. The bill avers that he was appointed by the surrogate for the county of Mercer, in the state of New Jersey, and counts upon that appointment as his only authority: If the bill had simply averred that he was administrator, the objection could have been taken only by a plea or answer; but, when the defective title is fully shown in the bill, advantage of such defect can be taken

by demurrer. Story, Eq. Pl. § 496; 1 Daniell, Ch. Pr. 325; *Childress v. Emory*, 8 Wheat. 642; *Swatzel v. Arnold*, 1 Woolw. 383. The law upon the subject is thus declared in the syllabus of *Noonan v. Bradley*, 9 Wall. 394.

"An administrator appointed in one state cannot, by virtue of such appointment, maintain an action in another state, in the absence of a statute of the latter state giving effect to that appointment, to enforce an obligation due his intestate. If he desires to prosecute a suit in another state, he must first obtain a grant of administration therein in accordance with its laws."

This is not the case of a suit for infringement by an administrator to whom a reissue or an original patent had been granted. In such case the grant has been made to him, as administrator, by the government, and his title has been passed upon by the commissioner. A bill in equity by an administrator for an infringement in the life-time of the intestate owner of the patent, or for infringement occurring after his death, is for an injury to the estate of the intestate; and, although there are decisions to the contrary, such a bill seems to me to fall within the general rule, and to require the foreign administrator to take out letters in the state in which he brings suit. It is true that the statute vests the title of the intestate in his administrator; but the point of the objection is that a foreign administrator is not recognized as administrator, when he sues in that capacity, unless appointed by the courts of the state within which suit is brought. But, as said by Mr. Justice MILLER in *Swatzel v. Arnold*, *supra*: "The impediment to the exercise of the full power of an administrator in a jurisdiction foreign to that granting his letters is essentially technical and formal, and should not be strained beyond its necessary application." The courts early found relief, in cases of equity, from too strict adherence to technicality upon the ground that "in equity a plaintiff may file a bill as administrator before he has taken out letters of administration, and it will be sufficient to have them at the hearing, which is not the case at law." 1 Daniell, Ch. Pr. 327. Therefore, in *Humphreys v. Humphreys*, 3 P. Wms. 349, where the next of kin had brought a bill without administering, and the defendant demurred, the lord chancellor allowed the demurrer, and then permitted the complainants to take out letters of administration, which, when granted, he said, related to the time of the death of the intestate, and to allege the same by way of amendment or by supplemental bill. The case of *Swatzel v. Arnold*, *supra*, was on this wise: An administrator appointed in Kansas brought a bill in equity, in a court of Nebraska, for a foreclosure of a mortgage belonging to the estate of the intestate. The court sustained a demurrer upon the ground that the foreign administrator had taken no ancillary letters. The case having come into the United States circuit court, and the complainant having taken out letters in Nebraska, Mr. Justice MILLER permitted an amendment upon the authority of *Humphreys v. Humphreys*. The substance of his decision is that "an administrator appointed in one state, like an executor who has not proved the will, may sue in the courts of another before he has letters therefrom, and, having obtained letters, may aver the fact by

amendment," before answer filed, and after demurrer. "He has an interest in the subject-matter, although he has no standing in court, and for that reason may support his suit, in order to defend his right, by authority afterwards acquired." To the same effect are *Bradford v. Felder*, 2 McCord, Eq. 168; *Blackwell v. Blackwell*, 33 Ala. 57; and *Giddings v. Green*, 4 Hughes, 446.

Upon this point the demurrer in No. 4,750 is sustained, with leave to the complainants to amend, if ancillary letters of administration shall be taken out in the state of New York, within 30 days after the date of the order upon the demurrer.

In No. 4,719 additional and different reasons of demurrer are relied upon. The principal new causes are that the alleged assignment of the inchoate right is not averred by the bill to have been in writing, and that it is clear upon the face of the bill that the reprinted maps were never legally copyrighted by the complainants. The position of the defendant is that an atlas is a bundle of maps; that there is no such thing as a manuscript of a map, and therefore the manuscript cannot be transferred to the assignee; and, furthermore, that every assignment of an inchoate right before copyright is obtained must be in writing. The alleged invalidity of the copyright is upon the ground that the book or atlas was copyrighted, whereas it is said that each map should have been copyrighted. A statistical atlas is a book of maps, tables, and printed text, and is not simply a bundle of maps, and is properly copyrighted as a whole. There was no necessity of copyrighting separately each map in the book. The unauthorized reprinting of eight maps from this volume, it being alleged that all of them were originated and prepared by the authors, is an infringement of the same character as the reprinting of original statistical tables or other printed matter. An inchoate right to a copyright may, prior to the taking of the copyright, be transferred by parol. *Lawrence v. Dana*, 4 Cliff. 1; *Callaghan v. Myers*, 128 U. S. 658, 9 Sup. Ct. Rep. 177. The other additional points referred to the averments of the bill in regard to the plaintiffs' licenses, and to the propriety of attaching to the bill the maps as exhibits. The pleader attached to the bill copies of the infringed and of the infringing maps, as part thereof. His course in regard to these two particulars was proper.

The demurrers in Nos. 4,718 and 4,719 are overruled. The demurrer in No. 4,750 is sustained, with leave to amend as hereinbefore stated.

v.42F.no.12—40

MONTANA Co., Limited, v. CLARK *et al.*

(Circuit Court, D. Montana. June 6, 1890.

## 1. MINES AND MINING.

Where defendants' mining claim is in the form of an isosceles triangle, they cannot follow their lode or vein on its downward dip, through the side lines of their claim, into plaintiff's claim. Parallelism in the end lines of the claim is essential to the exercise of such right. Following *Iron Silver Mtn. Co. v. Elgin Mtn. & S. Co.*, 118 U. S. 203, 6 Sup. Ct. Rep. 1177.

## 2. SAME—INJUNCTION.

Rev. St. U. S. § 2322, provides that the locators of all mining claims shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins shall so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines. *Held* that, the apex or top of a certain lode being within the surface lines of defendants' claim, plaintiff had no title to any portion of such vein underlying the premises granted to it, and therefore was not entitled to an injunction restraining defendants from working a portion of such vein within the side lines of plaintiff's claim.

## 3. SAME.

Plaintiff had dug and owned a tunnel which was necessary to the working of a lode or vein in its claim. By means of this tunnel plaintiff was in the actual possession of a portion of the vein or lode having its apex in defendants' claim. Defendants proposed to extend an incline along their lode within the side lines of plaintiff's claim in such a way as to cut the tunnel. The effect of such extension would be to destroy the tunnel for the purposes of plaintiff, and, when extended beyond the tunnel, the incline would be wholly in the lode owned by plaintiff. *Held*, that defendants would be enjoined from extending their incline so as to cut the tunnel.

## In Equity. Bill for an injunction.

Rev. St. U. S. § 2322, provides that the locators of all mining claims shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location.

*Cullen, Sanders & Shelton and E. W. Toole*, for complainant.

*McConnell & Clayberg*, for defendants.

KNOWLES, J. The plaintiff moves for a judgment on the pleadings. This presents the question as to whether there are any material issues presented by them. The plaintiff sets forth that it is the owner in fee-simple of the Drum Lummon lode claim and the Marble Heart lode claim, and of all the precious ores therein contained, and was, at the commencement of this suit, in the possession of said premises, except so much as defendants wrongfully withheld from it; that in said premises is a vein or lode which runs through said Drum Lummon lode claim, and on its dip passes out thereof into the said Marble Heart lode claim; that plaintiff has for a long time past been engaged in working and mining upon said lode claims, and at great cost and expense has driven

tunnels and drifts in, along, and upon said vein or lode, from said Drum Lummon claim into said Marble Heart claim, which are necessary in order to enable plaintiff to work and mine its said mining claims; that defendants, commencing upon the Hopeful claim, have drifted into said Drum Lummon lode or vein in the Marble Heart claim, and have approached so near to the tunnels, drifts and workings of plaintiff in said claim as to endanger the same, and destroy them, and the use thereof by plaintiff, and that defendants threaten, by means of their shaft or incline, to enter into the tunnels, drifts, and workings of the plaintiff, and to destroy the same, and to deprive the plaintiff of the use of the same, and are so near to the workings of plaintiff as to be dangerous to plaintiff's workmen and employes, and, if permitted to continue, will greatly damage and injure plaintiff's property; and that defendants threaten to enter into plaintiff's Drum Lummon lode, and to extract the ores, quartz rock, and precious metals therein contained. The defendants in their answer do not deny the title of the Drum Lummon lode claim and Marble Heart lode claim to be in plaintiff. They admit that plaintiff has driven tunnels and drifts in said claims. They admit that the location of the Hopeful claim was made subsequent to the other two claims above named, and that plaintiff was in possession of said two claims. Defendants admit that their shaft or incline has reached very near to the tunnels, drifts, and workings of plaintiff, and that by their incline they have passed out of their side lines, and within the side lines of plaintiff's Marble Heart claim.

There was some doubt in my mind as to whether the complaint did not present such an issue as should call for the determination of the legal title to the place of the alleged trespass of defendants before the court could grant the relief asked by plaintiff, namely, a perpetual injunction restraining defendants from committing the acts complained of. There seems to be no claim on the part of the defendants but that the complaint states a sufficient cause of action. The complaint, with the admissions in the answer, probably dispenses with any such proceedings as above indicated on the part of the court. The defendants, in what they term a "cross-bill," disclose their defense, and justify their action of entering by means of an incline from the Hopeful claim into the Marble Heart claim. Although the defendants term this part of their pleadings a "cross-complaint," the court is justified in treating it as an answer, setting up new matter constituting a defense. This undoubtedly is what the pleading is. The plaintiff has so treated it by replying to it instead of answering it. In taking this position as to this pleading I am justified by the case of *Doyle v. Franklin*, 40 Cal. 106. In this answer the defendants set forth that the said Drum Lummon vein or lode enters the Hopeful claim, owned by defendants, at a point near the top or apex of their claim, and passes through the same, and out at the base of the triangular part of ground which defines their claim; that the apex of this vein or lode is in the Hopeful claim from the point of entrance to said base line thereof; that they commenced upon the apex of this vein with their said incline, and have followed the same down some 118 feet; that in its dip said

vein passes into the Marble Heart claim. The plaintiff in its complaint avers that the apex of this lode is wholly within the Drum Lummon and Marble Heart claims. Here an issue is presented, and a material one, and must be determined by evidence, and is not a matter of law.

The plaintiff presents the point for consideration that the allegations of defendants in their answer show that the Hopeful claim has no parallel end lines. The answer of defendants does show that their claim is in the form of an isosceles triangle. A triangle has but three sides, and no two of these can be parallel to each other. The question is here presented of the right of the defendants to follow on the dip of their lead into the Marble Heart claim through its side lines. This point was settled in the case of the *Iron Silver Min. Co. v. Elgin Min. & S. Co.*, 118 U. S. 208, 6 Sup. Ct. Rep. 1177. In that case the United States supreme court uses this language:

"Under the act of 1866, [14 St. 251,] parallelism in the end lines of a surface location was not required; but, where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines, and extended in their own direction; that is, between parallel vertical planes. It can embrace no other."

This language is decisive of the defendants' right to follow their vein outside of their side lines. Having no parallel end lines, they cannot do it. The defendants urge that they located the Hopeful claim in such a way as to have parallel end lines. There is nothing in the pleadings to show this, and, if there was, I do not think they could maintain this position. According to the statement made by counsel, it appears the defendants did claim a piece of ground which had parallel end lines when they made their location; but it further appears that they set their stakes upon the premises of plaintiff, and claimed some of its ground. When compelled to relinquish what they had claimed, which belonged to plaintiff, they had no north end line, and their claim assumed the form of an isosceles triangle. The defendants could locate only what was subject to location, no matter what they claimed. It was decided in *Belk v. Meagher*, 104 U. S. 279-284, that a location upon premises belonging to another person gave no rights whatever. It was only when a location was made upon the public domain that rights were acquired. But does the fact that defendants cannot follow the lode out of the boundaries of their claim on its dip entitle the plaintiff to a judgment against them for so doing? Before the plaintiff would be entitled to a judgment, it must show that it is the owner of the vein upon which defendants entered its ground. The plaintiff received a grant from the United States to all lodes the top or apex of which was within the limits of their mining claim. It did not receive a grant to any lode which had its apex or top outside of its claims. Most, if not all, patents for lode mining claims have this clause, which specifies the conditions and stipulations under which the grant is made, namely:



"*Second.* That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit."

This shows what construction has been placed upon that portion of the congressional mineral act by the land department of the United States. The interpretation placed upon a statute by the officers who have to act thereunder, and their practice thereunder for many years, is entitled to great weight in its interpretation. *U. S. v. Moore*, 95 U. S. 760. The United States is the proprietor of all veins or lodes whose apex or top is not within the limits of any grant it has made, and this clause reserves its rights, and these rights it may grant to any citizen, or to any one who has declared his intention to become such. In the case of *Mining Co. v. Cheesman*, 116 U. S. 533, 6 Sup. Ct. Rep. 481, Justice MILLER, speaking for the United State supreme court, after quoting section 2322 of the United States Revised Statutes, says:

"It is obvious that the vein, lode, or ledge of which the locator may have 'the exclusive right of possession and enjoyment' is one whose apex is found inside of his surface lines, extended vertically, and this right follows such vein, though in extending downward it may depart from a perpendicular, and extend laterally outside of the vertical lines of such surface location."

Had the defendants so located the Hopeful claim that it would have had parallel end lines, there can be no doubt but they would have been entitled to follow any vein, which may have its apex within its limits, and which passed through both end lines in its strike, on its dip into the Marble Heart claim. If the plaintiff would be entitled to veins or lodes whose apex is outside of the lines of their claims which enter the same on their dip, and which have not been granted by the United States to any one else, what is the extent of their right to such vein or lode? Suppose it should pass in its dip through the Marble Heart claim into adjoining ground, could plaintiff follow it beyond its lines? It is granted the right to follow beyond its lines only such veins or lodes as have their apex within the boundaries of its premises. It was urged that the plaintiff might be considered to have a grant of that portion of the vein found within the lines of its premises until the United States granted it to some one else. If the United States granted it this lode, there is no law for revoking that grant, and granting the lode or vein to another party. Such a construction of the statute would make it inconsistent with any reasonable intention on the part of congress.

The plaintiff insists that the rule of the common law that whoever owns the surface is entitled to all beneath the same should apply to a case such as this. But this doctrine is not fully applicable to lode mining claims, and cannot be invoked in this case at all. In this view I am supported by the opinion of Justice BEATTY in the case of *Bullion Min. Co. v. Crævus Gold & Silver Min. Co.*, 5 Mng. Rep. 254. In this he says:

"The doctrine of the common law, that he who has a right to the surface of any portion of the earth has also the right to all beneath and above that

surface, has but a limited application to the rights of miners and others using the public lands of this state. Necessity has compelled a great modification of that doctrine. The departure from those old and established doctrines of the law will doubtless lead to many complications. To adhere to the common-law rules upon this subject is simply impossible."

From these considerations it would appear evident that plaintiff received no grant of any lode or vein whose apex is within the surface lines of the Hopeful claim. Notwithstanding this, it is urged that, as the defendants may acquire no title to any portion of such lode as lies within the limits of the Marble Heart claim, plaintiff has a better right to the same than defendants, because such part of the vein or lode is within the lines of their claim. In the case of *Reynolds v. Mining Co.*, 116 U. S. 687, 6 Sup. Ct. Rep. 601, it was claimed that, because a vein of ore had been found by defendants (plaintiffs in error in supreme court) within the lines of plaintiff's placer claim, and which defendants had acquired no title to from the government of the United States, plaintiff was entitled to the same, although such vein was known to exist by the grantors of plaintiff at the time of applying for the patent for this placer claim. The plaintiff claimed that the defendants were mere intruders and strangers, and that they were in possession of the premises. But the supreme court said that the vein, if known to exist at time of application for a patent, was not granted to plaintiff's grantors, but excluded from their patent; and that, although defendants did not connect themselves with any government grant, the plaintiff had no right to eject them from this lode. In this case the court below refused to give, at the prayer of the defendants, this instruction:

"If the vein is not conveyed to plaintiff by the placer patent under which they claim, then it makes no difference whether defendants have any title or not; the plaintiff cannot recover on the weakness of defendants' title."

The supreme court held this was error. It would seem that such a view of the law would meet the case now under consideration. If the plaintiff received no conveyance of that portion of the Drum Lummon lode which has its apex in the Hopeful claim, then it makes no difference whether defendants have any title or not to the same, the plaintiff cannot recover on the weakness of defendants' title. I have shown that the plaintiff received no grant for any lode whose apex is outside of their surface lines; that that was reserved to be granted to some one who should properly locate a piece of ground embracing this apex, whose end lines should be parallel. I do not conceive that there is any conflict between the doctrine here expressed and that set forth in *Cheesman v. Shreve*, 37 Fed. Rep. 36. The presumption may be that he who enters within the lines of another's mining claim on the surface or beneath the same is a trespasser; but where, as in this case, the fact is alleged that the defendants entered upon the Marble Heart claim by following down on its dip a vein or lode whose top or apex was without the limits of plaintiff's premises, a case is stated that shows that defendants were not trespassers upon plaintiff's premises; that they were following premises that did not belong to plaintiff.

The questions here raised being presented on a motion for a judgment on the pleadings for the purposes of the motion, the court must consider every fact set forth in the answer which is well pleaded as true. The result I have reached under the facts as presented by the pleadings is that, while the defendants cannot enjoin the plaintiff from working upon the lode or vein in dispute so far as the same lies wholly within the side lines of plaintiff's premises, the plaintiff cannot enjoin defendants from working upon such portions of that vein as has its apex within the lines of the Hopeful claim, until it shows in some way that it is the owner of, or entitled to the possession of, the same. If it should be shown by the evidence that the vein in dispute does not have its apex outside of plaintiff's premises, then there should be no dispute, but plaintiff should recover. I have considered this case upon the hypothesis that the facts set forth in the answer are substantially true. I am fully aware that the position taken in this case leaves a portion of a vein or lode in such a condition that it cannot be taken up by location, under the mineral act of the United States; but this portion of the vein cannot be said to belong to no one. It belongs to the government of the United States, and, by appropriate legislation, it can provide for the sale of the same.

There is no question presented upon the pleadings as to the appropriation of any portion of this vein or lode by taking actual possession of the same. I should not dispute but that an actual possession of portions of this vein or lode will give a right to the same as against an intruder, —a stranger,—that is, one who could not show a prior actual possession or a grant from the United States to the same.

The motion for judgment on the pleadings is overruled.

#### ON THE MERITS.

KNOWLES, J. This case has been divested of much of the difficulty presented to the mind of the court from a consideration of the pleadings. It did seem that the legal title to a portion of the Drum Lummon lode might be so involved as to require that the same should be settled in an action at law. As the case is presented by the evidence, no conflict as to title appears. It is admitted that the plaintiff owns the Drum Lummon lode claim and the Marble Heart lode claim, and that the defendants own the Hopeful lode claim. That the Drum Lummon lode or vein passed out of that claim into the Hopeful claim, and runs across the same in a southerly direction about 66 feet, when it enters the Marble Heart claim. The plaintiff has dug and has an undisputed title to a tunnel called the "Cruse Tunnel," which runs along the aforesaid vein or lode, and across the Drum Lummon lode claim, into the Marble Heart claim. That plaintiff is or was in the actual possession of this tunnel. That it is necessary to the working and mining of said lode or vein in the Marble Heart claim. That by means of this tunnel plaintiff is in the actual possession of a portion of the aforesaid vein or lode, which has its top or apex in defendants' claim. It also appears that defendants are extending an incline which they started on the apex of the aforesaid lode or vein in their own ground, and were and still are threatening to extend

the same down along said vein, within the side lines of the Marble Heart claim, in such a direction as to cut the aforesaid Cruse tunnel at a point where the same is wholly within that portion of the Drum Lummon lode or vein owned wholly by plaintiff. That in their operations they have already loosened the rock in the roof of said tunnel at the point where said incline, if extended, would enter the same. Although the defendants have 66 feet of the apex of the said lode or vein, owing to the fact that they located their claim in such a manner as to have no parallel end lines thereto, they have no legal right to follow their vein or lode beyond their side lines; never having received a grant to that portion of said lode beyond these, although owning the apex. It sufficiently appears from the evidence, if defendants are permitted to extend their incline it will wholly destroy the said Cruse tunnel for the use to which plaintiff is putting the same. The defendants do not deny that it was their purpose to extend this incline into and through this tunnel, and into the Drum Lummon vein beyond, in their search for ore; and the evidence shows that when extended beyond this tunnel, the incline will be wholly within that portion of the said vein or lode owned by plaintiff. It is true that the evidence shows that plaintiff might dig another tunnel around this incline at a cost of about \$1,000. This would be in part a new tunnel, and would be on a curve. A curved line is not as short as a straight one, and cars run upon a curved track encounter greater friction than on a straight one. The plaintiff, if compelled to abandon its old line of tunnel, would also be forced to abandon for some distance its possession of a portion of the said vein or lode which has its apex in defendants' premises. The defendants, in extending their incline beyond the tunnel, would be within the undisputed premises of plaintiff, and would be compelled in their workings to remove vein matter, and perhaps ore, from plaintiff's premises, concerning the title to which there is no dispute in this action. The defendants, as to this tunnel and the vein matter and ore beyond the same, come as strangers,—trespassers. They are clothed with no right whatever to destroy plaintiff's tunnel, or to disturb its possession of any portion of said vein along the line of said tunnel. If the defendants had any legal right to explore the said vein or lode beyond said tunnel, a plea for an accommodation in this matter would come with great force. But no ground exists for such plea. It would seem that no action for damages would afford adequate relief under such circumstances. The remedy for the wrongs threatened can be awarded only in a court of equity.

For these reasons, I think the plaintiff is entitled to the relief asked. It is therefore ordered that an injunction issue restraining and enjoining the defendants from extending their incline so as to cut the tunnel of plaintiff.

## WHITMAN v. HUBBELL.

*Circuit Court, S. D. New York. March, 1887.)***MUNICIPAL CORPORATIONS—AWNINGS—INJUNCTION.**

The city council of New York being authorized by Laws N. Y. 1882, c. 410, (Consolidation Act,) § 86, subd. 8, "to regulate the use of the streets for" awnings, a motion to restrain the maintenance of an awning *pendente lite* will not be granted in an action to compel the removal of the awning.

In Equity. Motion for injunction *pendente lite*.

Action by Nathaniel Whitman against W. L. Hubbell, as treasurer of the Adams Express Company, to compel the removal of an awning, on the ground that it interfered with the view of plaintiff's signs. Laws N. Y. 1882, c. 410, (Consolidation Act,) § 86, subd. 8, provides that the city council of New York shall have power "to regulate the use of the streets for signs, sign-posts, awnings," etc.

*Ira W. Warren*, for plaintiff.

*Seward, Da Costa & Guthrie*, for defendant.

BROWN, J. Under the Consolidation Act, § 86, subd. 8, the common council have apparently authority from the legislature to authorize awnings. The alleged want of constitutional power of the legislature to confer this authority is too doubtful a question to be determined upon a preliminary motion of this kind. If within 10 days the awning in question is made to conform strictly to the municipal regulations, the motion should, on the above grounds, be denied, without prejudice, however, to the consideration of the whole subject upon the trial of the cause. Ordered accordingly.

SEYMOUR *et al.* v. SLIDE & SPUR GOLD MINES, Limited.*(Circuit Court, D. Colorado. June 17, 1890.)***1. VENDOR AND VENDEE—CONTRACT—WAIVER OF VENDOR'S LIEN.**

An agreement between vendor and vendee, that, on the payment of a certain sum, the title to the property sold will be registered "free from all charges and incumbrances," is not a waiver by the vendor of his lien for the balance of the purchase money. Such agreement relates to the state of the title at that time, and not to anything growing out of the sale itself.

**2. SAME.**

The facts that a vendor withholds the deed, and afterwards retains possession of the property, and has stock of the corporation to whom he sells the property pledged to secure the purchase money, are not of themselves sufficient to constitute a waiver of his vendor's lien.

**3. SAME—ESTOPPEL.**

A vendee who accepts title and makes part payment, according to the terms of an agreement between the vendor and the broker through whom the sale is made, is estopped to afterwards deny the broker's authority to make the agreement.

In Equity. Bill to enforce vendor's lien.

*Teller & Orahood*, for complainants.  
*L. S. Dixon*, for defendant.

HALLETT, J. In 1886 complainants owned a mine in Boulder county, which they desired to sell in England, and they employed John Haldeman, of London, as a broker to make the sale. Haldeman conceived the idea of organizing a corporation to purchase the property, and procured the organization of respondent under the limited liability companies acts of Great Britain for that purpose, apparently with a view to keep the sellers and buyers apart. Haldeman proposed to take the title of the mine in his own name, and convey it to the corporation which should be organized, and thus become a purchaser from complainants, and a grantor to the corporation. Complainants were to sell for \$750,000, of which one-half was to be paid in cash, and one-half in stock of the corporation. The first deed to the property was made to Haldeman, and placed in escrow with Wells, Fargo & Company, of London and the United States, to be delivered on payment of the cash part of the consideration. Respondent was organized in the early part of the year 1887, but nothing of consequence was done towards completing the sale until August 18th of that year, when an agreement was entered into between J. Fenton Seymour, acting for complainants and Haldeman, to the effect that, upon payment of £10,000 in addition to £12,500 paid before that time, Seymour should "register the titles" "free from all charges and incumbrances" in Boulder county; and, furthermore, that Seymour should cause the mine to be worked "to its full capacity," and that the proceeds of the mine should amount to certain sums stated in the agreement, of which the company should have notice by cable. The agreement then proceeds as follows:

"The said J. Fenton Seymour hereby undertakes and agrees to take the control of the management of the said property until the payments hereinafter mentioned are completed, and it is understood and agreed that he shall retain such control until the said payments are completed. The said John Haldeman agrees that 375,000 shares, of one pound each, in the above company, shall be transferred to Mr. Clarence Preston Elder as trustee, and deposited with Messrs. Wells, Fargo & Company in London, to the intent that the said shares shall be held as security for the due performance of the following conditions, viz.: *First*, the payment of 10,000 pounds in addition to the above mentioned 22,500 pounds within three days after the receipt of the third successive weekly return from the mine as hereinbefore mentioned; and, *second*, the balance of 45,000 pounds at the expiration of ten days after the receipt of eight successive weekly returns of the nature and value above specified. Upon the completion of the above-mentioned payments, the said J. Fenton Seymour hereby undertakes and agrees to release the above-mentioned 375,000 shares, less 77,500 to which he is entitled, and also less the number of shares, with the consent and under the supervision of the aforesaid Clarence Preston Elder, acting for the said J. Fenton Seymour. In case the weekly returns cabled from the mine shall from any cause fall below the sum of two hundred pounds sterling per week, then, in that case, such returns shall not count, but the time for paying the second ten thousand pounds and the balance of the forty-five thousand pounds shall be extended *pro rata*; but should the successive weekly returns amount to two hundred pounds sterling per week, with a

moderate increase weekly, as hereinbefore mentioned, and the said John Haldeman shall make default in the payment of the balance of the forty-five thousand pounds, then, in that case, the said J. Fenton Seymour shall have the right to forfeit the amounts already paid, and to claim the above-mentioned 375,000 shares."

There is some dispute as to the result of work carried on by Seymour in the mine under this agreement, complainants claiming that returns were made as required by the agreement, and respondent claiming that the mine fell short of the amount specified in the agreement; but this is not material. The £10,000 first mentioned in the agreement were paid, and a deed from complainants to the company for the property was placed on record in Boulder county. This deed, it will be observed, was substituted for that which was first made out to Haldeman, and was then in escrow with Wells, Fargo & Company; and the parties say that this was done for convenience, and to save the necessity of recording two deeds,—one to Haldeman, and another from Haldeman to the company. At all events, the company obtained title directly from complainants. Some small payments were made on the further sum of £55,000, which by the agreement was to be paid to complainants within two or three months thereafter. Nothing further was done towards completing the sale until October 5, 1888, when a proposition in writing was made by J. Fenton Seymour as agent for complainants to certain persons who had become, or were about to become, stockholders in the company, as follows:

"*First.* In payment of thirty-five hundred pounds to Wells, Fargo & Company, we agree to start the mine at work in name of company. Said sum to credit of Col. Seymour. *Second.* Company to send cashier and engineer if they think fit, and Colonel Seymour to be resident manager and director for the period of one year. *Third.* All proceeds to be transmitted to company bankers. *Fourth.* Mr. Elder to deliver 75,000 shares to the Scotch subscribers, and forty-five thousand to Mr. Rust on payment of said sum. *Fifth.* The balance of shares to remain in Mr. Elder's hands as trustee until a final settlement can be made inside of three months after acceptance of this proposition. *Sixth.* Colonel Wilson, or whoever pays the thirty-five hundred pounds, to receive fifteen thousand shares from Mr. Elder on the final settlement, not later than three months, and meantime receive a legal obligation from Mr. Elder as trustee. *Seventh.* On resignation of Mr. Elder as a director, Mr. Allen to be elected. *Eighth.* Thirty-five hundred pounds to be paid so soon as the company can register the transfer of the 75,000 shares."

The £3,500 mentioned in this proposition were paid to complainants, and accepted by them, on the 15th day of December, 1888; and it is sufficiently shown that Seymour thereafter held possession of the property for the company. An agreement made by Haldeman and one H. E. Gilbert, who, prior to the organization of the company, seems to have been set up as its representative, of date May 16, 1887, and another agreement of date September 10, 1887, between the company, Haldeman, and Gilbert, sufficiently show that the 375,000 shares deposited with Wells, Fargo & Company, and by the agreement of August 18, 1887, transferred to Elder as trustee, were given to Haldeman in pay-

ment for the property, and a principal point in controversy between complainants and respondent is whether they were also accepted by respondents in the same way. It is clear enough, however, that this is not the effect of the agreement of August 18, 1887, for by the terms of that instrument Elder was to hold the shares "to the intent that the said shares should be held as security for the due performance of the following conditions," and then follow the conditions for the payment of the £10,000 and the £45,000; and the final clause which gives Seymour the right to forfeit the amount paid, and to claim the shares, is only an option in case of default, which complainants were in no way bound to accept.

It is said, however, that the corporation was not a party to this agreement, and that Haldeman was not its agent in making it. Having accepted title according to its terms, and paid some part of the money mentioned in the agreement, the corporation is not now in a position to deny its authority, and the agreement must be regarded as having been made by the corporation or in its behalf, or, at all events, as having been ratified by it. It is also urged that complainants waived their right to a vendor's lien upon sale of the property by taking security for the purchase money,—first, in withholding the deed; afterwards, in retaining possession; and again, by the pledge of shares in the hands of Elder as trustee; and it must be conceded that all these things were done by complainant with a view to secure the purchase money. When the matter was first presented, I was of the opinion that by these acts complainants had waived their lien, and so stated to counsel; but, upon looking into the authorities, I have reached a different conclusion. As stated by respondent's counsel, although resting upon the contract of sale, the lien is quite independent of it, being implied from the contract, rather than expressed in its terms. Where there is no waiver of lien, express or implied, it will be recognized and enforced, and taking security for the purchase money is only presumptive evidence of waiver. 2 Jones, Liens, § 1090. In all that was done by complainants throughout the whole negotiation there is no satisfactory evidence of intention to abandon the property as security for the purchase money. Certainly, in withholding the deed and the possession, they manifested the strongest disposition to hold onto the property until the money should be paid; and, as to the shares of stock, they assumed only a right of possession until the purchase money should be paid. Apparently the stock was to be sold by Haldeman, or by some one connected with the company, and complainants were not bound to do anything in that way. They merely required that the stock should be held by a trustee, subject to sale by Haldeman, until the purchase money should be paid. In this way, also, they were in a sense holding onto the property as security for the purchase money, in so far as the stock represented the property. In *Cordova v. Hood*, 17 Wall. 1, it is held that the matter of waiver is to be determined upon all the circumstances of the case; and, if nothing appears to show it affirmatively, the lien may be recognized and enforced.

I find nothing in these negotiations to support the conclusion that de-



fendants intended to abandon the property as security for the purchase money. As a further defense, respondent contends that the lien was waived by that clause of the agreement of August 18, 1887, by which the title to the mine was to be registered "free from all charges and incumbrances;" complainants thereby agreeing to give the company a clear title. This is undoubtedly a correct construction as to antecedent transactions, but it is not to be taken to refer to the negotiation then pending. An agreement to convey without incumbrance means only that the title shall be clear at the date of the agreement. Whatever is incorporated into the agreement, or grows out of it, is not affected by such an obligation. It has never been understood that a vendor's lien is waived by covenants of warranty inserted in the deed of conveyance; and so in this article complainants must be understood as saying that the title which would be given to the company by their deed was free from incumbrance. If the contract had provided for security by mortgage or trust-deed, it would be absurd to say that by the clause under consideration such security would be waived; and this clause has no relation whatever to the vendor's lien.

Further on in the same instrument provision is made for the payment of £55,000 of the purchase money, and so the article itself gives notice of the fact that a large part of the purchase money was still due. Upon the face of the instrument, it cannot be assumed that the premises were free and clear from incumbrance in respect to the purchase money. Referring to the same clause, respondent maintains that complainants are estopped of their lien from having participated in the sale of shares of stock of the company. It is urged that having agreed to invest the company with a clear title to the mine, and having sold shares of the company's stock upon that representation, they shall not be permitted to take the company's property, and thus destroy the value of the shares so sold. As already stated, the stock was sold by Haldeman or by the company; but, if the stock had been sold by complainants, there was in fact no representation as to the vendor's lien. As already explained, the agreement to convey without incumbrance relates to the state of the title at that time, and not to anything growing out of the sale itself. Mr. Justice Story says, (2 Eq. Jur. § 1224:)

"Generally speaking, the lien of the vendor exists, and the burden of proof is on the purchaser to establish that in the particular case it has been intentionally displaced or waived by consent of the parties. If, under all the circumstances, it remains in doubt, then the lien attaches."

There is much in the record, to which the learned and elaborate arguments of counsel have been addressed, which somewhat tends to show an intention on the part of complainants to waive their lien on the premises conveyed; but, in my judgment, it falls short of establishing the fact, and therefore I am constrained to enforce a lien for the purchase money. This, of course, excludes the part which was to be paid in stock of the company, and it has no reference to expenditures of complainant on the property since the conveyance. The bill prays for these expenditures, but they were not pressed in argument, and I see no rea-

son for allowing them. Probably counsel will be able to agree as to the amount of unpaid purchase money, and if they cannot do so it may be necessary to refer the cause for the purpose of ascertaining the amount.

PEOPLE *ex rel.* VAN DYKE *v.* COLORADO CENT. R. Co. *et al.*

(Circuit Court, D. Colorado. June 27, 1890.)

1. FEDERAL COURT—JURISDICTION—REMOVED CASE—MANDAMUS.

Where a petition for *mandamus* of which a state court has jurisdiction is removed to the federal court, the latter court will have jurisdiction of the suit, though it would be beyond its jurisdiction if originally brought therein.

2. SAME—TERRITORIAL LIMITS.

In the absence of express authority by act of congress, a federal court has no jurisdiction to compel the operation of a railroad outside of the state in which the court sits.

3. MANDAMUS—PLEADING.

Where a private person petitions for a *mandamus* "on behalf of the people of the state," he must show in his petition and in the alternative writ that he is a citizen of the state, and that his interests as such citizen are injuriously affected by the acts complained of.

4. RAILROAD COMPANIES—REGULATION—MANDAMUS—PLEADING.

An allegation in the alternative writ that the defendant ran and operated a certain line of railroad, and that said defendant was a corporation of the state in which the suit is brought, without showing when or for what purpose it was chartered, or what railroad, if any, it built, or was authorized to build, is not sufficient to show that the defendant was under any legal obligation to operate said railroad.

5. SAME—ILLEGAL LEASE.

The lessee of a railroad under a lease which all parties admit to be illegal, cannot be compelled by *mandamus* to operate such road.

At Law. On petition for *mandamus*.

On the 28th day of August, 1889, there was filed in the district court of Larimer county, in this state, a petition, the material parts of which are as follows:

"Your petitioner, Isaac N. Van Dyke, on behalf of the people of the state of Colorado, respectfully represents unto your honor that he is informed and believes that heretofore, to-wit, on the 12th day of May, A. D. 1884, the Colorado Central Railroad Company was a corporation of the state aforesaid; that said railroad extended through and from the city of Fort Collins to the northern line of said state, and from said northern line of said state through and to the city of Cheyenne, in the territory of Wyoming, and was then being run and operated under one management from said city of Fort Collins to said city of Cheyenne, aforesaid, and was by its being run and operated of great financial yearly value to the plaintiff, the people of said state, which was then, and has been hitherto, and is now, well known to the defendants hereto."

The petition then alleges that the company mortgaged its road to the defendants Jay Gould and Frederick L. Ames; states that, about the 20th of February, 1879, the Colorado Central Company leased its railroad to the defendant the Union Pacific Railroad Company for the term of 50 years, and sets out the terms of the lease, and avers "that the leasing of the said Colorado Central Railroad to the Union Pacific Railroad Company was done at the instance of Jay Gould and Frederick L. Ames; that

when accomplished it was the selling and leasing of a competing line, and done in violation of the statute laws of the state of Colorado." It is averred that for a period of "five years last past" the defendants have failed and refused to equip, operate, and run that part of the Colorado Central Railroad extending from Fort Collins to the northern line of the state of Colorado, and from thence to the city of Cheyenne, in the territory of Wyoming, and that, by reason of the failure to operate said line of road, "the people are compelled, when they wish to travel to Cheyenne, to go upon and use another line of railroad operated by the Union Pacific Railroad, making the distance much longer, with loss of time, change of trains, and other inconveniences too numerous to enumerate." It is alleged the people have been damaged by the neglect and refusal to operate the line of road mentioned in the sum of \$500,000, for which a judgment is asked; and the petition concludes with a prayer that the defendant may, by writ of *mandamus*, be required and compelled to put said line of road in repair and operation, and to operate the same.

On the petition of the defendant the Union Pacific Railroad Company, a corporation of the United States, the cause was removed into this court on the authority of *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. Rep. 1113. An alternative writ of *mandamus*, substantially in the terms of the petition, issued out of this court. The respondents filed a general demurrer and answer to the alternative writ.

Among other defenses, the following are set up in the answer:

"That the relator in this case has no right or authority whatever to make or file the petition herein, or to maintain this action. That this action purports to relate to a line of railroad from Fort Collins, in the state of Colorado, to Cheyenne, in the territory of Wyoming, and that this court has no jurisdiction over the subject-matter stated in the petition and writ herein. Admit that there may at one time have been a lease made by the Colorado Central Railroad Company to the Union Pacific Railroad Company, but deny that it is as stated in said petition and writ; and allege that, if there ever was any such lease, that the same was never in effect or operative on said companies; and further allege that the said the Colorado Central Railroad Company had no right or authority to lease, and the said the Union Pacific Railroad Company had no right to take a lease of, said premises, and that, as a matter of fact, it never did take the same; and that such lease, if any there is or was, is not now, and never has been, in force or effect. That defendants are not, neither is either of them, under any obligation whatever to construct, maintain, or operate said railroad under their charter or charters or otherwise. That there is no necessity whatever for the repairing, maintaining, and operating of said railroad described in said petition and writ. That the people of Fort Collins and vicinity have direct and adequate railway connections with said Cheyenne by railroad constructed, operated, and maintained between Fort Collins and said Cheyenne by way of Greeley, and thence directly to Cheyenne, and that they have not been damaged in any way or manner whatsoever. That said railroad between said Fort Collins and Cheyenne runs through a very thinly settled country, and there are very few settlers along the line of said railroad, and very little local travel, and that the same could not, when operated, and could not now, if repaired, maintained, and operated, be made to pay the running expenses thereof; and this is especially true from the fact that all of the business is now done without any inconvenience whatever over and by way of the line of railroad above described."

Testimony has been taken from which it appears that the line of road from Fort Collins to Cheyenne was operated until the year 1882, when trains were discontinued, and have not since been run; that the country between Fort Collins and Cheyenne is sparsely settled, and that the road between these points could not be made to pay running expenses; that the citizens of Fort Collins and vicinity can reach Cheyenne by rail via the Greeley, Salt Lake & Pacific and Denver Pacific Railroads,—the distance by these roads from Fort Collins to Cheyenne being 79 miles, and by the line of the Colorado Central, as formerly run, 48.1 miles. The general direction of the Denver Pacific and the Colorado Central between Fort Collins and Cheyenne is the same, but to reach the Denver Pacific from Fort Collins passengers have to pass over the Greeley, Salt Lake & Pacific Railroad, a distance of 24 miles, in a south-easterly direction, to Greeley.

*Isaac N. Van Dyke*, for the relator.

*Teller & Orahood*, for respondents.

CALDWELL, J., (*after stating the facts as above.*) The writ of *mandamus* is no longer a prerogative writ, but it is now regarded as in the nature of an action by the relator against the respondent for the enforcement of a legal right or duty which cannot be fully or adequately enforced in any other mode. It is used only to compel action and enforce the performance of a pre-existing duty. One who invokes its powers must show a clear legal right to have the act performed, and performed in the manner prayed for, and by the person or corporation sought to be coerced. Every fact essential to the exercise of the jurisdiction must be distinctly stated, and the relator's right to the relief he seeks must be clearly made to appear by the averments of the petition and alternative writ. It must be made to appear that the writ will be effectual as a remedy, and that the court granting it has the jurisdiction to enforce compliance with its commands. Whether a writ of *mandamus* shall be issued is in every case a matter resting largely in the discretion of the court, and depends upon all the surrounding facts and circumstances. Mor. Priv. Corp. § 1134.

These well-settled principles must be applied in the decision of the case at bar. The circuit court of the United States can exercise no original jurisdiction by *mandamus*, except when the jurisdiction is specially conferred by an act of congress, as was done by the act of March 3, 1873, (17 St. 509.) *U. S. v. Railroad Co.*, 2 Dill. 527, 3 Dill. 515, and 91 U. S. 343. In those courts the writ is granted only in aid of an existing jurisdiction, but this cause was removed from a state court into this court; and it has been decided by Mr. Justice MILLER on the circuit that a petition for a *mandamus* in a state court is "a suit of a civil nature at law," within the meaning of the act of congress of March 3, 1873, and that it "is a suit within the language and purpose and policy of the removal act." *Washington Imp. Co. v. Kansas Pac. R. Co.*, 5 Dill. 489. If it is "a suit" which can be removed into this court, then this court must have jurisdiction to try it. The object of removing a case from the state to the federal court is to try it in the latter court. Any cause

that cannot be tried in the federal court after it is removed into that court for want of jurisdiction is not a removable case. The cause being one that is removable under the removal acts, this court has jurisdiction to try and determine it, although its nature is such that it could not have been brought originally in this court.

It is the settled law in this court that a private person, whose rights are affected in common with those of the public, may, without the intervention of the attorney general, move for a *mandamus* to compel a railroad company to operate its road as required by law. *Railroad Co. v. Hall*, 91 U. S. 343, 3 Dill. 515. But when a private person moves for a *mandamus*, "on behalf of the people of the state," he must show that he is one of them, and that his interests as a citizen of the state are injuriously affected by the wrong complained of. In the petition, and the alternative writ in this case, the relator's name alone is given. It is not stated that he is a citizen or inhabitant of the United States or of this state, or that he, personally, has been injured by the alleged wrong, or that he has any interest whatever in the controversy he has set on foot.

And the petition and alternative writ are equally defective in describing the defendant the Colorado Central Railroad Company and its legal obligations to the public. These defects are not helped by anything in the respondent's answer. The only allegation in the petition concerning the Colorado Central Railroad Company, upon which alone, if upon any one, rests the obligation to operate the line of road in question, is the following:

"On the 12th day of May, 1884, the Colorado Central Railroad Company was a corporation of the state aforesaid; that said railroad extended through and from the city of Fort Collins to the northern line of said state, and from said northern line of the state to and through the city of Cheyenne, in the territory of Wyoming, and was being run and operated under one management."

And the allegation in the alternative writ is briefer still, being "that on the 10th day of August, 1884, the Colorado Central Railroad Company ran and operated a line of railroad from Fort Collins, in the state of Colorado, to Cheyenne, in the territory of Wyoming."

When the company was chartered, for what purpose it was chartered, where it was authorized to build a railroad or railroads, and what railroad or railroads, if any, it did build, is not stated, and nowhere appears in this record. It is stated "that on the 12th day of May, 1884, the Colorado Central Railroad Company was a corporation of the state aforesaid;" but it is nowhere averred that that corporation ever built a foot of railroad. It is not stated, and in this proceeding cannot be implied from what is stated, that the road from Fort Collins to Cheyenne was built by the defendant, or that it was built by any company under a charter granted by this state. It is obvious that a part of it was not so built, for this state could not grant a charter to a company that would authorize it to exercise in Wyoming the powers indispensable to building a railroad in that territory, particularly the right of eminent domain. Not the slightest reference is made to any charter or other obligation or

contract that imposed on the Colorado Central Railroad Company any obligation either to build or to operate this or any other railroad in this state. During the argument, the court asked for the charter of the Colorado Central Railroad Company, and counsel for the defendant handed the court a pamphlet which it was said contained it; but, upon an inspection of that document, the court is unable, unaided by testimony not in the record, to say that this road was built under the charter. Indeed, the name given to the corporation in that charter is not the name by which the defendant is sued. The references in the petition and alternative writ to mortgages executed by the Colorado Central Railroad Company, and the claim for \$500,000 damages, and the proofs on that subject, are all irrelevant in this proceeding, and do not require further consideration.

The Union Pacific Railroad Company is made a defendant as a lessee of the road, and it is alleged that it is bound by the covenants of the lease to operate the road. But the petition of the relator avers that this "leasing, \* \* \* when accomplished, was the selling or leasing of a competing line, and done in violation of the statute laws of the state of Colorado." The defendants strike hands with the relator on this point, and aver in their answer that, if there ever was any such lease, that the same was never in effect or operative on said companies; that the Colorado Central Railroad Company had no right or authority to lease, and the Union Pacific Railroad Company had no right to take a lease of, said premises; and that, as a matter of fact, it never did take the same, and that such lease, if any there is or was, is not now, and never has been, in force or effect." As the relator and respondents are agreed that the lease was void, that ends the case as to the Union Pacific Railroad Company; for if the lease is void it imposes no obligation on the Union Pacific Railroad Company to operate the road. Where both parties to a suit agree that a given instrument is void, the court will not, on its own motion, uphold and enforce that instrument in that case. It is well settled that the railroad company cannot lease its road in the absence of express authority. Whether such authority existed in this case the court does not inquire or decide, because the parties in their pleadings have advised the court that it did not.

As a general rule, a railroad company accepting a charter from the state, under and in pursuance of which it builds its road, may be compelled to operate it after it is built, and will be compelled to do so if it has received state aid, or if its charter in terms imposes this obligation. *State v. Railroad Co.*, 29 Conn. 538; *State v. Railroad Co.*, 7 Neb. 357; *Mor. Priv. Corp.* §§ 1115, 1116.

In *Morawetz on Corporations* (section 1119) it is said:

"The duty of a railroad company to operate its road requires it merely to meet the public wants and exigencies. If there is not sufficient traffic over a particular line of road to pay for the expense of running trains, this is sufficient evidence that the public do not require it to be kept in operation, and in such case the company may cease operating the road, unless this be contrary to the express terms of its charter."

Such is the rule in Massachusetts. *Com. v. Railroad Co.*, 12 Gray, 180. In the case last cited the court says:

"Again, it is to be considered that the respondent corporation has under its charter other roads to maintain and other duties to the public to discharge, and the running of passenger trains on these branches might exhaust its resources, and render it incapable of discharging these other duties. It would seem to be therefore not only its right, but its duty, to exercise a sound discretion in the use of its capital, lest, by exhausting it upon trains that were not required by the public wants, it should deprive itself of the means of running at reasonable rates those that were. The point is made in the argument for the commonwealth that, because the respondents have for a time maintained the roads in running regular trains for freight and passengers, they are bound to continue to run until authorized by the legislature to stop. We cannot see that a beginning to run these trains rendered their continuance, at whatever cost or sacrifice, a legal duty."

But whether the cases that hold that a railroad company which has not received state aid, and which is not bound by the express terms of its charter to operate its road, may cease to operate it, if it cannot, by prudent management, be made to pay running expenses, and whether that doctrine is applicable to this case, we are not called upon to decide, and do not decide; because, giving to the relator's petition and the alternative writ the most liberal construction, they do not show that the Colorado Central Railroad Company is under any obligation to operate this road, in any state of case or upon any conditions whatever. In a word, the alternative writ is so barren of the qualities essential to a good writ, is such an imperfect skeleton, that the court, by the most liberal intendment, cannot award a peremptory writ upon it. It leaves everything to conjecture, and that is too uncertain to found a judgment upon.

In Morawetz on Private Corporations (section 1134) it is said:

"It may be doubted, therefore, whether it be a rule applicable in all cases, that the courts will compel a railroad company to operate its line of road, even though the duty of the company be clear. The difficulty of supervising unwilling agents in the performance of a continuing duty, of so complicated a nature as that of properly managing a railroad, involving the exercise of a large amount of discretion and technical skill, would in many cases prove a serious obstacle in the way of such an attempt. Whether a writ of *mandamus* shall be issued is in every case a matter resting largely in the discretion of the court, and depends upon all the surrounding facts and circumstances."

And the court, in the exercise of this discretion, will never attempt to compel the specific performance of an obligation when it is apparent that the attempt would prove unavailing. *Id.* The specific object of the relator set out in the petition, and the mandatory clause of the alternative writ, is to compel the defendant to operate a railroad from Fort Collins, Colo., to Cheyenne, Wyo. This is the *gravamen* of the relator's case. Communication with Cheyenne is what is wanted. The operation of the road to the state line would not accomplish what the relator seeks, and is not what is asked for.

It is highly improbable that this state ever granted to defendant a charter by virtue of which it built or could have built a railroad beyond the limits of the state; and it is quite certain no court sitting in this state

can, by *mandamus*, compel the construction or operation of a railroad in any other state or territory of the Union. Nor can a United States court exercise such a jurisdiction, except it be specially conferred by act of congress in respect of a federal corporation, as was done by the act of March 3, 1873. This objection alone is fatal to the relator's case in its present form. The rule on this subject is that the mandatory clause of the alternative writ should state the averments of title or right which form the inducement of the writ, and should be in conformity with the legal obligation of the respondent. If it exceeds the limits of such legal obligation, it is void. High, Extr. Rem. § 539.

Assuming everything that is stated in the alternative writ to be true, the court could not award the peremptory writ. It is not a case of merely defective pleading which can be cured by amendment. If it were so, we would direct the proper amendments to be made, although leave to amend has not been asked. The defects relate, many of them, to matters of substance, and include nearly or quite every averment essential to maintain the action; and to make amendments that would show a *prima facie* case would be to make an entirely new case. The peremptory writ is denied, and the alternative writ quashed, and the case dismissed, at the costs of the relator, without prejudice to his right to bring another action, as he may be advised.

### CUMMINS v. DISTRICT TOWNSHIP OF DOON.

(Circuit Court, N. D. Iowa, W. D. May 6, 1890.)

#### 1. SCHOOL-DISTRICTS—REFUNDING INDEBTEDNESS—ISSUE OF BONDS.

The refunding of an outstanding valid bonded indebtedness of an independent school-district, under Act 18th Gen. Assem. Iowa, c. 132, allowing any independent school-district, having a bonded indebtedness outstanding, to issue negotiable bonds for the purpose of funding the same, is not the creation of a debt, within the inhibition of Const. Iowa, art. 11, § 3, providing that "no county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation."

#### 2. SAME—INCREASE OF INDEBTEDNESS—BURDEN OF PROOF.

In an action against the district on such refunding bonds, the burden is on defendant to show that at the date of the original issuance the outstanding indebtedness of the district exceeded the constitutional limitation.

#### 3. SAME—APPLICATION OF PROCEEDS—DUTY OF PURCHASER.

The right of the owner to recover on such bonds cannot be defeated because a part of the proceeds of their sale was misapplied. The statute authorizes a sale of the bonds in open market, and a purchaser cannot be charged with the duty of seeing that the proceeds of the sale are properly applied.

At Law. Action on interest coupons.

*Davis & Gault*, for plaintiff.

*Van Wagener & McMillan* and *Kaufmann & Guernsey*, for defendant.

SHTRAS, J. This action is based upon certain interest coupons attached to a series of bonds for the sum of \$20,000, issued by the defendant, a school district in the county of Lyon, in this state. The de-



fense is that the bonds were issued without consideration, without authority of law, and in violation of section 3, art. 11, of the constitution of Iowa, which provides that no municipal or political corporation within the state shall be allowed to become indebted in a sum exceeding 5 per cent. of the assessed valuation of the taxable property within the limits of the corporation, as shown by the last preceding state and county tax-lists. By written stipulation a jury was waived, and the cause submitted to the court upon the evidence taken in writing, and after full and able arguments by counsel upon the legal questions involved. From the evidence submitted, I find the following facts:

(1) The defendant, the district township of Doon, is a school-district in Lyon county, Iowa, created under the provisions of the laws of the state of Iowa, having power to contract in its corporate name, to issue negotiable bonds, and to sue and be sued in its corporate name. As originally constituted, the district included six congressional townships of land. From time to time other districts have been set off therefrom, until it now includes only two congressional townships.

(2) That the affairs of the district township from the date of its organization have been badly managed, and, through fraud and incompetency on part of the officers of the district, indebtedness to a very large extent has been created against the district, part of which was evidenced by bonds of the district, part by judgments against the district, and part by warrants or orders drawn on the different funds.

(3) That on or about the 14th day of June, 1881, the then officers of the district determined to undertake the refunding of the outstanding bonded indebtedness of the district, and to that end the board of directors of said district, on the 9th day of July, 1881, adopted the following resolution by an unanimous vote:

"JULY 9th, 81.

"Be it hereby resolved that the resolution of the board passed June 14, 1881, at a special session, be hereby set aside and declared void, and the following resolution be passed: That as there is a large bonded judgment debt upon the district of Doon, and as the records fail to show the total amount of said bonds outstanding and unpaid, and as we deem it for the best interest of the district that all of this debt should be under one form, and that the full amount may be known, and the rate of interest lowered, be it resolved, that we issue bonds for the purpose of funding the outstanding bonded indebtedness of the district to an amount not exceeding twenty-five thousand dollars, and, in the event of a less amount being needed, then only such an amount shall be issued as shall be required to take up all said debt, said bonds to be issued as authorized by chapter 132 of the acts of the 18th General Assembly of the state of Iowa, authorizing the funding of outstanding bonded indebtedness of school-districts. That said bonds shall bear seven per cent. interest, payable semi-annually, said interest payable at bank of Rock Rapids, Iowa. Said bonds shall run for ten years, payable after five years, at the pleasure of the district. That the treasurer shall keep a record of the bonds issued, in numbers and amounts, and the name of the parties to whom sold, with their post-office address. That B. L. Richards, cashier, is hereby appointed refunding agent to negotiate said bonds. That all indebtedness of the district before mentioned shall be taken up by said Richards, only upon order from the treasurer of the district. That all of the said indebtedness

shall be paid by said Richards, and he shall render a statement itemized of said operations, and surrender vouchers, whenever demanded by the school board of this district. On motion of Clafin above motion unanimously adopted."

(4) That, in pursuance of said resolution, negotiable bonds, with interest coupons attached, were prepared and duly signed by the proper officers of the district; said bonds having printed thereon chapter 132 of the Acts of the 18th General Assembly of the state of Iowa. The following is a copy of the statute, and of the bonds and coupons:

"Be it enacted by the general assembly of the state of Iowa: Section 1. That any independent school-district or district township, now or hereafter having a bonded indebtedness outstanding, is hereby authorized to issue negotiable bonds at any rate of interest not exceeding seven per cent. per annum, payable semi-annually, for the purpose of funding said indebtedness; said bonds to be issued upon a resolution of the board of directors of said district: provided, that said resolution shall not be valid unless adopted by a two-thirds vote of said directors.

"Sec. 2. The treasurer of such district is hereby authorized to sell the bonds provided for in this act at not less than their par value, and apply the proceeds thereof to the payment of the outstanding bonded indebtedness of the district, or he may exchange such bonds for outstanding bonds, par for par; but the bonds hereby authorized shall be issued for no other purpose than the funding of outstanding bonded indebtedness. The actual cost of the engraving and printing of such bonds to be paid for out of the contingent fund of such district.

"Sec. 3. Said bonds shall run not more than ten years, and be payable at the pleasure of the district after five years from the date of their issue: provided, that, in order to stop interest on them, the treasurer shall give the owner of said bonds ninety days' written notice of the readiness of the district to pay, and the amount it desires to pay; said notice to be directed to the post-office address of the owner of the bonds: provided further, that the treasurer shall keep a record of the parties to whom he sells the bonds, and their post-office address, and notice sent to the address as shown by said record shall be sufficient.

"Sec. 4. Said bonds shall be in denominations of not less than one hundred dollars, and not more than one thousand dollars; and said bonds shall be given in the name of the independent district or district township, and signed by the president and countersigned by the secretary thereof; and the principal and interest may be made payable wherever the board of directors may by resolution determine.

"Sec. 5. When said bonds are delivered to the treasurer to be negotiated, the president shall take his receipt therefor, and the treasurer shall stand charged on his official bond with the amount of the bonds so delivered to him.

"Sec. 6. The tax for the payment of the principal and interest of said bonds shall be raised as provided in section 1823, c. 9, tit. 12. Code: provided that, if the district shall fail or neglect to so levy said tax, the board of supervisors of the county in which said district is located shall, upon application of the owner of said bonds, levy said tax.

"Sec. 7. All acts and parts of acts in conflict with this act are hereby repealed.

"Sec. 8. This act, being deemed of immediate importance, shall take effect and be in force from and after its publication in the Iowa State Register and Iowa State Leader, newspapers published at Des Moines, Iowa.

"Approved March 25, 1880."

"\$1,000.

## IOWA SCHOOL BOND.

No. 1.

"The school-district of Doon, Lyon county, Iowa, for value received, promises to pay to \_\_\_\_\_ or \_\_\_\_\_, at the Bank of Rock Rapids, Iowa, on the 11th day of July, 1891, or at any time before that date, after the expiration of five years from date of issue, after ninety days' notice, at the pleasure of said district, the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, said interest payable semi-annually on the 11th day of January and July in each year at the bank of Rock Rapids, on the presentation and surrender of the interest coupons hereto attached. This bond is executed and issued by the board of directors of said school-district in pursuance of and in accordance with chapter 132, Laws 18th Gen. Assem. Iowa, is in accordance with the laws and constitution of the state of Iowa, and in conformity with a resolution of said board of directors passed in accordance with said chapter 132, at a meeting thereof held 9th day of July, 1881. In testimony whereof the said school-district, by its board of directors, have caused this bond to be signed by the president, and attested by the secretary, this 11th day of July, 1881.

"J. SHATSWELL, President.

"LON H. WAGNER, Secretary."

"(Exhibit 7.)

"\$35.00. The treasurer of the school-district of Doon, Lyon Co., Iowa, will pay to the bearer hereof, January 11, 1886, at Bank of Rock Rapids, thirty-five dollars, for interest on bond No. 7, dated July 11, 1881, issued under provisions of chapter 132, Laws of the 18th Gen'l Assembly.

"J. SHATSWELL, President.

"L. H. WAGNER, Secretary."

(5) That B. L. Richards, named in the resolution of the directors of said district as the refunding agent to negotiate said bonds, sold on or about July 25, 1881, \$10,000 of the bonds to plaintiff, who then resided at Lincoln, Ill., and on or about August 11, 1881, sold a further amount of \$10,000 to said plaintiff, who paid in cash the par value of said bonds, or in all the sum of \$20,000 therefor. In making the purchase of said bonds the plaintiff relied upon the representations made to him by the said Richards that said bonds were a good investment; that they were issued in accordance with the provisions of the resolution of the board of directors of July 9, 1881, and in pursuance of chapter 132, Acts 18th Gen. Assem. Iowa.

(6) That by section 3, art. 11, of the constitution of Iowa, adopted in 1857, it is provided that "no county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax-lists, previous to the incurring of such indebtedness."

(7) That the supreme court of Iowa in *Winspear v. District Tp. of Holman*, 37 Iowa, 542, has decided that a district township of the nature of the defendant corporation is a political corporation, within the meaning of the constitution, and is therefore subject to the above limitation.

(8) That the total valuation of taxable property within the district township of Doon, as shown by the state and county tax-lists made out

next previous to the issuance of the bonds in question, was the sum of \$131,038. This is the valuation of the property included within the territorial limits of the district of Doon, as the same were in 1881, at the date of the issuance of the bonds and coupons sued on. The assessed valuation of the property within the district of Doon is not shown at any other date or period prior to 1880.

(9) That the evidence fails to show the exact amount of bonds issued by defendant outstanding on the 9th and 11th and 25th days of July, 1881, and on the 11th day of August, 1881. It appears, however, that there was at least \$18,000 of bonds outstanding, upon which there was due on the 11th day of July, 1881, including interest evidenced by coupons, over \$20,000.

(10) It appears that in 1873 the defendant employed one James H. Wagner to build four school-houses in the district for the sum of \$2,500 each. As built, the school-houses were not worth to exceed \$1,500. The houses were accepted, however, and warrants issued therefor. These warrants were sued upon, and judgments rendered thereon in 1873 against the district aggregating \$10,100. These judgments were bonded, as well as some other small ones rendered about the same time; the bonds therefor being issued in 1873. It is probably true that, the judgments not having been all canceled upon the records, a further issue of bonds was made upon part of them in 1880. The evidence further shows that large amounts of warrants were issued from time to time for various purposes, a portion of which, at least, was fraudulent.

(11) When the bonds of defendant were purchased by plaintiff in July and August, 1881, there were standing upon the record unsatisfied judgments against the defendant as follows:

NAME.	DATE OF JUDG'T.	AMT.	COSTS.
S. S. Bradley.....	June 25, '73	\$1,950 00	\$39 50
Chas. Schultz.....	" " "	628 29	6 00
M. Wakefield.....	May 5, '75	180 00	8 50
National S. F. Co.....	Nov. 9, '75	543 52	
Wm. Larrabee.....	Feb. 18, '79	8,270 50	5 96
Wm. Larrabee.....	" " "	1,304 26	5 95
R. M. Peile.....	Dec. 9, '79	623 80	3 75
C. E. Dickerman.....	Feb. 18, '80	423 60	5 95
J. N. Perry.....	Feb. 18, '80	1,472 78	5 75
J. F. Eggleston.....	" " "	201 40	6 45
Hersey, Bean & Brown.....	May 19, '80	500 00	6 25

(12) The evidence shows that from the creation of the district township of Doon its financial affairs have been badly managed, and that many frauds have been perpetrated by its officers, and that thereby the amount of indebtedness evidenced by its bonds and by judgments against it has been fraudulently increased. The evidence fails to show that, as against the holders of the bonded indebtedness in July and August, 1881, a successful defense could have been interposed on behalf of the defendant. The evidence fails to show whether, at the date of the issuance of any of the bonds outstanding on July 11, July 25, and August 11, 1881,

and issued prior to July 9, 1881, the amount of the indebtedness of the district exceeded 5 per cent. of the taxable valuation of the property within the district; and it does not, therefore, appear that any of the bonds outstanding when the bonds bought by plaintiff were issued were void because of the constitutional limitation contained in section 3, art. 11, of the constitution of Iowa.

(13) The cash paid by plaintiff for the bonds sold to him in July and August, 1881, to-wit, \$20,000, was received by B. L. Richards, the financial agent named in the resolution of the board of July 9, 1881, and also the further sum of \$5,000, realized from a sale made December 20, 1881, of \$5,000 of bonds to the Society for Savings of Cleveland, Ohio. Richards, on the 6th day of March, 1882, made a report to the board of directors of defendant, which was accepted and approved, showing that he had paid out the sum of \$19,174 in taking up bonds, coupons, judgments, warrants, and orders drawn on the teachers,' contingent, and school-house funds. The balance in his hands, of \$6,485.79, was paid to the treasurer of the defendant.

(14) That, for four years after the issuance of said bonds bought by plaintiff, the district paid the semi-annual interest coming due thereon, thus retiring eight of the coupons attached to each bond. That the defendant failed to pay the coupons coming due January 11, 1886, July 11, 1886, January 11, 1887, July 11, 1887, January 11, 1888, July 11, 1888, January 11, 1889, and July 11, 1889, upon each of said bonds, being eight coupons on each bond, or 160 in all; each coupon calling for \$35. That said coupons are those declared on in this action, were due when this suit was brought, and that there is now due thereon, including interest at 6 per cent. up to the 5th day of May, 1890, the sum of \$6,462.40.

What judgment should be pronounced by the court upon the foregoing facts? The production of the coupons forming part of the bonds issued by the defendant, they being due and unpaid, makes out a *prima facie* case for plaintiff. The evidence shows that the bonds were issued by the defendant, that the plaintiff paid full value therefor, and there is nothing to connect the plaintiff with any alleged fraud in the issuance thereof, so that the defense of want of consideration is not sustained.

The main reliance of the defendant is upon the constitutional provision limiting the indebtedness of municipal and political corporations to 5 per cent. upon the taxable valuation of the property within the corporate limits. Under the rulings of the supreme court of the United States, the corporation is not estopped, by the recitals in the bond, from showing that the issuance of the bonds in fact increased the corporate indebtedness beyond the constitutional limit. *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654. The question is whether the defendant has in fact made out the defense relied upon. The bonds purchased by plaintiff were issued under the provisions of the act of the eighteenth general assembly of the state of Iowa, passed for the purpose of enabling school-

districts to refund their outstanding bonded indebtedness. If the provisions of the act were followed, the issuance of bonds under its terms would not increase the existing indebtedness of a district. For an illustration, if on the 11th day of July, 1881, there existed an enforceable bonded indebtedness against the district of Doon of \$20,000, and the same had been refunded by the issuance of \$20,000 of bonds of that date, could the latter be defeated by simply showing that the same exceeded in amount 5 per cent. of the taxable property in the district at that date? The refunding of an existing enforceable debt cannot be said to be increasing the indebtedness, and a mere change in the evidence of the debt from one bond to another, or from a judgment into a bond, is not within the constitutional inhibition. *Austin v. District Tp. of Colony*, 51 Iowa, 102; *Railroad Co. v. County of Osceola*, 45 Iowa, 168.

While the evidence shows great recklessness, lack of business management, and fraudulent practices which had doubtless greatly swollen the indebtedness of the district, it is not made to appear that a single dollar of the bonds outstanding against the district in July, 1881, could have been successfully contested in the hands of the then holders thereof. The evidence shows that the territorial extent of the district of Doon had been changed several times by the formation of other districts, and there is no evidence showing the amount of taxable property according to the tax-lists, when the bonds outstanding on July 11, 1881, were issued. It is not shown, therefore, that any of the bonds in existence on July 11, 1881, were void when issued by reason of the constitutional limitation. Assuming that the plaintiff knew all that the evidence adduced in this case now discloses, it could not be said that he knew, or should have known, that the bonds which it was proposed to refund were not enforceable against the district. True, if it had been proposed to issue bonds for the purchase of property then acquired, or for the erection of school-houses, or for any purpose other than refunding existing indebtedness, the plaintiff would have been bound to know that the amount of bonds proposed to be issued was in excess of 5 per cent. of the taxable valuation of the property at that date included within the limits of the district, and that such issue of bonds must of necessity increase the indebtedness of the district beyond the constitutional limitation. The proposition made to plaintiff, however, was, in effect, that contained in the resolution of July 9, 1881. He was informed that the bonds offered him were issued under and in accordance with the provisions of the act of the eighteenth general assembly for the purpose of refunding the bonds then outstanding against the district. The statute authorized the district to issue bonds for such refunding purposes. Having bought the bonds in good faith, and paid full value therefor under such circumstances, they are certainly valid in his hands, unless it is shown that they were invalid because the issuance thereof increased the indebtedness of the district beyond the constitutional amount. Under the issues made in the pleadings, the burden of showing this fact is upon the defendant. *Austin v. District Tp. of Colony*, 51 Iowa, 102. The plaintiff, in purchasing said bonds, had the right to assume that the directors and officials of

the district were acting in good faith; or, in the language of the supreme court of Iowa in *Railroad Co. v. County of Osceola*, 45 Iowa, 175: "There is a presumption that those charged with public trusts act honestly and in good faith. The whole theory of the law rests upon this assumption."

Recognizing the fact that the burden of showing the invalidity of the bonds was upon the defendant, the latter introduced a large amount of evidence touching the indebtedness of the district, and the manner of its creation. While, as already said, this evidence shows many frauds and much loose management in the conduct of the financial affairs of the district, it fails to show that any particular bond or series of bonds outstanding July 11, 1881, was invalid in the hands of the then holder thereof, or that when issued it increased the indebtedness of the district beyond 5 per cent. of the taxable valuation of the property included within the limits of the district as then constituted. The evidence, therefore, on the one hand, shows that on the 11th day of July, 1881, when the directors authorized the issuance of the bonds, and on the days when plaintiff bought the bonds, there was outstanding a bonded indebtedness exceeding \$20,000 in amount, and on the other, fails to show that any part of this could not be enforced against the district. Under these circumstances, it cannot be claimed that it is proven that the issuance of bonds for the purpose of refunding this existing bonded indebtedness was a violation of the constitutional limitation.

It is further urged that in fact part of the proceeds realized from the sale of the bonds was used for paying indebtedness of the district other than that evidenced by its bonds and coupons. I do not think the plaintiff was charged with the duty of seeing to the proper application of the proceeds realized from the sale of the bonds. The statute authorized the sale of the bonds in open market. It would be an impossibility to thus sell the same, if the validity of the bonds thus sold was made dependent upon the proper use of the moneys realized from the sale thereof. It could not be expected that a purchaser could be found who would buy the bonds and part with his money, if his right to recover on the bonds was to be determined by the use made thereof by the district after the money had passed into its possession, and beyond the control of the purchaser. The conclusion reached upon the facts developed in the evidence is that it is not made to appear that the bonds bought by plaintiff were void for want of consideration, nor that the same, being refunding bonds, were in violation of section 3, art. 11, of the constitution of the state of Iowa; and, it appearing that the coupons declared on were and are parts of said bonds, and that the same are due and unpaid, the plaintiff is entitled to judgment for the amount thereof, with interest.

## HARDIN v. CASS COUNTY.

(Circuit Court, W. D. Missouri, W. D. June 9, 1890.)

## 1. LIMITATION OF ACTIONS—RUNNING OF STATUTE—NONSUIT.

Where plaintiff, in an action in the federal court on county bonds, declares on fictitious bonds in addition to those held by him, merely for the purpose of giving the court jurisdiction of the amount, and takes a voluntary nonsuit, the institution of such suit, and bringing of another suit within one year, as provided by Rev. St. Mo. § 8784, does not arrest the running of the statute of limitations. The equitable construction given the statute allowing a new action after suffering a nonsuit cannot be invoked by one who knowingly practices a fraud on the jurisdiction of the court.

## 2. JURISDICTION—JUDGMENT FOR PART OF DEMAND.

After a successful plea of the statute of limitations to a part of plaintiff's claim, judgment may be rendered for the balance, though it is less than the amount necessary to give the court jurisdiction, and though the petition on its face shows that the part of the claim against which the statute was pleaded was barred at the commencement of the action; since plaintiff in bringing the suit was not bound to anticipate that defendant would plead the statute.

At Law. Action on bonds.

Karnes, Holmes & Krauthoff, for plaintiff.

W. S. Shirk and J. F. Lynn, for defendant.

PHILIPS, J. This is an action founded on certain bonds and coupons issued by the defendant county. The petition contains three counts. The first counts on eight bonds, of \$500 each, issued August 26, 1869, due six years after date. The second counts on three bonds and twenty-three coupons, two bonds for \$500 each, and one for \$250, dated July 11, 1870, due nine years after date, with interest at 10 per cent. after maturity. The answer interposes the plea of the statute of limitations. It is conceded that the statute has run against the bonds set out in the first count, and the cause of action, therefore, is barred as to them. The statute of limitations is also interposed as to the cause of action set up in the second count of the petition. It appears that the statute of limitations has run as to coupons from 6 to 20, inclusive, attached to bonds 1, 2, and 13, described in the count, and the cause of action as to said coupons is therefore barred.

The more important question arises on the third count. At the time this action was begun the two bonds numbered 25 and 26 were *prima facie* barred by the statute of limitations. To avoid this plea, the plaintiff alleges that on the 5th day of July, 1889, 13 days before the statute of limitations had completed the bar, he instituted suit in this court on said bonds 25 and 26, and on the 12th day of September, 1889, he took a voluntary nonsuit therein, and instituted the present suit January 29, 1890, within the year allowed by the state statute after such nonsuit. To this defendant makes answer that in such action begun by plaintiff on the 5th day of July, 1889, he alleges "that he was the owner and holder for value of bonds number 23 and 24, and of the bonds herein described as Nos. 25 and 26, and that said bonds remained due and unpaid, amounting in the aggregate to the sum of \$2,000, and prayed judg-



ment thereon; that at the time of the bringing of said suit the said plaintiff was not the owner of said bonds Nos. 23 and 24, nor did the said bonds 23 and 24 remain unpaid, but, to the contrary, no such bonds were ever issued by the defendant, and that bonds of that number had been issued by the defendant dated August 26, 1869, and due August 26, 1878; that judgment had then long since been rendered upon the first, in case No. 1,082, and the second in case number 942; and that the said judgment had long since been fully paid, and satisfaction of the same entered upon record, and said second bonds fully canceled. Defendant avers that said second bonds Nos. 23 and 24 were only mentioned and declared upon in plaintiff's petition for the purpose of enabling the plaintiff to perpetrate a fraud upon the jurisdiction of this court, by apparently giving the court jurisdiction as to the amount of said action; that this defendant at the September term, A. D. 1889, of this court, filed in said cause an answer stating the aforesaid facts, and that thereupon the plaintiff dismissed its said suit. The defendant avers that the bringing of said action, and the dismissal thereof as aforesaid, was not the commencement of an action, and the suffering of a nonsuit therein, within the meaning of the statute of the state of Missouri in such case made and provided." The court finds the facts thus charged by defendant are substantially true. The aggregate amount of the four bonds sued on in the first action was just \$2,000; and, in order to increase "the amount in dispute" to over \$2,000, \$100 of interest coupons attached to said bonds 25 and 26 were counted on. Waiving here any discussion of the question whether, under the act of March 3, 1887, said interest coupons could have availed to make the debt "exclusive of interest" over \$2,000, it is indisputable that, without the two bonds 23 and 24, the sum sued for was not over \$1,100.

The question, therefore, to be answered is, was such action taken by plaintiff in the first attempt such institution of a suit as was contemplated by the law-maker as sufficient to stop the running of the statute of limitations? Section 6784, Rev. St. Mo., provides that, "if any action shall have been commenced within the times respectively prescribed in this chapter, and the plaintiff therein suffer a nonsuit, \* \* \* such plaintiff may commence a new action from time to time within one year after such nonsuit suffered or such judgment arrested or reversed." A voluntary nonsuit, such as the voluntary dismissal of the action, is held by the supreme court of the state to be within the terms of this statute. It is also to be conceded to the plaintiff that authorities entitled to the greatest respect hold that a suit begun within the statutory period of limitation, in a court not having jurisdiction of the subject-matter, may be within the saving clause of the one-year provision. The leading case, perhaps, is that of *Coffin v. Cottle*, 16 Pick. 383. The plaintiff brought his action within the time limited by law against the administrator to recover a debt due from the intestate, obtained judgment, and took out an execution, which was returned *nulla bona*, and plaintiff then sued out a writ of *sci. fa.*, suggesting waste, and before judgment the defendant's letters of administration were adjudicated to be void, on the ground that

the probate judge, having an interest in the estate, was technically without jurisdiction to issue them. The plea to the *sci. fa.*, alleging the invalidity of the judgment by reason of the nullity of the first letters of administration, was sustained by the court. Within one year thereafter the action was renewed, and it was held by the court that the first action was the institution of a suit, in contemplation of the statute. This case was followed in *Caldwell v. Harding*, 1 Low. 326. There the defendant was administrator appointed by the court in Massachusetts. The plaintiff brought his action against the administrator in the circuit court of the United States in New York, which was dismissed for want of jurisdiction. Afterwards, and within the year, he renewed the action against the administrator in the United States circuit court for the district of Massachusetts. LOWELL, J., applied the doctrine in *Coffin v. Cottle* to the facts of this case, and held that the action was not barred. This was predicated of the provision of the Massachusetts statute of limitations, which provided, *inter alia*, that if an action is brought in due season, and is abated or defeated in consequence of any defect in form, etc., or of a mistake in the form of proceeding, the plaintiff may commence a new action for the same cause within one year after the determination of the original suit. In *Weathersly v. Weathersly*, 31 Miss. 662, the plaintiff filed his bill in chancery; which was afterwards dismissed by the court for want of prosecution. Afterwards, on motion, the cause was reinstated on the docket, and in the further progress a final decree was rendered in favor of the complainant. Upon appeal to the supreme court, the decree of the lower court was reversed, on the ground that the trial court had no jurisdiction of the cause at the time the decree was rendered, "inasmuch as the suit had been dismissed by the chancery court, and after the expiration of the time at which the dismissal took place all jurisdiction over the suit had ceased." Within two months after the judgment and reversal the suit was renewed. It was held that the first suit stopped the running of the statute of limitation. The court say:

"It is true that the decree rendered in behalf of the complainant was declared void because the jurisdiction of the chancery court over the cause had ceased before the decree was made; yet the decree, though void in law, was operative and effectual in form, in so much that the defendant found it necessary to resort to this court in order to have it declared a nullity. It was a valid decree in law until reversed by this court, and, being a decree of a court of competent jurisdiction, it could not have been properly set at naught until it was reversed. Its validity depended on a doubtful question of jurisdiction."

The case most relied on by defendant is that of *Railway Co. v. Manees*, 49 Ark. 248, 4 S. W. Rep. 778. The plaintiff instituted the first action before a justice of the peace to recover damages for the sum of \$125, in which he prevailed. On appeal to the supreme court the judgment was vacated, on the ground that the justice had not jurisdiction in such cases over a sum exceeding \$100. Within a year thereafter the action was re-instituted, and it was held to be within the saving provision of the statute.

No impartial eye can read any of the decisions in question without

discovering that the existence of good faith on the part of the actor in the first action instituted is the basis of the "equitable construction" given the statute. Chief Justice SHAW in *Coffin v. Cottle*, *supra*, after stating that the statute is remedial, and should have such construction as would best carry into effect the intent of the legislature, and that after a fixed time the presumption arising from the creditors remaining a certain length of time silent would be that the debt was discharged, observed: "But this presumption does not arise if the creditor resorts to *legal* diligence to recover his debt within the time limited." So LOWELL, J., in *Caldwell v. Harding*, observes: "The statute intends to guard suitors against mistakes which are not of substance, whether large or small." And again, in the *Manees Case*, 49 Ark. 248, 4 S. W. Rep. 780, the same thought was in the mind of the court. The chief justice observed:

"It cannot be said to be the policy of the state to encourage the citizen to take upon himself the task or the hazard of determining the validity of the proceedings of the courts. \* \* \* It is not to be presumed that the framers of this remedial law, the only object of which was to relieve meritorious creditors, intended to invite the debtor who had gone through all the forms of a trial of his cause in a judicial tribunal, and seen the result recorded in the form and with the apparent effect of a binding judgment or decree, afterwards to take the law in his own hands, and wholly disregard the court's proceedings."

The statute in question, as all the courts say, should be equitably construed, as its purpose is to protect honest suitors. As it is designed to accomplish the ends of justice, *ex æquo et bono*, it is to be presumed that, whenever and wherever it should be made to appear to the court administering the statute that there was no mistake of fact, no misapprehension of law, in the mind of the actor in first selecting his remedy or the forum, but that he took the course he did knowingly to evade the law and obtain an unauthorized judgment, the court would say to such a suitor: You are not within the equity of the statute. It was designed to promote justice, and not to aid fraud on jurisdiction. In *Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. Rep. 319, the first action failed simply by reason of the omission in the pleadings of the allegation of a jurisdictional fact, which fact, however, actually existed. The plaintiff was allowed to reinstitute his action within the year, as provided by the Tennessee statute. Mr. Justice Woods made the following suggestive observation:

"Defendants in error, however, contend that the bringing of a suit in a court having no jurisdiction thereof was gross negligence, and that the current of authority is against extending the terms of the statute to let in one guilty of it. Cases might be supposed, perhaps, where the want of jurisdiction in the court was so clear that the bringing of the suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute, as if an action of ejectment should be brought in a court of admiralty or a bill in equity should be filed before a justice of the peace. But the suit between these parties, which was begun December 31, 1873, is far from being such a case. There is nothing in the record to show that it was dismissed for any inherent want of jurisdiction in the court in which it was brought."

In the case at bar there was not only an "inherent want of jurisdiction in the court in which it [the suit] was brought," but the plaintiff knew it, and sought to evade the admission of the legal fact on the face of his petition by declaring on two other bonds he did not have, and which were not in existence. He was not guilty of "gross negligence," it is true; but, if in the opinion of the supreme court the benefit of the statute should be denied to a suitor guilty of inexcusable negligence, how much more so should it be denied him when it is manifest that he counted on a fictitious demand in order to give his cause a colorable standing in court, merely to get a demand below the jurisdiction of the court into judgment, as he preferred a judgment on his genuine claim from the federal rather than a state court. The whole legislation of congress respecting the jurisdiction of the United States courts, especially since 1875, indicates that its policy was and is to restrict the number and character of suits in this jurisdiction. This is made quite manifest by section 5 of the judiciary act of 1875, which provides—

"That if in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court \* \* \* for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

By the latter clause of this section, such action of the circuit court was made reviewable by the supreme court; but, as further evidencing the mind and policy of congress in this direction, by the act of March 3, 1887, this right of appeal is taken away. And the action of the supreme court on this statute indicates a determined and settled policy on its part to carry out to the very letter this legislative policy. So that no matter at what stage of the proceedings, whether the parties raise or suggest such question or not, the moment the court observes, from the record and actual facts, that the matter in litigation is not within the jurisdiction of the court, it will summarily dismiss the proceeding. *Hawley v. Fairbanks*, 108 U. S. 548, 2 Sup. Ct. Rep. 846; *Hawes v. Oakland*, 104 U. S. 459; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207; *Bernard v. Stebbins*, 109 U. S. 341, 3 Sup. Ct. Rep. 252; *Farmington v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. Rep. 807. Mr. Justice MILLER in *Hawes v. Oakland*, *supra*, observed of this statute that it "strikes a blow, by its fifth section, at improper and collusive attempts to impose upon those courts the cognizance of cases not justly belonging to them. \* \* \* It is believed that a rigid enforcement of this statute by the circuit courts would relieve them of many cases which have no proper place on the docket."

It certainly is in the legitimate line of carrying out the spirit of both statutes under consideration to leave where he has voluntarily placed himself the suitor who has sought to misuse and abuse the jurisdiction

of this court to obtain its aid in the collection of a claim not cognizable by it. With full knowledge of his rights, the plaintiff saw fit to let the statute of limitations run against his demand while he was juggling with the court and the defendant; and he ought not to expect the same court to invoke the spirit of "equitable construction" to release him from the trap he sprung on himself. This practice in bond litigations has, doubtless, been pursued by other suitors, until plaintiff regarded it but following precedent to adopt it. But it is a bad precedent, and one that can never ripen into a right by prescription. I feel constrained, therefore, to hold that the statute of limitation has also run against the cause of action stated in the third count of the petition.

Defendant insists that the "matter in dispute" involved in the second count, being the only real cause of action left to the plaintiff, is below the jurisdiction of the court, the plaintiff ought not to recover on this count, and the action should be dismissed. To this I cannot consent. In *Lee v. Watson*, 1 Wall. 337, the court say: "By matter in dispute is meant the subject of litigation, the matter for which the suit is brought, and upon which issue is joined, and in relation to which jurors are called and witnesses examined." *Prima facie*, the amount claimed in the petition is the amount in dispute, and this determines the jurisdiction in the first instance. *Id.* This governs the question of jurisdiction until it is made to appear that the real demand is less. *Hilton v. Dickinson*, 108 U. S. 166, 2 Sup. Ct. Rep. 424; *Gray v. Blanchard*, 97 U. S. 565. Although the petition may have shown on its face that the causes of action stated in the first and third counts were barred by the statute of limitations, yet, unless the defendant had seen fit to interpose the bar by appropriate plea, the plaintiff would have proceeded to judgment thereon. The plea of the statute is personal to the defendant. It might, as debtors often do, have waived the privilege. A creditor is not required to anticipate, in every case, such defense, and on the bare expectation of the plea refrain from suing. After a successful defense to one or more causes of action counted on in the petition, the jurisdiction of the court is not ousted to prevent it from proceeding to judgment for the amount found on trial to be due and owing to the plaintiff, forsooth it may be less than \$2,000. *Upton v. McLaughlin*, 105 U. S. 640. It results that the issues are found for the defendant on the first and third counts of the petition, and for the plaintiff on the second count, except as to the coupons numbered from 6 to 20, inclusive, as hereinbefore stated. Judgment accordingly.

v.42r.no.12—42.

RICE *et al.* v. EGE *et al.*

(Circuit Court, N. D. New York. June 30, 1890.)

## AMENDMENT OF PLEADINGS—LACHES.

In an action against several defendants upon a contract signed by one of them for the benefit of all, a joint answer was interposed which practically admitted the execution of the contract. Six years after the making of such answer, and after the evidence had all been taken, and some of the witnesses had died, one of the defendants asked leave to file an amended answer denying the authority of his co-defendant to execute the contract for him. *Held*, that the application came too late.

At Law. On motion by defendant Milo C. Treat for leave to amend answer or to serve a supplemental answer.

*Hamilton Ward*, for plaintiffs.

*Charles H. Brown* and *John E. Brandegee*, for defendant Treat.

COXE, J. This action was originally commenced in the supreme court of the state of New York in November, 1883, and was removed by the defendants, who are citizens of Pennsylvania, to this court in May, 1884. The summons was served personally and by publication upon the defendant Milo C. Treat. The service was completed February 20, 1884, and, no answer having been served, judgment by default was entered against all of the defendants. This default was opened on the 21st of April, 1884, upon the verified answer interposed on behalf of all the defendants, the affidavit of Charles H. Brown, who has since acted as counsel for Treat, and upon the affidavits of William Armstrong, the law partner of Brown, and Joseph A. Ege, one of the defendants. The latter made the affidavit of merits and verified the answer. Pursuant to stipulation the testimony was taken out of court, the right to objection being reserved until the trial. The taking of testimony commenced on the 24th of April, 1885, and was concluded May 18, 1886. This motion for leave to amend was not made until the cause came on for trial at the Utica term on the 31st day of March, 1890.

In order to appreciate the character of the motion a brief review of the facts is necessary. The plaintiffs, at the time in question, were co-partners under the name of the Friendship Oil Company. Prior to the 1st day of July, 1881, the parties to the suit had various transactions in leases of oil lands in Allegany county, N. Y., which they held as tenants in common. On that day a settlement was effected and the leases were divided between them. In this division the plaintiffs took the leases of the Nelson and Dodson farms, upon which oil wells had been started, and where it was expected oil would be found, but the value of the wells had not been demonstrated at the time of the settlement. The theory of the settlement was that if these wells proved productive the division of the leases was an equitable one. If they proved unproductive the defendants would have an undue advantage, they having received the Richardson lease covering property of ascertained value. To meet this contingency it was agreed that if the wells then being drilled on the

Nelson and Dodson farms proved failures the defendants would pay the plaintiffs \$1,000 to equalize the settlement. The agreement upon which the plaintiffs sue is as follows:

"This agreement, made this 1st day of July, 1881, between J. A. Ege, H. B. Huff and M. C. Treat of the first part, and the Friendship Oil Company of the second part, witnesseth: That, whereas a settlement of various matters has been made between the parties hereto, it is hereby, for value received, agreed on the part of the parties of the first part that they will, if the well now being put down on the Nelson farm in Wirt proves to be unproductive as an oil-well, or not a paying well, and the well on the Dodson farm is not, the said first parties will pay to the second parties one thousand dollars; and in case either of those wells are good the parties of the second part shall assign to the parties of the first part the M. W. Taylor lease, dated July 2, 1879, recorded in Liber 1 of Leases, page 82, in Allegany Co., N. Y. A paying well, above referred to, shall mean a well in which oil is produced in paying quantities.

[Signed] "J. A. EGE for himself, H. B. Huff and M. C. Treat.  
"THE FRIENDSHIP OIL COMPANY. By S. M. NORTON."

The complaint alleges and the plaintiffs contend that, after necessary tests, the wells on the Nelson and Dodson farms proved unproductive, and they bring this action to recover the \$1,000 agreed to be paid, in that event, by the defendants. The answer admits that in the year 1881 the defendants were interested, as individuals, with the plaintiffs in the ownership of a large number of oil leases in Allegany county, N. Y.; "that a settlement was had of their affairs on or about July 1, 1881, and a division of said leases was made between the plaintiffs and defendants." The answer further contains the allegation "that the terms of said contract, and the understanding and agreement of the parties at the time of the execution thereof, required that the plaintiffs should have given the defendants an opportunity to examine said wells, and an opportunity to convince themselves as to the unproductiveness and non-paying qualities of said wells in said contract and the plaintiffs' complaint referred to, before they became liable, if at all, to pay the said sum of \$1,000 referred to in said contract." The defendant Treat now asks that these clauses be stricken from the answer so far as they relate to him, and that an allegation be added denying the authority of the defendant Ege to execute the contract for him. He asks further that he be permitted to file a supplemental answer, sworn to March 18, 1890. This answer contains a general denial simply, except it admits that prior to July 1, 1881, the parties were owners of the oil leases as alleged in the complaint. It will be seen that the original answer, of 1884, practically admits the making of the contract by the defendants as alleged in the complaint, the defense there stated being, that the wells upon the Dodson and Nelson farms were not sufficiently tested to enable the plaintiffs to maintain their action. Upon the issue thus joined the testimony has all been taken, and the cause prepared for trial. The motion is opposed upon the ground of laches, and for the reason that since the testimony has closed several witnesses who could sustain the plaintiff upon the new issue have disappeared or are dead.

The court has not been furnished with an authority holding that an amendment of this kind is permissible after so long a lapse of time. It is entirely clear that the counsel who signed the original answer, and who have since acted for the defendant, must have been cognizant of its contents from the outset, and, even if Treat is correct in asserting that he was entirely ignorant of what had been done on his behalf until the hearing in 1886, he certainly must have had full knowledge at that time, but no reasonable excuse is given for his silence and inactivity during the four years intervening. It is too late after the proofs have all been taken, and the witnesses dispersed and dead, to change the issues upon which the case is to be tried. The rule in such cases is clearly stated in *Smith v. Babcock*, 3 Sumn. 583. Judge STORY says:

"When application is made to amend an answer in material facts, or to change essentially the grounds taken in the original answer, courts of equity are exceedingly slow and reluctant in acceding to it. To support such application, they require very cogent circumstances, and such as repel the notion of any attempt of the party to evade the justice of the case, or to set up new and ingeniously contrived defenses or subterfuges. \* \* \* And it seems to me, that, before any court of equity should allow such amended answers, it should be perfectly satisfied, that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected, or the facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put in and sworn to."

See, also, *Suydam v. Truesdale*, 6 McLean, 459; *Ruggles v. Eddy*, 11 Blatchf. 524; *Loom Co. v. Higgins*, 13 Blatchf. 349; *Medbury v. Swan*, 46 N. Y. 200; Fost. Fed. Pr. §§ 167, 168. Upon authority it would seem quite clear, therefore, that the amendment should be denied; certainly there is no precedent for granting it without the imposition of very stringent terms.

Furthermore, the plaintiffs ask, as they have an undoubted right to do, that, if the motion is granted, they be permitted to amend their complaint and take further testimony upon the new issue. Surely, it would be unfair to the defendant to require him to pay a large bill of costs, and subject him to the expense of further proceedings, unless it can be seen that the proposed amendment will inure to his advantage. Having read the entire testimony I am constrained to say that it would be unavailing. The amendment would take the question of Ege's authority from under the admission and make it an issuable one, but no amendment can remove from the record the fact that the original answer was filed, or the circumstances in which it was interposed. As evidence, these facts are well-nigh as disastrous to the defendant as though crystallized into a formal admission. The dilemma is a plain one. Let it be assumed for a moment that the defendant Treat is correct in his theory that Ege's acts were unauthorized. He swears that he was personally served with the summons. He knew—he must have known—that he was being sued on account of Ege's acts. He knew further that unless he



answered the complaint judgment would be taken by default. What then would have been his course tested by any rational standard? Surely confidence in Ege would have ceased with the commencement of this suit. There would have been an angry interview, a sharp dismissal and no further joint undertakings. Treat would have retained his own lawyer, taking good care that he was not Ege's lawyer, and would have put in a separate defense. Having been betrayed once he would have been vigilant not to place himself in a position where he could be betrayed a second time. His answer would have exposed the fraud of which he was the victim and would have denounced the conspirators. But, on the other hand, if plaintiff's version is the correct one, Treat's conduct in leaving the defense to Ege is perfectly natural and in accordance with the rules which govern the actions of men. In other words, is not Treat's conduct in intrusting the defense to Ege in direct conflict with his present position that Ege's acts in making the contract and putting in the answer were without authority from him? A party sued on a forged note does not, usually, intrust the defense to the forger. It seems incredible that the action should have been commenced, the attachment levied, Messrs. Armstrong & Brown retained to defend, the judgment *pro confesso* entered, the answer prepared at Bradford, the home of the defendant, the default opened and issue joined, without Treat's knowledge and consent. Either he was cognizant of all this, or he has no standing in court, and the action so far as he is concerned is undefended. No such inference is permissible. The fact that the management of the defense was left solely to Ege is in harmony with the theory of the plaintiffs that he was the trusted agent of Treat and Huff as to their joint interests in Allegany county, that the answer states the defendants' strongest ground of defense, and that it did not occur to any one to dispute the authority of Ege until the turn of fortune's wheel made Treat the only responsible defendant. The motion is denied.

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RICE *et al.* v. EGE *et al.*

(Circuit Court, N. D. New York. June 30, 1890.)

1. PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL.

Upon making division of several oil leases in which plaintiffs and defendants were jointly interested, plaintiffs took a lease for land which had not been tested for oil, and received a written agreement, signed by one defendant in behalf of all the defendants, to pay plaintiffs \$1,000 in case the oil-wells on the land transferred to plaintiffs should be unproductive. The defendants who did not sign this agreement knew of the exchange, and acquiesced in it. Their answer did not deny the execution of the agreement, and there was evidence to show that they authorized their co-defendant to sign the agreement, and afterwards ratified his act. *Held*, that they were bound by the agreement.

2. CONTRACT—EVIDENCE—OIL-WELL.

Said agreement having defined an unproductive well as one in which oil is not produced in paying quantities, evidence that the wells were drilled through the stratum in which oil was found, if at all, in that county, at an expense of about \$3,000, and only a trace of oil discovered, is sufficient to show that the wells were unproductive.

At law. Tried by the court, a jury having been waived.

*Hamilton Ward*, for plaintiffs:

*Charles H. Brown* and *John E. Brandegee*, for defendant Treat.

*George L. Roberts*, for other defendants.

COXE, J. Many of the facts appear in the opinion rendered upon the motion to amend the answer, *ante*, 658. These need not again be stated. Upon the merits, but two questions are presented. *First*, did the defendants enter into the agreement set out in the complaint? *Second*, were the wells on the Nelson and Dodson farms drilled to a sufficient depth to determine that they were unproductive?

Upon the first of these questions the issue, as before determined, is a narrow one. The answer admits that the defendants were interested with the plaintiffs in a large number of oil leases in Allegany county; that on July 1, 1881, a settlement was had, and a division of the leases was made between the plaintiffs and the defendants, and, recognizing the binding force of the agreement upon both parties, and relying upon its provisions for their exculpation, the defendants allege that pursuant to its provisions they were entitled to notice, and an opportunity to examine the Nelson and Dodson wells, in order that they might satisfy themselves of their unproductiveness. It is true that the answer avers "that said agreement was signed by J. A. Ege, and that the defendants H. B. Huff and M. C. Treat never signed said agreement," but this allegation adds no new element to the discussion. The plaintiffs do not contend that Treat and Huff, with their own hands, affixed their signatures to the paper. In fact the agreement on its face shows that they did not. The contention of the plaintiffs is that Ege, as the representative of the other defendants and with authority from them, negotiated the agreement with Norton, who had like authority to act for the plaintiffs. This statement of the situation seems nowhere to be denied in the answer and is not now disputed by Ege or Huff. But were the question of Ege's authority an open one a similar conclusion must be reached. The contract of July 1st was an equitable one. In the division of the leases the most valuable, the Richardson lease, was assigned to the defendants. Every consideration of fairness required that the plaintiffs should receive property of equal value, or at least that the expense of testing it should not fall entirely upon them. For his interest alone in the Richardson lease the defendant Treat received \$1,292.50. On the other hand the testimony fails to show that the leases assigned to the plaintiffs had any value at all. Besides, the plaintiffs were liable to lose, and they have since lost, the large sum expended in drilling the two wells in question. The contract being a fair one to all the defendants, Treat included, there is no room for the suspicion that its terms were concealed from him. Were the positive testimony of Treat's participation in all of these transactions eliminated from the case the presumption that he had knowledge of them is irresistible. The defendants lived together in the same town. Treat had dealt in oil for 20 years. He was no novice. His place of business was directly across the street from Ege's bank. Their relations

were intimate. The evidence shows many joint ventures. They were in consultation regarding their oil interests immediately subsequent to the transaction of July 1st, and thereafter they bought property jointly and gave their joint note in payment, taking the title, however, in Ege's name alone. On the 1st day of July, the same day that the agreement in question was made, the plaintiffs assigned to the defendants, Treat being named in the assignment, all their interest in the Richardson lease, except 10 acres taken from the west side of the property. This assignment was recorded July 25, 1881. On the 13th of July, 1881, Treat assigned all his interest in the Richardson lease, and other leases, to Huff and Ege for \$1,292.50; but he testifies that at that time he had ascertained, from recent developments, that the Richardson lease was the only one of value. On the 20th of July, 1882, Huff and Ege assigned to John Coast & Sons and H. and W. W. Rice their interest in the Richardson lease covering 46½ acres of land. As the original lease was for 57 acres, this assignment, evidently, did not cover the 10 acres reserved by the assignment of July 1, 1881. On the trial Treat produced the original Richardson lease, the assignment by the plaintiffs to the defendants of July 1st, and his assignment to Ege and Huff. The fact that Ege delivered the assignment of the Richardson lease to Treat is persuasive evidence that the latter knew of the assignment. The evidence regarding the 10 acres is unsatisfactory and obscure. It is difficult to determine from the proof in whom the title to the 10 acres vested after the settlement of July 1st, and there is nothing authentic to show who first conveyed this property after that settlement. No written assignment or conveyance of the property has been introduced in evidence. The accounts of its disposition are not in harmony, the evidence leaving the matter very much in doubt. It is entirely clear, however, that the defendant Treat never obtained title to the 10 acres until after his assignment of July 13, 1881, to Huff and Ege. He swears that he obtained the assignment of the 10 acres between the 15th and 30th of July, 1881. No one pretends that it was prior to July 13th. It seems, therefore, impossible to account for his receipt of nearly \$1,300, except upon the theory of the settlement of July 1st. He certainly knew that if this 46 acres was owned by eight persons instead of three, \$1,300 was too large a sum for one of them to receive for his interest. And it can hardly be insisted that this sum covered the other leases, for he swears that before that time the parties had ascertained that there was no value to any of the leases except the Richardson lease. The impression derived from all these facts is that Treat could not have been ignorant of the transactions carried on for his benefit and in his name. He must have known of them, and, had they been unauthorized there would have been some evidence of renunciation or dissatisfaction on his part. But in addition to these cogent inferences the record contains positive testimony that Ege's authority from Treat was ample, besides evidence from Ege, and others, that Treat not only had knowledge of Ege's acts but subsequently ratified and confirmed them. Treat denies this, but in many important instances his denial consists merely in a failure to recollect. The de-

endants must, therefore, be held to the contract for the following reasons: *First*, the answer practically admits that they executed it. *Second*, the presumption is strong that Treat must have known of its existence and assented to its terms. *Third*, the preponderance of testimony establishes Ege's authority to make the contract. *Fourth*, Treat subsequently ratified and confirmed it.

Upon the remaining question the proof, establishing the unproductiveness of the wells, is clear. The character and extent of the test required must be measured by the contract and not by the opinion of witnesses. The contract provides for the payment of \$1,000 if the Dodson and Nelson wells "prove to be unproductive as oil-wells, or not paying wells, viz.: wells in which oil is produced in paying quantities." If the testimony establishes the proposition that the plaintiffs pushed their investigations sufficiently to show that neither the Nelson nor Dodson well was one in which oil could be produced in paying quantities they are entitled to recover. Their right cannot be defeated by proof that a trace of oil was discovered or even by proof that one of the wells might be made to produce a few barrels, for such production was not sufficient to make it a paying well. The Nelson well was put down 1,600 feet. The Dodson well 1,377 feet. Oil in Allegany county is found, if at all, in the third sand. Both of these wells were drilled through the third sand, and little, if any, oil was discovered. Subsequent developments still further demonstrated their unproductiveness. They are surrounded by a circle of dry holes. No oil has been found in their vicinity. The plaintiffs are criticised because the wells "were not shot, torpedoed or tubed," but it would seem that it is not necessary to do this unless the drilling shows some promise of oil. A torpedo may make oil flow more freely, but it will not produce oil from barren sand. There was no possible motive for the plaintiffs to omit anything required to make the wells a success. It was manifestly for their interest that the wells should pay. There is no direct proof as to the amount agreed to be paid for drilling the two wells, but if it were at the rate which the evidence shows was paid for similar wells in Allegany county the plaintiffs were obligated to pay nearly \$3,000. The, comparatively, small sum which they were to receive from the defendants in case the wells proved unproductive was no inducement to them to stop the work until every reasonable test had been made. Every incentive was in this direction. If the wells proved successful it meant a fortune to the plaintiffs. If they failed, it meant a large loss even after the \$1,000 had been paid by the defendants. I am satisfied that the plaintiffs did all that the agreement required, and that nothing which they could have done would have developed oil in paying quantities in either of the wells in question. It follows that the plaintiffs are entitled to the judgment demanded in the complaint, with interest and costs.

McALEER *et al.* v. CLAY COUNTY.

(Circuit Court, S. D. Iowa, C. D. June 16, 1890.)

## MANDAMUS—JUDGMENT—LIMITATIONS.

The holders of a judgment against a county obtained a writ of *mandamus* commanding the supervisors to levy a tax to discharge the judgment. The decree awarding the writ was reversed by the supreme court, and the cause remanded, whereupon an amended petition for *mandamus* was filed. Pending the proceedings in the supreme court the period during which, under Code Iowa, § 3025, an execution could issue on the judgment, expired. Held, that the collection of the judgment could not be enforced by *mandamus*, since the judgment was no longer operative, and the pendency of the *mandamus* proceedings created no lien.

At Law. Proceedings for *mandamus*. On demurrer to answer.

*Mitchell & Dudley and Hughes & Hastings*, for plaintiffs.

*A. C. Parker*, for defendant.

SHIRAS, J. On the 2d day of October, 1864, a judgment was rendered in this court in favor of Michael McAleer, and against Clay county, Iowa, for the sum of \$9,172.50. On the 2d day of May, 1881, an information for a *mandamus* was filed by Hugh McAleer and Hugh McAleer, Jr., administrators of the estate of Michael McAleer, who had died in the state of New York on February 22, 1881, in which it was charged that the judgment in question remained in force, that a large part thereof remained unpaid, that an execution had been issued and returned unsatisfied, that it was the duty of the county board of supervisors to levy a tax for the payment of the portion of the judgment remaining unpaid, and praying that a writ of *mandamus* be issued, commanding the supervisors to levy, collect, and pay over a tax sufficient to discharge said judgment in full. On the 15th day of May, 1882, the court, upon the hearing, granted a writ of *mandamus* requiring the board of supervisors to levy a tax of one mill on the dollar of the assessed value of the taxable property in Clay county for the year 1882, and to collect and pay the same upon the McAleer judgment, and that they levy and collect a tax of one mill for each succeeding year until the said judgment, interest, and costs should be paid in full. Upon a writ of error the supreme court reversed this judgment, on the ground that the answer to the information averred that the whole of the six-mill levy for the year 1882, which was the limit of taxation permissible under the statute of Iowa, was needed to meet the ordinary expenses of the county, and that the court could not require the county to set aside any part of the levy to pay the judgment when the whole of the levy was needed to meet the current expenses of the county. See 115 U. S. 616, 6 Sup. Ct. Rep. 199. The mandate showing the reversal of the judgment by the supreme court was filed in this court May 17, 1886. On the 13th day of May, 1890, an amendment to the information was filed, in which it was averred that, if the full levy of six mills on the dollar of the taxable property in the county be levied each year, there will be realized therefrom a sum sufficient to defray the ordinary current expenses of

the county, and leave a yearly surplus which may be applied to the payment of the judgment in favor of McAleer; and, further, that there is now in the treasury of the county the sum of \$5,000 not appropriated to the payment of current expenses, which the board of supervisors refuse to apply to the payment of said judgment; and the relators therefore ask an order that the county officials be required to levy annually a tax of six mills, and pay over the surplus left of the amounts realized, after defraying the necessary current expenses, until the judgment is fully paid. In the second division of the answer filed to this amended information, it is averred that, before the filing of said amended information, the judgment against the county had been barred and extinguished by the operation of the statute of limitations of the state of Iowa; that the period of limitation applicable to judgments of courts of record is 20 years; that the judgment was rendered in 1864, and had not been revived by any action in any court since that date; and that, consequently, these proceedings for the enforcement of the judgment are abated. To this division of the answer the relators have demurred, and thereby is presented the question of the effect upon the proceedings of the admitted fact that by lapse of time the judgment sought to be collected has become barred.

Under the provisions of section 3025 of the Code of Iowa, executions may issue at any time before the judgment is barred by the statute of limitations. When the 20 years from the date of the judgment expired, the right to the issuance of a writ of execution terminated. If, however, before the 20 years had expired, an execution had been issued, and a levy had been made thereunder, the lien thereby acquired would not have been ended by the expiration of the statutory limitation, but the judgment creditor would have been entitled to the benefit of all rights acquired by the levy of the execution during its life-time, and to such auxiliary process as might be necessary to enforce payment out of the property thus subjected to the lien of the judgment and execution while the same were in life. Counsel for plaintiffs claim that the proceedings for *mandamus* are to be deemed to be of the nature of an execution, and that as the original information was filed and service had long before the judgment was barred, it is still open to the plaintiffs to pursue the relief sought by the information. Conceding, for the sake of the argument, that the filing of the information is to be deemed to be the equivalent of the issuance of a writ of execution, it does not follow that thereby any lien or other right has been acquired which remains in existence after the judgment has ceased to be operative and enforceable. If, during the life-time of an execution, the same is levied upon property, thereby a new right is created in the execution plaintiff. The levy of the execution is *prima facie* a satisfaction of the judgment; and the lien, whether legal, equitable, or statutory, created by the levy of an execution, is not defeated by the mere fact that after the creation of the lien the period of time has elapsed which terminates the right to the issuance of an original writ of execution upon the judgment, or which bars a new action upon the judgment. The mere filing of an information seeking a writ of

*mandamus* to enforce the levy of a tax for the payment of a judgment creates no lien upon property. The judgment rendered in 1882, directing the levy of a tax in that and the succeeding years, has been wholly set aside. No lien or right to the levy of a tax was then created. The right to the issuance of a *mandamus* for the purposes set forth in the amended information filed May 13, 1890, is based upon the fact that there exists in favor of plaintiffs an operative and enforceable judgment against the county. The aid of the court is sought to put in motion the taxing power of the county through its officials, in order to realize funds sufficient to pay this judgment. The answer shows that before the amended information was filed the judgment had become inoperative and non-enforceable by reason of the lapse of time creating a statutory bar to its enforcement. The action sought by the present information is not for the preservation and enforcement of a lien or right coming into existence before the judgment became barred. If the facts were that, by operation of a tax ordered to be levied by a judgment in *mandamus* rendered during the life-time of the judgment, there was a fund realized, and in the hands of the county, properly applicable to the payment of the judgment, it might well be that the court would enforce the application of such fund to the payment of the judgment, even though the bar of the statute had become applicable. The present proceedings are wholly prospective, and it is now sought to compel the county officials to hereafter levy and collect a tax, or to hereafter apply money in the treasury to the payment of the judgment in question. Unless there exists in favor of the plaintiff a valid and enforceable judgment against the county, there is no foundation for such action on part of the court. If for any reason the judgment has become inoperative or has been barred, no ground for its enforcement exists, either by way of execution or other equivalent proceeding. In the language of the supreme court in *Ross v. Duval*, 13 Pet. 44, "it cannot be supposed that the legislature would bar an action on a judgment, and still authorize an execution to be issued on it." If the right to an execution is barred, the right to a writ of *mandamus* to serve the purposes of an execution must be likewise barred. The demurrer to the second division of the answer filed by the county officials is therefore overruled.

UNITED STATES v. MIDGLEY.<sup>1</sup>

(District Court, E. D. Pennsylvania. May 20, 1890.)

## 1. CUSTOMS DUTIES—WOOL—"MERINO BLOOD, NEAR OR REMOTE."

In the tariff act of 1883, in the enumeration of wools of the first class, the phrase, "wools of merino blood, near or remote," "remote" is limited to mean within the limit of merino blood requisite to characterize the wool as possessing merino qualities, and adding to the value.

## 2. SAME—CHANGE OF CLASS—PRESUMPTION.

Where an article has been finally placed in a class other than that in which it was originally, and the collector brings suit to recover the excess of duty, he is entitled to a presumption that it is rightfully placed in said other class, and the burden of proof is on the defendant to prove that it rightly belonged to the class in which it had been formerly placed.

## 3. SAME—EVIDENCE—CONFLICTING CLASSINGS BY EXAMINER.

A wool was originally placed in the third class by the examiner, who afterwards, upon the orders of the appraiser, made another examination, and placed it in the second, and, upon the refusal of the appraiser to indorse, made a third examination, and placed it in the first class. On trial several experts testified, upon seeing the wool for the first time, that it was plainly clothing wool, (first class.) *Held*, the fact of the original judgment of the government examiner was evidence for the defendant as to the "grade" of the wool, and to impeach the reliability of plaintiff's expert testimony produced at the trial.

## At Law.

This was an action brought by the United States to recover \$3,894.38, alleged to be due as additional duty upon an importation of 221 bales of so-called "Smyrna wool," imported at Philadelphia, April 9, 1889. The wool was entered as carpet wool, and was valued at 5½ pence per pound, dutiable at 2½ cents per pound. The examiner in the first instance returned the wool as entered in class 8, under 12 cents a pound, and his return was approved by the appraiser as of April 15, 1889. Upon April 26, 1889, a reclassification was made in class 2, under 30 cents a pound, at 10 cents a pound by the examiner, but no approval was entered by the appraiser. Upon May 22, 1889, a further reconsideration and reclassification was made in class 1, under 30 cents a pound, 10 cents a pound, and value advanced to 6½ pence per pound, and upon this classification the liquidation was made by the collector, and the balance aforesaid alleged to be due. The samples sent to the appraiser's stores for examination remained under the control of the government until liquidation. Protest was made by the importer that the government was bound by the first return of the appraiser, and that the other classifications were unlawful. It was also contended that the importation was bought, sold, and used under the name of "Smyrna wool."

W. Wilkins Carr, Asst. U. S. Atty., for plaintiff.

John G. Johnson and Frank Pritchard, for defendant.

BUTLER, J., (*orally charging the jury.*) The plaintiff in this case asks the court to say to you:

"(1) If you believe the article in suit is what is known as clothing wool and of merino blood, immediate or remote, or a wool of like character to any of those mentioned in class No. 1, then your verdict should be for the plaintiff."

That is correct.

<sup>1</sup>Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.



"(2) If you believe that the wool in suit is not designated or described in classes two and three of combing wools or carpet wools, then your verdict should be for the plaintiff."

That is also correct.

"(3) It is not necessary that the wool should be identical in its quality with the merino blood wools mentioned in the first classification of the tariff act, but if it is what is usually designated as a clothing wool like those named in the first classification, and possessing the same general quality of those wools, and having merino blood, then it properly falls within the first class, and your verdict should be for the plaintiff."

That is correct.

"(4) Your verdict in this case should be for the plaintiff."

I refuse that point.

By the tariff act of 1883 it is provided as follows:

"All wools \* \* \* shall be divided, for the purpose of fixing the duties to be charged thereon, into three \* \* \* classes: Class one, clothing wools; that is to say merino, mestiza, metz, or metis wools, or other wools of merino blood, immediate or remote, down clothing wools, and wools of like character with any of the preceding, including such as have been heretofore usually imported into the United States from Buenos Ayres, New Zealand, Australia, Cape of Good Hope, Russia, Great Britain, Canada, and elsewhere, and also including all wools not hereinafter described or designated in classes two and three."

"Class two" I need not read, because it is not involved in this case.

"Class three, carpet wools and other similar wools,—such as Donskoi, native South American Cordova Valparaiso, native Smyrna, and including all such wools of like character as have been heretofore usually imported into the United States from Turkey, Greece, Egypt, Syria, and elsewhere."

It may be proper to remark that the wools named in the first clause are wools containing merino blood, fine wools, high-grade wools. All wools containing merino blood, in the language of the statute, near or remote, are within the first clause, and embraced in the first class. The words, "merino blood, immediate or remote," require some remark. The word "immediate" probably requires nothing to be said of it, but the word "remote" does. As used in the statute, it signifies a degree of remoteness that is within the limit of merino blood requisite to characterize the wool, and add to its value. If the remoteness is beyond this,—so great that it does not characterize the wool as possessing merino qualities, does not add to its value,—then it is too remote to be within the meaning of the statute.

In 1889 the defendant imported the wool in question. On its arrival it was sampled and examined by the proper customs officers,—upon whom the duty of classification is devolved by law,—who pronounced it "carpet wool," and consequently placed it in the third class. The defendant paid duty on it accordingly. Very soon thereafter the appraiser, Mr. Leach, becoming doubtful of the correctness of the classification, recalled the return that had been made to the collector, and directed another inspection and examination. The examiner, several days later, reported it as "combing wool," and placed it in the second class.

This being unsatisfactory, also, to the appraiser, a still further examination was made, and it was finally pronounced to be "clothing wool," and was consequently placed in the first class, and subjected to duty accordingly. This higher duty the defendant refused to pay; and the government now sues to recover the difference between the sum paid in pursuance of the first report, and the amount assessed on the final return.

To which class does the wool belong? This is the only question in the case. Does it fall within the description of the first clause read, and consequently belong to class one? or within the description of the third clause, and belong to class 3? There is no suggestion that it is within the second class. You must start on the inquiry with the presumption that it is within the first clause and belongs to class 1. The customs officers having decided that it belongs to this class, their finding must be regarded and accepted as correct until the contrary is proved. You thus observe the burden is on the defendant to prove that the wool does not fall within the description of the first clause, and consequently that it is improperly classified. If, therefore, the defendant has not proved this, your verdict must be against him, for the sum claimed. His contention is that the wool falls within the description of the third clause, and consequently that it belongs to the third class. If the evidence fails to satisfy you he is right in this, his defense fails.

It is only necessary, therefore, to determine whether the defendant has proved that the wool falls within the description of the third clause. Now, let us read this clause again:

"Class three, carpet wools and other similar wools,—such as Donskoi, native South American, Cordova, Valparaiso, native Smyrna, and including all such wools of like character as have been heretofore usually imported into the United States from Turkey, Greece, Egypt, Syria, and elsewhere."

It is proper to observe at this time that the words "native Smyrna," in the light of the evidence before you, may be read "Smyrna," because, according to that evidence, all Smyrna wool is native Smyrna. There is no such thing as "native Smyrna," as contradistinguished from Smyrna wool. According to the plaintiff's testimony, all the wool that is known to the trade as Smyrna wool is native Smyrna. There are not two descriptions of Smyrna wool, one Smyrna and the other native Smyrna; it is all Smyrna wool. So that as far as relates to this case, in view of the evidence, you can disregard the word "native;" if it is Smyrna wool it is native Smyrna wool.

You observe that the clause embraces all "carpet wool," and that it also particularly specifies "Smyrna wool," as a "carpet wool." The defendant contends that the wool before us is "carpet wool," and, furthermore, that it is "Smyrna wool;" that is, that it is "carpet wool" grown in Smyrna. If it is "Smyrna wool," it follows that it is "carpet wool," and belongs to the third class, because the statute makes all "Smyrna wool," "carpet wool." The question is thus reduced to the narrow and single inquiry: Is this "Smyrna wool?" As you have seen, the words "carpet wool," used in this clause, embrace a similar description of wool from many other countries besides Smyrna. The defendant, however, does

not claim that this is "carpet wool from either of such other countries, but asserts and claims that it is Smyrna wool." He imported it from England, he says, as "Smyrna wool," and it came to this country invoiced as "carpet wool."

Does the evidence satisfy you that it is "Smyrna wool?" Many witnesses have been called on the one side and the other to instruct you on the subject. Those called by the defendant pronounce it "Smyrna wool;" in other words, carpet wool from Smyrna. They tell you why they so pronounce it, and speak with great positiveness on the subject. Those called by the plaintiff say it is not "Smyrna wool," just as positively, and give their reasons for saying so. They further say it is a wool of merino blood, and consequently is "clothing wool." Respecting the presence of merino blood, and its quantity, the testimony on the one side and the other is in direct conflict also. The witnesses called generally are men of unusual intelligence, and of high character. Their business as wool dealers, woolen manufacturers, or wool growers has been such as to qualify them to speak intelligently on the subject involved. Their disagreement may seem remarkable; but it must be remembered that they speak from different stand-points, and may reasonably be supposed to feel some bias. It cannot be doubted, however, that they are honest, and believe what they say. I could not aid you by citing the testimony, and dwelling upon it. The duty is on you of determining whether the fact on which the defense rests, to-wit, that this is "Smyrna wool," is proved. If the testimony upon the one side and the other is equally balanced, for and against it, it is not proved. There must be a preponderance of testimony in its favor to prove it.

A fact to which I adverted at the outset, is entitled to some weight probably in deciding this question. You must consider whether it is or not, and, if it is entitled to any, you must determine how much. As it was there said, the government officers, in the first instance, themselves pronounced this wool "carpet wool," treated it as "Smyrna wool," and consequently "carpet wool," placing it in the third class. The examiner may possibly have been influenced in reaching his conclusion by the fact that it was invoiced as "carpet wool." This can hardly be supposed, however, in view of the fact that it was his sworn duty to examine it with great care, and form his judgment from such examination. This report or return was approved by the appraiser, Mr. Leach. He, the appraiser, says, however, he did not examine the wool. Nevertheless this was the action of the government, and was an expression of judgment that the wool was "carpet wool"—a judgment based on examination by a competent officer—selected for this particular duty, because of supposed especial qualifications to perform it correctly, and at a time when there was no controversy, when no feeling had arisen, and when the duty and purpose of the officer was, must have been, to get at the truth, at all events, to make no mistake against the government which he represented. While this judgment and finding did not bind the government, but was subject to revision and correction, if incorrect, the fact that such a judgment was pronounced, after examination, is ev-

idence against the plaintiff,—apparently entitled to some weight in deciding the question before us. Again, when the examiner was requested to make a second examination, a full and particular examination, he reported after some time had elapsed, in effect that it was not clothing wool,—in terms, that it was “combing wool,”—which belongs to the second class, and it was not till the appraiser demurred to this, by declining to indorse, that the examiner placed it in the first class. The fact that the examiner, after a second and presumably very careful examination, found it to be “combing wool,” seems to be inconsistent with the testimony of the plaintiff’s witnesses, who say that it plainly and distinctly appears to be “clothing wool,” from inspection alone,—such as they gave it in your presence. It is for you to say what weight these facts should have. Nevertheless, the question whether this is “Smyrna wool,” and consequently “carpet wool,” is a question for your determination from all the evidence in the cause bearing upon it. If you find it is “Smyrna wool,” your verdict will be for defendant, because if it is “Smyrna wool” it is carpet wool, and belongs to the third class. If you do not so find, your verdict will be for the plaintiff.

The jury disagreed.

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### RICHARD *et al.* v. HEDDEN.

(Circuit Court, S. D. New York. April 29, 1890.)

#### 1. CUSTOMS DUTIES—CONSTRUCTION OF LAWS—CLASSIFICATION—FINISHED FURNITURE.

The term “finished,” as applied to house or cabinet furniture at and prior to the passage of the tariff act of March 3, 1883, (22 U. S. St. 488,) in the furniture trade of this country, was used to designate not only house or cabinet furniture that was in pieces fitted so that they could be put together, and made ready for use as such furniture, but also house or cabinet furniture that was actually put together, and made ready for use as such furniture when shellaced or varnished or painted or painted and varnished, etc.

#### 2. SAME—FURNITURE NOT FINISHED.

The house or cabinet furniture dutiable under the provision for “house or cabinet furniture in piece or rough, and not finished,” contained in Schedule D of this tariff act, (Tariff Index, New, 229,) is house or cabinet furniture not only “in piece or rough,” but also “not finished.”

#### 3. SAME.

Cabinet ware and house furniture, whether in pieces fitted so that they can be put together and made ready for use, or actually put together and made ready for use, as such furniture, if “finished,” is dutiable under the provision for “cabinet ware and house furniture, finished,” contained in said Schedule D, (Tariff Index, New, 230,) and not under the provision for “house or cabinet furniture in piece or rough, and not finished,” contained in the same schedule, (Id. 229.)

**At Law.** Action to recover back duties.

During the year 1886 the plaintiffs imported from Vienna, Austria, into the port of New York, certain Austrian bent-wood furniture in pieces. This furniture was classified for duty under the provision for “cabinet ware and house furniture, finished,” contained in schedule D of the tariff act of 1883, (Tariff Index, New, 230;) and duty was exacted

thereon at the rate of 35 per centum *ad valorem* by the defendant as collector of customs at that port. Against this classification and exaction the plaintiffs duly protested, claiming that this furniture was "in pieces, and not finished," and therefore dutiable at the rate of 30 per cent. *ad valorem* under the provision for "house or cabinet furniture in piece or rough, and not finished," contained in the same schedule. Id. 229. The plaintiffs thereafter, having made due appeals, duly brought this suit to recover the difference between duties at the rate of 35 per cent. *ad valorem* as exacted by the defendant as said collector, and duties at the rate of 30 per cent. *ad valorem* as claimed in their protest.

Upon the trial, it appeared from the evidence produced by the plaintiffs that this furniture, though in pieces, consisted of all the parts of chairs, settees, tables, and other varieties of house furniture, including the backs, seats, and one or more other portions thereof, that were each put together in permanent form; that each of these parts was completely shaped, smoothed, and fitted to go together without further work thereon, was polished and varnished, or polished, painted, and varnished, had the usual holes therein for the necessary screws and bolts used in fastening these parts together, and was accompanied with all such necessary screws and bolts, so that all these parts were ready to be put together and fastened so as to constitute completed chairs, settees, tables, and other varieties of house furniture, as used by everybody, the putting together and fastening only remaining to be done; that these parts, in the condition described, together with the aforesaid screws and bolts, as imported, were wrapped with or packed in straw or paper, and placed in boxes or cases; that they were so wrapped or packed and placed for convenience of transportation, and to save, as far as possible, the expense of freight; that after their importation the only thing done to them besides putting together, and fastening them so as to constitute completed chairs, settees, tables, and other varieties of house furniture, as used by everybody, was to touch up the ends of the aforesaid screws and bolts, paint or varnish them, in order to make them match such furniture, unless the wood-work had been jammed or crushed or bruised, and, if it had been, then the wood-work was touched up where jammed or crushed or bruised, but otherwise the wood-work was not touched; that the difference between the price at which this furniture was sold when sold as imported from Austria, and the price at which it was sold when put together and fastened so as to be ready for use, was about 3 per cent. of the wholesale price as sold in this country. It appeared from the evidence produced by the defendant: That at and prior to the passage of the aforesaid tariff act, in the furniture trade of this country, furniture like plaintiffs, after the parts thereof were made and fitted, was put together and fastened, shellaced, or varnished, or painted, or painted and varnished, etc., then generally taken to pieces, and afterwards packed for shipment in boxes or cases in the manner in which plaintiffs' was when imported. That at those times, in that trade, each of the terms "set up," "knocked down," "finished," "finished set up," "finished knocked down," and "finished and boxed," as applied to furniture, had a particular and specific trade

meaning, as follows: "Set up" furniture meant furniture whose parts had been fitted, put together, and fastened so that it was in the form in which ordinary furniture was used. "Knocked down" furniture meant furniture that had been set up, and then taken to pieces again. "Finished" furniture meant furniture that had received a shellac or varnish or paint, or paint and varnish, etc., after having been set up, but did not mean completed furniture. "Finished set up" furniture meant set up furniture that had been finished, such as plaintiffs' would be if set up. "Finished knocked down" furniture meant furniture that had been set up, finished, and then knocked down, such as plaintiffs' was when taken from the boxes or cases in which it was imported; and "finished and boxed" furniture meant furniture that had been set up, finished, knocked down, wrapped with or packed in straw or paper, and placed in boxes or cases, such as plaintiffs' was when imported. That in the furniture trade at those times the phrase "furniture in the rough" meant furniture "in the white" or "in the wood," i. e., not finished. That the phrase "in piece" or "in pieces," at those times, was not a term used by that trade with a trade or technical meaning. Both sides having rested, counsel for plaintiffs moved the court to direct the jury to find a verdict in their favor, and counsel for defendant made a motion for a like direction in his favor.

The court denied both motions.

*Edwin B. Smith, Stephen G. Clarke, and Albert Comstock, for plaintiffs.*

*Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for defendant.*

LACOMBE, J., (*orally.*) The collector classified the articles in suit under the 230th paragraph of the tariff act as "cabinet ware and house furniture, finished," and laid upon them a duty of 35 per centum *ad valorem*. The plaintiffs claim that such classification was wrong, and that it should have been held dutiable at 30 per centum *ad valorem*, under paragraph 229, which reads: "House or cabinet furniture in piece, or rough, and not finished." Of course the presumption is that the collector's decision was right, in the absence of any testimony. Therefore, in all these actions to recover duties, it is for the plaintiffs, by a fair preponderance of proof, to satisfy the jury that the collector was in error in his assessment. In order to do so in this case, the plaintiffs must satisfy you of two things: (1) That the articles here are either "in piece" or "rough." As to that branch of the case, I may instruct you that there is no conflict of testimony. These articles are furniture in piece. The plaintiffs must go further, however, and satisfy you (2) that these articles, "furniture in piece," are "not finished." Now, the laws imposing duties upon importations are intended for practical use and application by men engaged in trade and commerce; and the language adopted by the legislature, particularly in the denomination of articles, should be construed according to the commercial understanding of the terms used. Many witnesses from the furniture trade have been called to the stand; and, I think without an exception, they have all testified that there is some particular trade meaning of the word

"finished,"—that to the furniture trade the word "finished" means something, and that it means something other and different than it might mean to a man who was not engaged in that trade. It is for you, upon the testimony, to determine what that word did mean, in trade and commerce in this country, on March 3, 1883. Having found out what the trade meaning was, you will then apply that meaning to these articles. If you reach the conclusion that they were "not finished," within the trade meaning of that term, then your verdict must be for the plaintiffs. Should you reach the conclusion that they were "finished," within the trade meaning of that word, your verdict will be for the defendant.

The jury rendered a verdict for the defendant.

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WASHBURN & MOEN MANUF'G CO. v. CINCINNATI BARBED WIRE  
FENCE CO.

(Circuit Court, S. D. Ohio, W. D. June 20, 1890.)

**PATENTS FOR INVENTIONS—ASSIGNMENT AND LICENSE—SUIT FOR ROYALTIES—PLEADING.**

A patentee who grants a license to manufacture and sell the patented article, under a contract by which the licensee is to make monthly reports, and pay a stipulated royalty, and for failure to comply with which the licensor may declare a forfeiture, cannot sue in equity to compel the licensee to make reports and account for royalties due, or, on his failure to do so, to enjoin him from further manufacture or sale. By such prayer, he waives the forfeiture clause, and is left to his action at law for the royalties.

In Equity. On demurrer.  
*Lehmann & Parks*, for complainant.  
*James Moore*, for defendant.

SAGE, J. The bill sets forth that the complainant is the owner of certain patents relating to barbed wire, and machinery for making the same; that the defendant is its licensee, engaged in making and selling barbed wire under the license, which provides that the defendant shall make monthly reports of its manufacture and sales, and pay the stipulated royalty thereon; and that, for failure to comply with the provisions of the license, the complainant may declare a forfeiture. The bill further sets forth that many licenses have been granted by the complainant upon like terms with that of the defendant, all for the manufacture and sale of a limited quantity per annum of specified styles of wire; that for the proper maintenance of its business, and of the rights of the several licensees, monthly reports are necessary; that defendant promised, by its acceptance of the license, to co-operate with complainant in maintaining the license system; that it has failed to keep its agreement, and is engaged in making and selling barbed wire under the license without making monthly reports, or paying royalty. The prayer is that the defendant be decreed to perform its agreement; that an account be had of

the royalties due on its manufacture and sales; and that, unless it complies with the requirements of its license, it be enjoined from further manufacture and sales thereunder. A general demurrer is interposed by the defendant; the point relied upon being that the complainant has an adequate remedy at law.

The defendant relies upon *Washburn & Moen Manuf'g Co. v. Freeman Wire Co.*, 41 Fed. Rep. 410; *Root v. Railway Co.*, 105 U. S. 189; *Purifier Co. v. Wolf*, 28 Fed. Rep. 814; and *Crandall v. Manufacturing Co.*, 24 Fed. Rep. 738. *Washburn & Moen Manuf'g Co. v. Freeman Wire Co.*, was, in every particular, such a case as this, and the demurrer to the bill was sustained. In *Purifier Co. v. Wolf*, the license authorized the defendants to make and sell the patented article, and reserved the royalty, to be paid at the end of each month, upon the return of the number and kind of machines manufactured and sold. The court held that the payment of the royalty was a condition subsequent, and not precedent, and hence that the license was absolute, and, unless it contained some provision of forfeiture for non-payment, the failure to pay the royalty did not forfeit it, and that the licensor was left to his action for the royalty, and could not sustain a bill upon the patent as for an infringement. The court say, Justice BRADLEY pronouncing the opinion, that—

“A suit for royalty on a license is a suit at common law, or, if in equity, it is a suit on general equity, not depending at all upon the patent law, and not within the jurisdiction of the circuit court of the United States, unless the parties are citizens of different states.”

The court further said that, in view of the decision in *Root v. Railroad Co.*, 105 U. S. 189, they were satisfied “that the cause of action on the license is not within the equitable jurisdiction of the court; and therefore, if there had been a prayer in this bill for relief on the license for a recovery of the royalty, I don't think it could have been maintained.” Counsel for the complainant undertakes to distinguish that case from this, but we are unable to see that it does not fully apply. In *Crandall v. Manufacturing Co.*, it was held that the licensor had an adequate remedy at law, and could not maintain a bill in equity for an accounting of royalties accruing under the license. In that case it appears from the report that the only question was how much was due from the licensee under his contract, and no injunction was prayed for. The demurrer to the bill was sustained, but leave given to the complainant to amend. In *Densmore v. Tanite Co.*, 32 Fed. Rep. 544, which was also cited by counsel for the defendant, the bill was brought to annul the license for the non-payment of the royalty. The court held that there could be no doubt that such a cause fell within the cognizance of equity, but that the failure to make returns of manufacture and sales, and pay the royalty, afforded no ground for annulling the license; and the demurrer was sustained, and the bill dismissed. Counsel for the complainant calls attention to the fact that the report of that case does not set out the provisions of the license, and suggests that it may be safely assumed that failure to report and to pay royalty was not a cause of forfeiture. Conceding the assumption, it avails the complainant nothing;



for in no material respect does a cause upon a license containing no such clause of forfeiture differ from the present case, in which the forfeiture clause is waived, and therefore, so far as the distinction claimed is concerned, might as well have been omitted.

It is contended by counsel for the complainant that the license in the present case gives the licensee nothing more than a qualified right to manufacture and sell the patented article, and that that right is dependent upon the payment of the royalties, and subject to forfeiture for non-payment. But this contention disregards the pregnant suggestion of Justice BRADLEY in *Purifier Co. v. Wolf*, already referred to, that, inasmuch as the payment of the royalty is a condition subsequent, and not a condition precedent, the license is absolute, subject only to the forfeiture clause. Such being the contract, the proposition in this case to waive the forfeiture, and substitute an injunction against manufacturing or selling under the license until payment of arrears of royalties, is, in effect, an appeal to a court of equity to coerce payment by making and enforcing a new contract for the parties, which ought not to be done. *Refeld v. Woodfolk*, 22 How. 318. In *Woodworth v. Weed*, 1 Blatchf. 165, cited for the complainant, the claim of forfeiture was not waived. It was held that the license was forfeited, and the licensee liable as an infringer, or to an action for the royalties, at the option of the licensor. In *Wilson v. Sherman*, Id., 536, it was held that there was a forbidden use of the patented thing; and as to that use, but not as to the use authorized by the license, a preliminary injunction was granted. In *Magic Ruffle Co. v. Elm City Co.*, 13 Blatchf. 151, the license was to manufacture exclusively a specified ruffle, known as the "double ruffle," and to use the patented machines in its manufacture only. The bill alleged that after the license was made the defendants continued to make and sell the double ruffle specified, and also, in violation of their agreement, quantities of single ruffles. It was held that the complainants could sue either for an infringement of the patent, or for a breach of the agreement, and that, as a bill founded on the agreement, although no royalties were payable, and the patent had expired, the bill was not open to the objection that there was a complete and adequate remedy at law, because an account and a discovery were prayed for, and were necessary. In that case the manufacture and sale were clearly not within the license, which distinguishes it from the present case. In *Manufacturing Co. v. Owsley*, 27 Fed. Rep. 100, the claim was that the defendants had manufactured machines covered by complainant's patent, but not included in defendants' license, which sufficiently distinguishes that case from the present. In *McKay v. Smith*, 29 Fed. Rep. 295, it does not appear that the license contained a clause of forfeiture. See *Perkins v. Hendryx*, 23 Fed. Rep. 418. In *Oil-Cup Co. v. Manning*, 32 Fed. Rep. 625, there was a covenant not to sue, which the court held was equivalent to a license, and said that it was apparent from the affidavits presented upon the motion for a preliminary injunction that the real controversy was whether the covenant not to sue was still in force. Upon the facts it was ordered that the motion for an injunction be granted, unless the defendants should ex-

ecute an undertaking to secure the complainant for the amount of any decree which might be rendered in its favor. In *Manufacturing Co. v. Porter*, 34 Fed. Rep. 745, the defendants had repudiated the license, and combined with other licensees and with infringers to embarrass the complainant by expensive litigation, and to destroy its license system. It does not appear that there was any clause of forfeiture in the license; and the court distinguished the case, upon the facts, from *Root v. Railroad Co.* and *Purifier Co. v. Wolf*. That case, therefore, does not affect the conclusion in the present case. There was no clause of forfeiture, so far as the report of the case shows, in *Ball Glove Fastening Co. v. Ball & Socket Fastener Co.*, 36 Fed. Rep. 309. *Washburn & M. Manuf'g Co. v. Hawkeye Steel Bar Fence Co.* is an unreported case, and therefore, although the ruling was made by a judge who is very high authority, not entitled to the consideration we give to *Purifier Co. v. Wolf*,—decided by a judge of equally high authority, and reported,—or to *Hartell v. Tilghman*, 99 U. S. 547. But if we disregard the distinctions, above stated, between the cases cited for complainant and this case, it is enough to say that *Root v. Railroad Co.* overruled those of earlier date, and is a controlling authority against those of later date, which support the contentions of complainant's counsel.

*Eureka Co. v. Bailey Co.*, 11 Wall. 488, is relied upon as exactly in point, and conclusive against the demurrer. But in that case the Bailey Company was the owner of a reissued patent for an improved washing and wringing machine, and was engaged in the manufacture of clothes-wringing machines under other patents. There was an agreement licensing the Eureka Company, in consideration of a stipulated royalty, to use the patent of the Bailey Company, and a covenant that the Eureka Company would not directly or indirectly infringe the reissued patent of the Bailey Company. The bill sets out the covenants of the agreement, charging that they were the result of protracted negotiation, in which the original patent, the reissues, and the character of the invention were well considered, and that they were a fair adjustment of the interests of the parties. The supreme court, in *Root v. Railroad Co.*, referring to this case, say that it was because the defendant was guilty of an infringement of the complainant's patent that he was suable in equity in the United States courts, and that it was because of the infringement that the injunction was asked, although, as the court say, the object of the suit, doubtless, was to collect the royalty, but that it was sought by means of, and therefore as an incident to, the jurisdiction of the court, invoked for the purpose of enjoining the continuance of what, until the royalty was acknowledged and paid, was found to be an infringement. The court further say that, for the mere purpose of enforcing the contract for royalty, it was not a case arising under the patent laws, so as to give jurisdiction to the courts of the United States. This view is in full accord with the holding in *Hartell v. Tilghman*, cited above, that a suit between citizens of the same state cannot be sustained in the circuit court, as arising under the patent laws of the United States, where the defendant admits the validity and the use of the complainant's letters patent, and a contract is shown

governing the rights of the parties in the use of the invention. The opinion of the court, pronounced by Justice MILLER, is, that relief in such a suit is founded on the contract, and not on the patent laws. The cases from Blatchford, above cited, appear in the memorandum of cases cited by counsel for the complainant in the court below. To the same point, see *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. Rep. 550, and *Manufacturing Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. Rep. 756. See, also, *Purifier Co. v. Wolf*, 28 Fed. Rep. 814; *Seibert Cylinder Oil-Cup Co. v. Detroit Lubricator Co.*, 34 Fed. Rep. 216; *Seibert Cylinder Oil-Cup Co. v. Manning*, Id. 538; *Seibert Cylinder Oil-Cup Co. v. William Powell Co.*, 38 Fed. Rep. 600; and *Densmore v. Manufacturing Co.*, Id. 747. It is to be observed, moreover, that there was no clause of forfeiture in the license contract in *Eureka Co. v. Bailey Co.* It may also be observed that it does not appear that the objection that the complainant had an adequate remedy at law was made in the court below, and, the subject-matter being within the jurisdiction of equity, it was too late to make it on the hearing in the appellate court. *Reynes v. Dumont*, 130 U. S. 395, 9 Sup. Ct. Rep. 486, and cases cited. Such an objection "should be taken at the earliest opportunity, and before the defendants enter upon a full defense." *Kilbourn v. Sunderland*, 130 U. S. 514, 9 Sup. Ct. Rep. 594.

The objections to recognizing that the complainant has the right to an accounting in equity, and to a discovery, are so well stated by Judge THAYER in *Washburn & Moen Manuf'g Co. v. Freeman Wire Co.*, 41 Fed. Rep. 410, that it is enough to refer to the decision in that case, which was made, as has already been stated, upon a case in all respects like the present case. The demurrer will be sustained, and the bill dismissed, at the complainant's costs. The circuit judge concurs in this opinion.

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### NATIONAL CABLE RY. CO. v. SIOUX CITY CABLE RY. CO. *et al.*

(Circuit Court, N. D. Iowa, W. D. June 2, 1890.)

#### 1. PATENTS FOR INVENTIONS—NOVELTY—CABLE RAILWAYS—CONDUIT TUBES.

Claim 1 of letters patent 179,016, to A. S. Hallidie, for a device used in operating cable railways, was for the combination of a diagonal tube, interposed between the main tubes containing the cable, with a longitudinal slot therein connecting with the slot on the cable-bearing tubes, so that when a cable-car passed from one track to another the grip device could pass through it from the tube on one track to that on the other. *Held*, that the claim was not novel, since before the patent was issued cars were passed from one track to another by means of a track diagonally between them, and all that was necessary in the case of cable-cars was to construct under such track, and diagonally between the two cable-bearing tubes, a similar tube to conduct the grip.

#### 2. SAME—PIVOTED SWITCH RAIL AND SPRING.

The third claim in the patent was for a pivoted switch rail and spring, so arranged as to obviate the objection of the opening made at the meeting of the slot in the branch tube with that in the main tubes. The rail was pivoted on one end, and worked freely at the other, so that the grip, in passing from the branch tube, would press it aside, the spring pressing it back into place, thus leaving the slot in the main tube unobstructed. *Held*, that the combination was novel and patentable, though there was used before a switch rail on railroad tracks pivoted at one end

and free at the other, kept against the rail by a spring, so that the flange on the wheels of cars passing in one direction on the tracks would press it from the rail, and pass through, while cars in coming from the other direction would cross on it to the other track.

**8. SAME—CONDUIT—ENDLESS CABLE.**

The first claim of letters patent No. 195,505, September 26, 1877, to A. S. Hallidie, which is for a combination of pulleys and a single tube, so arranged that an endless cable can be run through it, making two cables running in different directions, is not patentable for want of novelty, since before the patent was issued a combination was known by which the same result was reached by the use of two separate tubes.

In Equity. Bill to restrain infringement of letters patent.

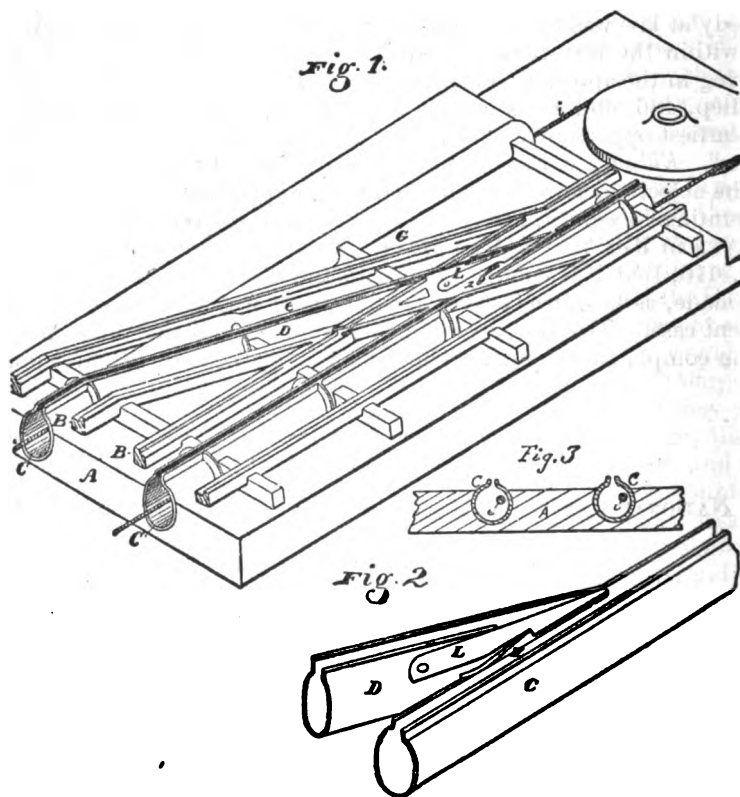
The drawing to which reference is made in the opinion is as follows:

A. S. Hallidie.

Endless Traction Railway.

No. 179,016.

Patented June 20, 1876.



*Coburn & Thacher*, for complainants.

*Offield & Towle* and *C. L. Wright*, for defendants.

SHIRAS, J. The complainant corporation is the owner of letters patent Nos. 179,016 and 195,505, issued to A. S. Hallidie, for improve-

ments in the mechanism used in connection with cable railways, and claims that the defendant company, in its line of railway operated at Sioux City, Iowa, is using certain features of such patented improvements, thereby infringing upon the rights of complainant. The first and third claims of patent No. 179,016 describe the devices included in this patent which, it is charged, are infringed by the defendant company. The defenses relied on are substantially that in view of the state of the art no invention is shown in putting together the combinations described in these claims, and that defendant does not infringe the same even if the claims are sustainable. Claim 1 of this patent is for the combination of a diagonal tube interposed between the tubes containing the cable or rope, with a longitudinal slot therein connecting with the slot on the rope-bearing tubes. At the date of this patent it was well known that a connection between one line of railway tracks and another could be made by using a diagonal track between the same. There is hardly a street railway or a steam railway in the country that did not show such mode of passing from one track to another. In a patent issued to William Eppelsheimer, dated August 24, 1875, No. 166,975, such use of a diagonal track in connection with a cable railway is shown, combined, it is true, with a turntable, but the diagonal track serves the purpose of passing the cable-car from one track to another. When it was sought to pass a cable-car from one track to another, it was not only necessary to construct a diagonal track for the wheels to pass along, but also a diagonal tube for the passage of the grip device; but this necessity was self-apparent. The mode for doing so, as shown in the Hallidie patent, was simply to place under the diagonal track the same opening or tube that was found in the main tracks, with the same longitudinal slot therein. This certainly did not demand the exercise of any invention, or the devising of any new mechanism, nor any novel combination of the respective parts. The well-known method of passing a car from one track to another, by means of a diagonal intersecting track, was simply applied to a cable track, and there was no display of invention in the application of the method or in the mechanism used therefor, as described in the first claim.

The third claim in the patent is for the pivoted switch rail, L, and spring, Z. At the points of junction between the slot in the diagonal tube and the slot in the main rope-carrying tube the open space would be enlarged, or, to use the language of the patentee in his specifications:

"At the point where the slot in the main tube connects with the slot in the branch tube it is evident that an opening of objectionable size would be made by the meeting of the two slots. To obviate this difficulty, or, rather, objection, I employ a pivoted V-shaped switch rail, L, at the meeting angle, which is pressed by a spring, Z, so as to force its point against the side of the slot in the main tube, and across the end of the tube in the branch slot, thus closing the end of the branch slot, except from pressure applied in one direction, while it leaves the slot in the main tube unobstructed."

The novelty of this combination is attacked on the ground that substantially it appears in patent No. 1,759, issued to N. Eaton in 1840, and patent No. 44,376, issued in 1864 to Allison and Halliwell. In the

Eaton patent, issued for an "improvement in the connection of railroad switches," is shown a rail pivoted at one end, the free end being kept pressed against the main rail by a spring pressing against it. When going in one direction the flange of the wheel, overcoming the pressure of the spring, will separate the safety rail from the main rail and pass through the opening thus created, but as soon as the wheel passes beyond the end of the movable rail the pressure of the spring will carry the safety rail against the main rail. In the Eaton combination the wheel acts upon the free end of the pivoted rail, the same as the shank of the grip in the Hallidie combination acts upon the pivoted switch rail, L. In the Allison and Halliwell patent, which had reference to atmospheric railways, is found a shifting tongue piece or guide in the tube for the purpose of aiding in shifting the direction of the piston when the car is crossing from one track to another. These devices, and especially that shown in the Eaton patent, show that a pivoted switch rail, combined with a spring to hold it in place, had been known long before the date of the Hallidie patent. Yet it is not clear that the mode of the use thereof was such as to preclude a claim for invention in so combining a pivoted switch rail and spring in connection with the tubes of a cable-car system as to obviate the difficulty caused by the large opening formed by the junction of the slot in the diagonal tube with that in the main tube. In view of the Eaton patent, Hallidie cannot successfully claim that he was the inventor of a pivoted switch rail, nor of a spring pressing against such rail to keep it in place, and to return it to place after the passage of a car over the same. If, however, he has perfected a combination of these devices with the slotted tubes of the cable-car system in such form as to overcome the difficulty presented by the large opening caused by the intersection of the slot in the diagonal tube with that in the main tube, I think there is sufficient novelty and utility in the combination to sustain a patent therefor. It is urged that the device used by defendant is not an infringement, because the spring used therein is not located in the position shown in the drawings attached to the patent. The patentee does not, however, in his claim, locate the position of the spring, and in his specification he states that "to obviate this difficulty, or, rather, objection, I employ a pivoted, V-shaped switch rail, L, at the meeting angle, which is pressed by a spring, Z, so as to force its point against the side of the slot," etc. The mere location of the spring is thus left open to be determined by the exigencies of each particular situation, and the mere fact that in the drawing the spring is shown in a particular location does not confine the claim in the patent to that particular mode of applying the spring to the rail. Although the invention covered by this claim is clearly narrow in its limits, I think the claim is sustainable, and that it appears that the defendant company is using the device described in the claim, and that the allegation of infringement in this particular must be sustained.

It is further charged in the bill that the defendant infringes the first claim in patent No. 195,505, issued to Hallidie on September 26, 1877, said claim reading as follows:

"The combination, with the underground slotted tube or tunnel, A, with its double line of pulleys, *d, e*, rope, D, and end pulleys, *g*, of the tube or siding, I, pulley, K, and horizontal pulley, *l, l*, substantially as and for the purpose described."

At the date of this patent the use of a single track, with proper sidings for the passing of cars going in opposite directions, thereby saving the expense of a double track, was not a novelty in street railways. The fact that the endless cable, used in connection with the cable-car system, could be carried around a pulley or drum at the ends of the track, and returned back underneath the same track, was known. One form of this construction is shown in the patent issued to William Eppelsheimer, August 24, 1875, in which the cable passes both ways under one track, but through two tubes or conduits. Analyzing claim 1 of the patent sued on, we find the combination includes an underground slotted tube or tunnel, having a double line of pulleys therein for carrying the cable. Did it require invention to substitute for two smaller tubes placed alongside of each other, and each having a line of pulleys therein for carrying the cable, a single, larger tube, with two rows of pulleys? That this change is a valuable improvement will not be questioned, but there are many valuable improvements on pre-existing structures that are not inventions within the meaning of the patent law. It is well known that in the building of a given structure improvements will almost always be suggested through the practical knowledge of the skilled mechanics employed in its construction. It is through these improvements that nearly all the original inventions are perfected and rendered of practical use, and, when the improvement is of such a nature that it would readily suggest itself to persons of skill in the development of the particular structure to which it is applied, it cannot be classed as an invention simply because of its practical value. It seems to me that the substitution of one larger tube for two smaller ones, for the purpose of carrying the cable when moving in opposite directions, cannot be said to involve any exercise of the inventive faculty.

Of the other elements named in the claim, to-wit, the rope, D, the end pulleys, *g*, of the tube or siding, I, pulley, K, and horizontal pulleys, *l, l*, it cannot be said that Hallidie was the inventor of any one of them. In the argument of counsel, stress was laid upon the arrangement of the pulley, K, and horizontal pulleys, *l, l*, in the siding, I, but nothing novel is shown therein. When the cable passes from the main track into the side track, its line of direction and pressure is changed, and the pulleys supporting the cable are also changed so as to conform to this change of bearing in the cable; but this presents no new solution of the problem always present when there is a change made from a vertical to a horizontal pressure in a rope or cable passing over supporting pulleys. The patentee himself, in his specifications, expressly negatives any claim to novelty in this element of the combination by the statement that—

"I am aware that bearing pulleys have been used in tubes for sustaining the rope at the points where the line of direction has been changed vertically; and such I do not claim as my invention."

The siding, I, so far as it is merely a side track to receive one car while the other passes on the main track, is certainly not a novelty. So far as it is a separate tube, connecting with the main tube, and intended to carry the rope when it is deflected from a straight line in order to carry the car onto the side track, can it be said that it required invention to supply two tubes in place of one, when it is shown that the original method of running cable-cars was to use two tubes for the passage of the cable in opposite directions? It is first claimed that it required invention to combine the pre-existing double tubes into one tube for the purpose of carrying therein the cable when moving in opposite, parallel directions, and then, when it became desirable to change the direction of part of the cable that it required invention to separate the single tube into two tubes, which, in effect, was only resolving the single double-cable tube into its original elements of two tubes with a single cable. Failing to find in any of the several elements named in claim 1 of the patent declared on any novelty in the form or use thereof of a character sufficient to constitute invention, it follows that to sustain this claim it must appear that the combination thereof works out a result of sufficient novelty and utility to confer upon it the requisite character of invention, as distinguished from mechanical improvement. Granting that the combination described is operative, the immediate result is that by its use an endless cable can be operated under one track, in a single tube, instead of using two tubes, as shown in the Eppelsheimer patent No. 166,975. Thus we are brought back to the question whether it required the exercise of the inventive faculty to conceive of the plan of merging the two tubes into one, and it would seem that this transformation did not demand anything more than the exercise of such mechanical skill as would belong to one acquainted with the previous state of the art. But if it be held that the combination, as a whole, does possess sufficient novelty to sustain the claim as a patentable invention, it is entirely clear that it cannot be broadly construed upon the question of infringement. None of the elements therein combined are new, nor was the ultimate purpose of running cars in opposite directions, upon a single track, with side switches, a novelty. Unless, therefore, the defendant uses the combination as presented in the patent, it cannot be said that the charge of infringement is sustained. The claim in question includes the end pulleys, *g*, as elements in the combination. In the specifications the location and uses of these pulleys are thus described:

"At each end of the tube, I mount a single horizontal pulley, *g*, one of which is a driving pulley, and this pulley is connected with the engine which furnishes the power."

In the drawings attached to the patent the pulley, *g*, is located at the end of the tube, in close proximity thereto, and of such relative size to the tube that the cable coming along one side of the tube will pass directly around the pulley, and at once return into the tube, being supported upon the vertical pulleys, *d* and *e*, shown in the end of the tube. As it appears in the drawings the pulley, *g*, is smaller in diameter than the rope-bearing tube, and it is clear that it was the intent of the pat-



entee to have it so constructed, for if it was made larger than the rope-bearing tube the cable, in leaving the tube, would be deflected from a straight line, thus tending to draw it away from the pulleys, *d* and *e*, and to bring it into contact with the sides of the tube. Reading the claim in the light thrown thereon by the specifications and the drawings, it is entirely clear that it was intended by the patentee that the pulleys, *g*, should be so located with reference to the end of the tube, and should be of such a relative size thereto, that the cable passing along the line of pulleys represented by *d* should pass directly therefrom to the pulley, *g*, and from it return into the tube upon the line of pulleys represented by *e*. According to the plan shown in the drawings and specifications this cannot be done except by having the pulley, *g*, located at the end of the tube, and of a size not exceeding the diameter of the tube. In the system in use at Sioux City, at the one-end of the line, the pulley, *g*, is not found. The cable passes around a pulley or wheel much larger than the tube, and is not returned therefrom into the same tube, but passes into another tube, which is ultimately united with the main track by means of a loop. This is the construction of the line at the point most distant from the power house, and it cannot be held that the pulley, *g*, of the Hallidie combination is used at that end of the line. The evidence fails to show the construction of the line at the end nearest the power-house, and hence complainant has failed to show that the pulleys, *g*, forming an essential element in the Hallidie combination, are found in defendant's structure, or, in other words, it is not shown that the combination described in claim 1 of the letters patent sued on is in fact used by defendant. The identity or great similarity of many of the elements found in defendant's structure with those shown in the claim is not sufficient, in a case of this character, to establish the charge of infringement of the combination. It must be held, therefore, that in this particular the complainant has failed to sustain the allegations of the bill. In view of the fact that the charge of infringement of complainant's rights is sustained in only the one particular, and of the further fact that the complainant permitted the defendant company to construct its line without hindrance or notice of its purpose to assert its claims under the patents sued on, and as the use by the defendant of the device sustained in the foregoing opinion is only upon its own line, and does not interfere with complainant's rights in any other way, there does not seem to be need for the issuance of an injunction at the present time. It is a case that the parties should settle upon a money basis. If the parties cannot agree as to the sum to be paid for the future use of the device held to be infringed, it will be open to complainants to move for an injunction against such future use, and the cause will be continued for that purpose; but for the present no injunction will be ordered, in the belief that the parties will be able to reach a settlement obviating the need of an injunction.

DABLE GRAIN SHOVEL CO. v. FLINT *et al.*<sup>1</sup>

(Circuit Court, N. D. Illinois. March 31, 1890.)

## PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—DEFENSES.

Under Act Cong. March 3, 1839, (5 St. at Large 354,) which provides that any person who has purchased or constructed any newly-invented machine before the inventor's application for a patent may use and sell such machine without liability to the inventor, it is a complete defense to an action for infringing a patent that the machine used by the defendants was constructed for them by the patentee before he applied for the patent, though after obtaining it he demanded compensation for the use of said machine, which was refused.

## At Law.

*William Zimmermann*, for plaintiff.

*Banning, Banning & Payson*, for defendants.

BLODGETT, J. This is an action at law for the alleged infringement of a patent issued to John Dable on the 7th day of August, 1866, for an "improvement in machines for unloading railroad cars," and a patent granted to the said John Dable on the 28th day of July, 1868, for an improvement upon said first-mentioned patent, which patents, it is averred, were on the 8th day of December, 1880, duly assigned to the plaintiff, together with all claims and rights of action for past use of said patented devices; and by this action plaintiff seeks to recover damages for the use of the said patents, not only since it became the assignee thereof, but for the use of the same by defendants before such assignment.

Defendants have interposed numerous pleas in the case; but I deem it necessary to consider only the fourth, which is, in substance, that the only machines for unloading grain from railroad cars ever used by defendants during the life of either of said patents were constructed and put into use in defendants' grain elevators by the said patentee, John Dable, and with his consent and allowance, while he was in their employ as superintendent of machinery, and prior to his application for either of said letters patent, whereby defendants claim that they became possessed of the right to use all of said machines during the life of each of said patents without liability to the said John Dable or the plaintiff, as his assignee. The parties have also filed a stipulation in the case admitting that the facts stated in the fourth plea are true, but with the further fact, to be considered in connection with the facts stated in the plea, that the patentee, when he obtained the patents in question, demanded compensation of the defendants for the use of his said invention. By this stipulation the question submitted to the court is whether the plea states a valid defense to the action, admitting the fact that Dable, when his patents were issued, demanded compensation from defendants for their use. Section 7 of the act of March 3, 1839, in relation to patents, (5 St. at Large, 354,) which was in force at the time

<sup>1</sup>Reported by Louis Bolsot, Jr., of the Chicago bar.

these patents were granted, and has, substantially, been in force since that time, under the various re-enactments and revisions of the patent laws, provides that—

“Every person or corporation who has, or shall have, purchased or constructed any newly-invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention.”

The allegation in this plea that the machines used by the defendants were constructed by the patentee, John Dable, while in defendants' employ, and put into use in the defendants' elevators, by his consent and allowance, before he applied for his patents, seems to me to make a complete defense under this statute; and the only additional fact brought into the case by the stipulation, that when he obtained the patents, which must have been after they were applied for, Dable demanded compensation for the use of the patents, and the defendants refused to recognize his rights thereto, does not, in my opinion, affect the defense raised by the plea, because, if Dable had no right to compensation, a demand could not give him such right. By the showing of the plea, there was no patent upon these machines at the time they were constructed and put into use in the defendants' elevator, and such construction and use, according to the statements of the plea, was with the consent and allowance of the patentee. I do not see how a case could be made to bring the defense more clearly within the provisions of this statute than is made by this plea, and the additional fact stated in the stipulation does not change the effect of the plea. The plea is therefore held to be a complete defense to the suit.

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### THE PIERREPONT.

(District Court, N. D. New York. June 19, 1890.)

#### TOWAGE—LIABILITY OF TUG FOR NEGLIGENCE.

Libelants sued for damages for injuries to a schooner insured by them, while being towed by a steamer in the St. Lawrence river. The evidence showed that the schooner was drawing 13 feet of water, and when at a point which, according to ranges taken by the steamer's captain at the time of the accident, was within the regular channel of the river, struck a rock 11 feet below the surface of the water. The government chart showed 25 feet of water at this place, and the obstruction was not known to pilots. Some of libelants' witnesses knew of it, but their knowledge was gained as fishermen, and not as pilots. *Held*, that libelants could not recover, since the accident occurred in the regular channel, where no obstruction was known to exist by those engaged in the navigation of the river.

#### In Admiralty.

These libels were filed by the Union Insurance Company and the Marine Insurance Company against the steamer Pierrepont, to recover dam-

ages for injuries received by the schooner Ellsworth while being towed by the steamer. The libelants, having policies of insurance upon the schooner, paid the amount of damages to her owners, and were subrogated to their rights.

*Benjamin H. Williams*, for libelants.

*Harvey D. Goulder*, for claimant.

COXE, J. On June 16, 1888, the schooner Ellsworth, loaded with stone and drawing about 13 feet of water, was taken in tow by the Pierrepont at the quarry dock, Grindstone island, St. Lawrence river, bound for Chicago. While passing through what is known as the "Middle Channel" between Grindstone island and Seven Pine island, the schooner struck a sharp pinnacle rock, and was injured. This rock was 450 feet from Seven Pine island, the point which occasioned the injury being about 11 feet from the surface of the water. If the accident occurred in the regular channel, where no obstruction was known to exist by those engaged in the navigation of the river, the libelants cannot recover; if it occurred outside the regular channel, the steamer was at fault.

The weight of testimony clearly establishes that the rock in question was unknown to pilots whose business it was to navigate the St. Lawrence river. The government chart shows 25 feet of water at this point, and there is hardly a dispute that prior to the accident the regular channel was supposed to extend much nearer than this to Seven Pine island. Within 200 feet of the island there is a shoal, and there is reason to believe that some of the libelants' witnesses mistook this shoal for the venue of the accident. If the captain of the Pierrepont, who took ranges at the time the schooner struck, is correct in locating her position at 450 feet from Seven Pines, the proof is overwhelming that she was in the regular channel when the accident happened. But, even though some of the libelants' witnesses did have knowledge of the rock which occasioned the injury, it was a knowledge gained rather as fishermen than as pilots. If known at all, the knowledge was confined to two or three, and was not imparted by them to river pilots generally. It is well settled that a steamer is not negligent when the tow strikes an unknown obstruction in a regular channel. *The Angelina Corning*, 1 Ben. 109; *The Mary N. Hogan*, 30 Fed. 927, reversed on the facts, 35 Fed. Rep. 554; *The James A. Garfield*, 21 Fed. Rep. 474; *The Willie*, 2 Fed. Rep. 95. The Pierrepont was neither insurer nor common carrier. She was bound to exercise ordinary care, skill, and prudence, and was liable only if she failed in these respects. The burden is upon the libelants to establish negligence, and they have not done so. The accident might have happened to any one of the river men produced at the trial, and should a similar accident happen in the future, still further south of Seven Pines, it would occasion no more surprise. The libels are dismissed, with costs.

STATE OF NORTH CAROLINA v. KIRKPATRICK *et al.*

(Circuit Court, W. D. North Carolina. April Term, 1890.)

## 1. REMOVAL OF CAUSES—CRIMINAL PROSECUTION.

Under Rev. St. U. S. § 643, which provides that, when any civil suit or criminal prosecution "is commenced" in a state court for an act done by an officer under the revenue laws of the United States, the same may be removed into the United States circuit court, a prosecution is "commenced" when the warrant is issued and the arrest made by the state officers, and it is no objection to the removal that no indictment has yet been found in the state court, and that there is no provision in the federal law for indictment for offenses against the state law.

## 2. SAME—FURTHER PROCEEDINGS IN STATE COURT.

Under said section, which declares that after removal "any further proceeding, trial, or judgment therein in the state court shall be void," an indictment found in a state court after the removal of the cause to the United States circuit court was null; and where, upon *habeas corpus cum causa*, it appears that the prisoners were in the discharge of their duty as revenue officers of the United States when the act was committed, and were without fault, they will be discharged.

## 3. CONFEDERATES IN CRIME—REVENUE OFFICERS.

The rule that confederates in an unlawful undertaking are each responsible for the evil consequences that ensue does not apply where a homicide was committed by one of a party of revenue officers while the party was engaged in the duty of searching for illicit distilleries.

## 4. REVENUE OFFICERS—ILLICIT DISTILLERIES—JUSTIFIABLE HOMICIDE.

Revenue officers searching for illicit distilleries came upon a furnace from which the still fixtures had been recently removed. A man was seen observing their movements, who afterwards offered to conduct them to a certain house, and walked in front of them for that purpose. Soon he began to run towards the house, and the officers ran after him, when he seized a gun, fired upon and wounded one of them, and was shot by another. *Held*, that the officers were warranted in suspecting him of an intention to warn guilty parties, and, although they had no warrant for his arrest, were justified in running after him to frustrate that design.

Preliminary Examination on *habeas corpus cum causa*.

Rev. St. U. S. § 643, provides that, "when any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States, \* \* \* on account of any act done under color of his office, \* \* \* the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending; \* \* \* and any further proceedings, trial, or judgment therein in the state court shall be void."

*Isaac Strayhorn* and *Robert Winston*, for the State.

*Jas. E. Boyd*, *W. S. Ball*, *W. P. Bynum*, and *Chas. Price*, U. S. Atty., for defendants.

DICK, J. The petition for the removal of this case into this court, and for a writ of *habeas corpus cum causa*, was duly filed in the office of the clerk of this court on the 6th day of March, 1890, under the provisions of section 643 of the Revised Statutes of the United States. As the circuit court was not then in session, the clerk, being of the opinion that the averments in the petition were sufficient for the removal of this case under the provisions of said statute, entered the case on the record of this court. As it further appeared that the petitioners were in actual

custody under due process issued by state authority, the clerk issued a writ of *habeas corpus cum causa* to the marshal of this district, together with a duplicate, to be served on the clerk of the state court for the county in which the homicide occurred. By virtue of such writs the marshal took the bodies of the petitioners into his custody, and on the 11th day of March, 1890, produced them before this court, then in session in this city. As the clerk of the state court had not made a return of a copy of the process under which the defendants were arrested, and the solicitor for the state was not present, the court ordered that the case be continued until the 14th, and that due notice be given the state solicitor. On the 14th of March the solicitor was not present. At his request, communicated by the counsel for the defense, and with the consent of the petitioners, the case was continued to the 7th day of April, the first day of this regular term of court. The case now being before the court for hearing, consideration, and action, the counsel for the prosecution made a motion to dismiss the proceedings for removal, upon the ground that this court had no jurisdiction; for, at the time when the petition was filed and the writ of *habeas corpus* was issued, no bill of indictment had been found against the petitioners by a grand jury in a state case, and there is no provision of law for the finding of a bill in a United States court for an offense against a law of the state.

I am of the opinion that, under the proceedings for the removal of this case from the state tribunal, this court has acquired full jurisdiction to hear, try, and determine all questions of law, and all matters of fact involved. The prosecution was commenced when the warrant of the justice of the peace was issued, and the petitioners were arrested. This opinion is founded upon a fair and reasonable construction of the language, purpose, and spirit of the statute under which these proceedings were instituted. It is also supported by carefully considered opinions delivered in United States courts. *State v. Port*, 3 Fed. Rep. 117; *State v. Bolton*, 11 Fed. Rep. 217; *Tennessee v. Davis*, 100 U. S. 257.

I regard a further discussion of these questions of law as unnecessary. The motion to dismiss is disallowed.

The material averments made in the petition bring this case clearly within the provisions of section 643 of the Revised Statutes of the United States, and the proceedings have been legally and regularly instituted. After hearing the evidence on both sides, and the arguments of counsel, I am of the opinion that there is not even slight evidence tending to show that L. M. Cates, A. T. Dodson, and W. T. Dickson had any participation in the unpremeditated homicide. The rule of law that confederates in an unlawful undertaking or transaction are each personally responsible for the evil consequences that ensue does not apply to this case. These parties were engaged in the performance of a legal duty, under the direction of superior officers of the law, and in no way exceeded the scope of their legal duty and authority. As there are no grounds for holding L. M. Cates, A. I. Dodson, and W. I. Dickson for further prosecution, it is ordered that they be discharged. As there is some conflict in the evidence as to the conduct of the revenue officers S. Kirk-

patrick and A. C. Patterson in the unfortunate transaction, I will hold them under their bonds until I can give the testimony my most careful consideration. I will also reserve for further consideration the question of law presented by the certified copy of the record of the superior court of Orange, showing that a bill of indictment has been found in said superior court against the petitioners for the alleged murder of Henry McMannen. It appears that said indictment was found in said state court after the removal of the case to this court. I will, during the next eight days of this term, hear further argument as to the force and effect of the proceedings in the state court, if counsel desire to present their views more fully.

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(April 18, 1890.)

DICK, J. Since hearing the evidence in this case, and the motions and arguments of counsel on the first day of this term, I have carefully considered the questions of law and the matters of fact then reserved. I am of the opinion that the bill of indictment found by the grand jury in the state court, after the removal, and during the pendency of this case in this court, is null and void, and cannot be the foundation for a prosecution of the alleged offense in this or any other court. The statute under which the proceedings for the removal of this case into this court were instituted expressly declares that after the removal "any further proceeding, trial, or judgment therein in the state court shall be void." The language of the statute is direct and positive, and there can be no correct judicial interpretation and action other than giving force and effect to this clear expression of the legislative will of congress. The statute is constitutional, and is a supreme law of the land. When this court has acquired jurisdiction under this statute of the parties and subject-matter of this case, no other court can institute proceedings for the prosecution of the parties for such alleged offense. The jurisdiction of this court, when thus acquired, is for all purposes exclusive.

From my recollection of the testimony set forth in the written statement which will be filed with this opinion, I have formed the following conclusions as to the material facts in this case: I find that S. Kirkpatrick and A. C. Patterson were duly-authorized revenue officers of the United States, and were in the performance of official duty, in searching for illicit distilleries, which they had been informed were in operation in that neighborhood; that while so engaged, about sunrise of the morning of the 25th of February, they discovered in the woods, and near a branch, the remains of a furnace of a deserted illicit distillery, and found McMannen, standing not far off, observing their movements; that no arrest was made and no menacing language was used, and McMannen voluntarily agreed to show them the house of Mr. Hunt, and went in front of the officers for that professed purpose; that the officers did not know that the house they saw, not far from the discovered furnace, was the house of McMannen; that the officers had reasonable grounds for suspecting that McMannen, when he reached the path lead-

ing to the house, intended to delay or mislead them in their search, and that when he started to run towards the house his purpose was to communicate information to the illicit distillers in the neighborhood, as the house to which he was going was not far from the place where the deserted distillery furnace had been discovered; that when the officers followed rapidly they had no purpose of doing any violence to McMannen, but merely wished to frustrate his design of communicating information; that the officers did not draw their pistols from their belts until they saw McMannen seize the gun on the bed, or on the table, in the house; that McMannen fired the first shot into the face of Kirkpatrick, who fell from his horse, and discharged his pistol while falling, and the ball struck the rock near the door-sill; that Patterson then dismounted, went behind the house, entered the back door, and fired the fatal shot as McMannen was presenting his gun and was about to fire upon Mr. Dickson, who was in the road in front of the door. I am not able to form a definite opinion as to the place where the ball entered the body of McMannen. From the testimony of Patterson and from the range of the ball, McMannen must have been standing with his side towards Patterson. If the left side was towards Patterson, the ball could have entered the left breast. If the right side was presented, the ball must have entered under the shoulder blade. I am not able to form a satisfactory opinion as to the ball found in the log in the back side of the house. I feel sure that the ball fired by Kirkpatrick struck the rock near the door-sill. I have formed these conclusions as to facts from the testimony of Patterson, Cates, and Dickson, who were present, and had better opportunity of seeing and hearing everything that occurred than Martha McMannen, who was 75 yards distant. Her testimony confirmed the statement of the other witnesses as to McMannen presenting the gun at Dickson, for she said that when her brother staggered out of the door he was holding the gun across his breast. A. I. Dodson was not examined, but the counsel for the defense stated in open court that his testimony would fully sustain the officers who had testified. He was present in court, and the state counsel had opportunity of examining him. Kirkpatrick was in Baltimore, under the care of a physician. He was wounded too severely to be before the court on former occasions.

Cates, Dickson, and Dodson in no way counseled or participated in the homicide. They were not summoned by Kirkpatrick or Patterson, but were present in the performance of duties directed by their immediate superior officer. They are men of good character, and have no motive to induce false testimony. The testimony of William and John Overaker, who were 350 yards distant, is merely the expression of an opinion as to the succession of the shots, from the nature of the sound. Such testimony is not sufficient to overcome the direct and positive testimony of the witnesses who were present, and could both see and hear. The shots of McMannen and Patterson were both fired in the house, and the reports were thus, in some degree, obstructed. The pistol of Kirkpatrick was of large calibre, and was fired in the open air, and may have seemed to be the loudest report to persons at a distance. Such supposi-



tion reconciles the testimony of the Overakers with that of the officers. Kirkpatrick and Patterson, as revenue officers, were in the performance of official duty. They had received reliable information that there were two illicit distilleries in that neighborhood in full operation. The nature of their duties in searching for illicit distilleries required vigilance, secrecy, and promptitude of action. They had, very early in the morning, reached the neighborhood, and had discovered a furnace from which the still and fixtures had been removed. They had found McMannen at that early hour near the furnace, observing their movements. From his conversation and action they had reason to suspect his connection or sympathy with illicit distillers. When he ran towards the house, which was near to the discovered furnace, without any explanation of such conduct, they had reason to suspect an evil motive, and had a right to keep him in view for the purpose of frustrating the suspected design, provided that they did not arrest him, or threaten him with personal violence. They had no right to arrest him without a warrant, but they had a right to watch him, and thus keep him from communicating information to violators of the law that would enable them to carry off and conceal their still and fixtures, and escape the legal penalties incurred by criminal misconduct.

Suppose that these officers had been duly authorized by law, and were seeking to surprise a band of counterfeiters, and to seize the implements and materials of such unlawful business, could there be any doubt as to the right and duty of such officers to follow and watch a person whom they had reasonable grounds to suspect was endeavoring to communicate information that would frustrate their lawful purpose and efforts? This principle of common sense and common justice certainly ought and does apply to illicit distillers, who carry on their nefarious business in secret places, by night and on the Sabbath, and who usually have sentinels and signals to give warning of the approach of revenue officers. In some localities this just principle is not as fully recognized in cases of illicit distillation as it is in the case of other crimes.

I deeply regret the occurrence of the unfortunate transaction that has given rise to these proceedings, for it has resulted in a homicide, and it has deprived a faithful revenue officer of the government of his sight, of his capabilities of supporting his family, and left him only a life of suffering. Similar cases have often occurred in the course of the enforcement of the internal revenue laws relating to the illicit manufacture, removal, and sale of spirituous liquors. The violators of such laws have sometimes been killed, and they have often been the slayers of revenue officers engaged in the performance of official duty. Congress has made provision by statute for securing a fair and impartial trial of revenue officers in the courts of the United States, for acts done in the performance of official duty. Such provisions are just, reasonable, and constitutional. It is a high and imperative duty of the government to make provisions by law to secure a fair and impartial trial for officers who are charged with crime for obeying its mandates and enforcing its laws. The enactment of such laws by the government is the exercise of a necessary, in-

herent, and constitutional power of national sovereignty. Fifteen years ago cases like this caused much political, legislative, and forensic discussion, and some conflict of jurisdiction between state and federal courts. Most of the disturbing and perplexing questions of law involved in such cases have now been authoritatively settled by carefully considered decisions in state and national courts. *Tennessee v. Davis*, *supra*; *South Carolina v. Davis*, 107 U. S. 597, 2 Sup. Ct. Rep. 636; *State v. Hoskins*, 77 N. C. 530; *In re Neagle*, 39 Fed. Rep. 833. In the *Neagle Case* the authorities are ably and fully reviewed, and among others the following principle is announced:

"It is the exclusive province of the United States courts to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is therefore the prerogative of the national courts to construe the national statutes, and determine upon *habeas corpus* whether a homicide, for which the petitioner is charged with murder by the state authorities, was the result of an 'act done in pursuance of a law of the United States,' and, when that question has been determined in the affirmative, the prisoner will be discharged, and the state has nothing more to do in the matter."

This case has just been affirmed by the United States supreme court. 10 Sup. Ct. Rep. 658.

Being well satisfied from a decided preponderance of the evidence in this case that the petitioners were acting in the line of official duty when the homicide occurred, and that they are not guilty of murder, as charged in the state process under which they were arrested, it is ordered that they be discharged.

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### CHAMBERS v. McDUGAL *et al.*

(Circuit Court, D. Kansas. May 22, 1890.)

#### 1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—PRACTICE.

A petition for the removal of a cause from the state to the federal court, on the ground of diverse citizenship, stated that plaintiff was a resident of Kansas, and that defendants were, and still are, non-residents, and citizens of states other than Kansas, "as will more fully appear by the affidavit of the plaintiff C. for an order of publication filed herein." Such affidavit recited that defendants (giving their names) were non-residents, and the complaint in the cause referred to certain of defendants as residents of Vermont and Missouri. *Held*, that the diverse citizenship of the parties sufficiently appeared from the whole record, and a motion to remand because the petition for removal failed to show the citizenship of defendants should be denied.

#### 2. SAME—JURISDICTIONAL AMOUNT.

Where the petition for removal, in such case, alleges that the action is on a fraudulently executed mortgage, and to cancel bonds fraudulently issued and secured by it, to the amount of \$45,000, and states that the amount in controversy exceeds \$2,500, exclusive of interest and costs, and the controversy is sufficiently stated in the complaint, a motion to remand to the state court on the ground that the petition for removal and the record do not show that the amount in controversy exceeds \$2,000 will be denied.

#### 3. SAME—JURISDICTION—SUITS BY RECEIVERS.

The rule that the court appointing a receiver will reserve the right and power to control him, and the property under his charge, cannot prevent a receiver ap-

pointed by a state court from bringing in the federal courts suits affecting the receivership property.

4. **SAME—IRREGULARITIES IN REMOVAL BOND.**

Where a cause is once removed from a state to a federal court, and there are no jurisdictional objections to its remaining there, the facts that a defendant bank has signed the removal bond as surety, and the other surety had no authority to sign, are not, where the bond is otherwise ample, sufficient grounds for remanding the cause.

In Equity. On motion to remand.

*E. A. McMath*, for plaintiff.

*Elijah Robinson*, for defendants.

FOSTER, J. The defendants removed this cause to this court from the state court on the ground of diverse citizenship. The plaintiff now files his motion to remand the cause to the state court for several reasons:

First, that the petition for removal does not state the residence and citizenship of the several defendants. The averment as to citizenship in the petition for removal is as follows:

"That this action involves a controversy between citizens of different states; that the plaintiff, R. L. Chambers, said receiver, was at the time of the commencement of this action, and at all times since has been, and now is, a resident and citizen of the state of Kansas, and that said defendants, and each of them, were at the date of the commencement of this suit, ever since have been, and still are, non-residents of the state of Kansas, and citizens of states other than Kansas, as will more fully appear by the affidavit of the plaintiff, Chambers, for an order of publication filed herein on the 8th day of October, 1889."

The averment as to citizenship in the affidavit for publication is as follows:

"And deponent further says that the defendants Harry C. McDougal, E. A. Hall, James S. Warden, Harry C. McDougal as trustee, George F. Walker, H. D. Stone, Annie Lee, and each of them, are non-residents of the state of Kansas, and that said defendants the Windsor National Bank of Windsor, Vt., the Savings Bank of Bradford, Vt., the National Exchange Bank of Kansas City, Mo., and each of them, are foreign corporations, not located or doing business within this state, and that plaintiff, with due diligence, is unable to make service of summons in this action on either or any of the defendants within the state of Kansas."

In the plaintiff's complaint the defendant corporations are referred to as follows:

"The Windsor National Bank of Windsor, Vt., a banking association duly organized under the national banking laws of the United States, and the Bradford Savings Bank, of Bradford, Vt., a corporation duly organized under the laws of the state of Vermont, and the National Exchange Bank, of Kansas City, Mo., an association duly organized under the national banking laws of the United States."

If it appears from the whole record that the citizenship of the parties is such as to give this court jurisdiction, the case will not be remanded. *Bondurant v. Watson*, 103 U. S. 285; *Water Co. v. Keyes*, 96 U. S. 199. The affidavit for publication, as well as the plaintiff's complaint, are a necessary part of the record; and from the petition for removal, and the

record, it sufficiently appears that all the defendants are citizens of other states than Kansas.

It is further objected that it does not appear from the petition for removal or the record that the amount in controversy exceeds \$2,000. The allegation in the petition for removal, on this point, is as follows:

"That this action was founded upon an alleged fraudulent execution of a certain mortgage or deed of trust executed by the said First National Bank Building Association of Colby, Kan., and for the cancellation of forty-five thousand dollars of bonds issued by said building association, the payment of which is secured by said deed of trust, and alleging in said petition, among other things, that these defendants are the holders of said bonds; that plaintiff, in his said petition, prays the cancellation of said bonds; and that the amount in controversy exceeds twenty-five hundred dollars, exclusive of interest and costs."

By reference to the plaintiff's complaint, it will be seen that the controversy is fairly but briefly stated, and, without going into technicalities, appears to be sufficient.

Defendants further allege that, inasmuch as this is a suit by a receiver, it could not have been originally brought in this court. That is a misapprehension of the law. It does not matter whether the plaintiff is a receiver, an administrator, trustee, or holding any other fiduciary capacity. The federal courts are not closed against him on that account. It is true that the court appointing a receiver will reserve the right and power to control such receiver, and the property under his charge. So does the probate court control its administrator, and the estate under his control. And in this case the controversy between plaintiff and defendants can be tried in this court without in any manner encroaching on this rule.

The fourth and last objection to the right of removal is the most serious; and this case discloses a mode of practice which, under the comity of courts, should be condemned. The defendants filed their petition and bond for removal in the state court. They did not appear and present it to the court, and ask to have an order removing the case, but allowed the adverse counsel to call it up; and the following order was entered in the state court:

"Each and all the above-named defendants having appeared in this action by Elijah Robinson, Esquire, their attorney, and filed their petition for the removal of this case to the circuit court of the United States for the district of Kansas, and the said plaintiff appearing by E. A. McMath, his attorney, in opposition to such application, the court, upon due consideration, doth deny and refuse said petition, and this cause is continued until the next term of this court."

It is true the state court cannot deprive a party entitled to remove the case of his right of removal. On the other hand, the state court cannot be deprived of its jurisdiction until a proper petition and bond for removal have been presented. In this case, it does not appear on what grounds the state court refused to order the case removed. The petition seems to be in proper form, but the form of the sureties to the bond may be questioned. The bond reads as follows:

"Know all men by these presents, that the undersigned, Henry C. McDougal and George F. Walker, as principals, and the National Exchange Bank of Kansas City, Missouri, and the First National Bank of Frankfort, Kansas, as sureties, are held and firmly bound unto R. L. Chambers as receiver, the above-named plaintiff, in the sum of one thousand dollars," etc.

It will be seen that the National Exchange Bank of Kansas City, Mo., and the First National Bank of Frankfort, Kan., are named as sureties. The first-named bank is a party to the suit, and one of the removing parties, and, of course, could sign the bond, but whether as surety instead of principal is not so clear, while the First National Bank of Frankfort had no authority to sign the bond either as principal or surety. The action of its cashier was *ultra vires*. The National Exchange Bank has a paid-up capital of \$200,000; and waiving the question whether it is liable as principal or surety, the sufficiency of the bond cannot be disputed. This case is one which the defendants are entitled to remove to this court, and the order of the state court refusing the removal was not, apparently, based on any objection to the bond or the surety; and the case need not be remanded to the state court on account of the informality of the surety to the bond. *Beede v. Cheeney*, 5 Fed. Rep. 388; *Stevens v. Richardson*, 9 Fed. Rep. 191; *Removal Cases*, 100 U. S. 457. This question is fully discussed in the case of *Dennis v. Alachua Co.*, 3 Woods, 683; and Judge SETTLE, in that case, uses the following language:

"There are many cases to be found in the recent numbers of the law publications to the effect that when a case is once removed from a state to a federal court, and there are no jurisdictional objections to its remaining there, it will not be remanded or dismissed for defects connected with the giving of the security or bond, or other irregularities which can be remedied, or which have not worked any prejudice."

For the various reasons before stated, I reach the conclusion that this case is properly in this court, and the motion to remand must be denied.

### COOPER v. RICHMOND & D. R. Co.

(Circuit Court, N. D. Georgia. June 21, 1890.)

#### 1. REMOVAL OF CAUSES—LOCAL PREJUDICE—PROCEDURE.

Since Act Cong. March 3, 1887, which provides for the removal of causes on the ground of local prejudice does not prescribe any mode of procedure, a petition for removal, accompanied by an affidavit by a person authorized to make it, stating of his own knowledge the existence of prejudice and local influence, is sufficient to justify an order of removal. Following *Whelan v. Railroad Co.*, 35 Fed. Rep. 849.

#### 2. SAME—TRAVERSING AFFIDAVIT.

Where such an affidavit is presented, the court will not permit the adverse party to traverse it, and will not hear evidence on the subject. Following *Whelan v. Railroad Co.*, 35 Fed. Rep. 849.

Motion to Remand.

*Hall & Hammond*, for plaintiff.

*Jackson & Jackson and Pope Barrow*, for defendant.  
Before PARDEE and NEWMAN, JJ.

NEWMAN, J. This is a case removed to this court from the state court, under the Act of March 3, 1887, by the defendant corporation, on the ground of "prejudice and local influence." The questions for determination arise over the sufficiency of the affidavit made on behalf of the defendant, and on which the order for removal was made. In connection with the petition, setting forth the facts as to the amount involved, the citizenship of the parties, and the residence of the plaintiff and defendant, the subject-matter of the suit, and the prayer for removal, which is sworn to by counsel, defendant presented an affidavit made by S. G. Hammond, acting superintendent of the road in Georgia, who states therein that—

"From very many years' experience in railroad matters, and especially with litigation against the defendant, Richmond & Danville Railroad, in this particular, in the courts of Atlanta, in said Fulton county, state of Georgia, I know that, from prejudice and local influence, defendant will not be able to obtain justice in the superior court of Fulton county, of the state of Georgia, nor in any other court to which the petitioner may, under the laws of said state, have the right, on account of such prejudice or local influence, to remove said cause."

The motion of the plaintiff is in these words:

"And now comes the plaintiff in the above-stated case, and makes application to the court to examine into the truth of the affidavit and grounds for removal of said case to this court, and to remand said case to the superior court of Fulton county, on the ground that it is not true that the said defendant is unable to obtain justice in said state court from prejudice or local influence."

Two questions have been argued and submitted. *First*, whether or not the court was justified in signing the order for removal on the affidavit of defendant's acting superintendent, above quoted; *second*, whether or not the court will now hear evidence as to the existence of prejudice and local influence, or, in other words, ascertain by evidence *aliunde* as to the existence or non-existence of the grounds for removal. There is decided conflict in the decisions and opinions of the various circuit courts upon both of these questions. The following decisions are upon this subject: *Fisk v. Henarie*, 32 Fed. Rep. 417; 35 Fed. Rep. 230; *Short v. Railway Co.*, 33 Fed. Rep. 114; *Hills v. Railroad Co.*, Id. 81; *Whelan v. Railroad Co.*, 35 Fed. Rep. 849; *County Court v. Railroad Co.*, Id. 161; *Malone v. Railroad Co.*, Id. 625; *Southworth v. Reid*, 36 Fed. Rep. 451; *Huskins v. Railway Co.*, 37 Fed. Rep. 504; *Goldworthy v. Railway Co.*, 38 Fed. Rep. 769; *Dennison v. Brown*, Id. 535; *Amy v. Manning*, Id. 536; *Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 885; *Minnick v. Insurance Co.*, 40 Fed. Rep. 369.

After a careful examination of all the cases, we are disposed to adopt the conclusion, and the reasoning by which he arrives at that conclusion, of Judge JACKSON, in the case of *Whelan v. Railroad Co.*, *supra*, and to hold that where the petition for removal is accompanied by an affidavit on behalf of the defendant, by a person authorized to make it, stating

of his own knowledge, as in this case, the existence of prejudice and local influence, it is sufficient to justify the order for removal. In other words, when it is "made to appear" to this court, by affidavit made on the affiant's own knowledge, that the prejudice and local influence exist, that it is a compliance with the statute. There is nothing whatever in the act of 1887 to show how it shall be "made to appear" to this court that the prejudice and local influence exist; and unless subdivision 3, § 639, of the Revised Statutes, (Act 1867,) remain of force, there is no law prescribing a method of procedure. The language of the court in the *Whelan Case*, *supra*, is as follows:

"It is further contended that no proper proceedings have been had or taken by the defendant, even conceding its right of removal, to effect such removal. By the third section of the act of 1887, the steps required to be taken in removal cases generally are indicated; but that section excepts from its operation cases sought to be removed on the ground of local prejudice, in respect to which clause 4 of amended section 2 prescribes no mode or method of effecting that class of removals. What procedure may, then, be adopted by the party seeking or entitled to remove under this clause? In conferring the right, congress certainly intended that some process for its exercise should be within the reach of the party so entitled. We think the method or procedure for effectuating the right so conferred by said clause may be found in the two paragraphs of section 639, Rev. St., which succeed the third subdivision of said section. These two paragraphs, prescribing the method of accomplishing removals, are not in conflict with the act of 1887, and may therefore be considered as still in force, and as furnishing the proper and appropriate remedy to be employed by the party seeking a removal, and in making it 'appear to said circuit court that, from prejudice or local influence' he will not be able to obtain justice in the state courts. It is not indicated in the act of 1887 how or in what manner the fact that the removing party cannot obtain justice in the local courts, on account of such prejudice or local influence, shall be made 'to appear' to the circuit court. Judge DEADY, in *Fisk v. Henarie*, 32 Fed. Rep. 417-421, (Nov. 29, 1887,) held that the last clause of section 639, Rev. St., which immediately follows subdivision 3 of said section, might reasonably be looked to as furnishing the machinery for making it 'appear' to the circuit court that the petitioning party could not obtain justice in the state court because of prejudice or local influence. If this suggestion of that learned judge, in which I concur, is not deemed correct, then, in the absence of all provision as to the method or mode of presenting the application for removal, this court would be left free to adopt proper and suitable rules prescribing and regulating the practice in such cases; and such rules would naturally be made to conform to the practice and procedure heretofore in force in like cases. In either view of the subject, we think the mode adopted by the defendant in this case is not open to any serious objection. A formal petition, properly sworn to, was duly presented to this court, setting forth all the conditions required by the act to entitle said defendant to remove the suit. This petition was accompanied and supported by the affidavit of the proper officer of the defendant company, stating, not what the affiant had reason to and did believe in respect to the existence of local prejudice, but in direct terms, and in the very language of the act, 'that, from prejudice and local influence, said said railroad company will not be able to obtain justice in said courts of common pleas, or in any other state court to which it has, under the laws of the state of Ohio, a right, on account of such prejudice or local influence, to remove said cause,' etc. This made a *prima facie* showing as to what was required 'to be made to appear to the circuit court.'"

In the case of *Hills v. Railroad Co.*, *supra*, (decided in this court by the district judge presiding therein,) and in the case of *Fisk v. Henarie*, *supra*, (decided by Judge DEADY in the circuit court of Oregon,) it was held that the old act, so far as the method of procedure for removal was concerned, remained of force, and that, when an affidavit was made in accordance with the act of 1867, it was sufficient to justify removal. It seems the better practice now, however, even if it be that it is not required by the law, that the existence of the prejudice and local influence should be stated of the affiant's own knowledge. That has been done in this case, and we think the affidavit was sufficient to justify the order for removal.

Now, the affidavit named being sufficient to authorize the order for removal, will the court permit the other party to traverse the grounds of the affidavit, and hear evidence as to the existence of prejudice and local influence? We adopt the conclusion of the court in the *Whelan Case* upon this subject, also. The argument of Judge JACKSON upon this subject in the case named (pages 861-866) leaves nothing to be added by us. It seems to us conclusive upon this question. We have had occasion in this case, and in some other similar cases arising here, to examine a copy of the bill presented informally, and discussed in a former case which passed the house, and, after amendments in the senate, was concurred in by the house, and resulted in the Act of March 3, 1887. This shows the bill as it passed the house, and the various particulars in which it was amended, by striking out and inserting language, in the senate. From this it appears that, as the bill went from the house to the senate, it read, so far as pertinent to the questions here, as follows: "When it shall be made to appear to *the satisfaction* of the court that, from prejudice or local influence," etc. In the senate, the words, "the satisfaction of the," were stricken out, and the words "said circuit," before "court," inserted, so that it read as it went back from the senate to the house and was passed, as the act now reads, "When it shall be made to appear to the said circuit court," etc. It will be seen from the history of this part of the act that, by the house bill, it was contemplated that it should be made to appear "to the satisfaction of the court," (probably the state court,) that the prejudice or local influence existed, and that the senate changed it so that it should clearly provide for the application to be made to the circuit court, and refused to agree to the language which was stricken out, above quoted. This undoubtedly indicates an intention not to allow a provision looking to investigation and inquiry as to the existence of prejudice or local influence to become a part of the act. If this part of the history of the act of 1887 be a proper matter for consideration, it greatly strengthens the argument in favor of construing the clause in question as indicated above. The supreme court of the United States in *Blake v. Bank*, 23 Wall. 307, adopted this method of interpreting an act of 1870 taxing incomes from dividends, etc. The rule there announced is that—

"A badly-expressed and apparently contradictory enactment (such as the one above mentioned) interpreted by a reference to the journals of congress,



where it appeared that the peculiar phraseology was the result of an amendment introduced without due reference to language in the original bill."

If the history of this act, in the respects named, be the proper subject for consideration, it seems to us conclusive upon the questions now presented, and clearly negatives the idea that any investigation or inquiry such as we are requested to make here as to the existence of grounds of removal was contemplated by congress. Irrespective of this, however, it appears that, when congress came to deal with the cases which had been removed to this court by plaintiff before the passage of the act, it provided that—

"The circuit court shall, on application of either party, examine into the truth of said affidavit, and the grounds thereof; and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto." 24 St. U. S. 553.

It appears from this that when an examination into the truth of the affidavit, and the ground thereof, was contemplated, it was so stated in express terms; and the statement of it there, we think, gives emphasis to its omission in the preceding part of section 2, in making provision for removal by the defendant. So that, giving no weight whatever to the history of the act, and construing it by what appears upon its face, the clear statement of the duty of the court in one case, and its entire omission in the other, is very significant, and leads to the conclusion, that in the latter case, no such duty was intended to be imposed. Motion denied.

PARDEE, J., concurs.

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### WITTERS v. SOWLES *et al.*

(Circuit Court, D. Vermont. June 28, 1890.)

#### QUIETING TITLE—REMEDY AT LAW.

A purchaser of land at execution sale cannot bring suit to quiet title against another purchaser of the same land under a subsequent execution, in order to determine which has the better title, since the respective rights of the parties may be determined at law.

In Equity. On demurrer to bill.

C. W. Witters, *pro se*.

Edward A. Sowles, for defendant.

Before LACOMBE and WHEELER, JJ.

PER CURIAM. The complainant heretofore brought an action on the law side of this court against the defendant Margaret B. Sowles, and therein attached certain real estate upon mesne process, November 2, 4, and 5, 1887. Verdict and judgment followed, May 7, 1889, and ex-

ecution was issued July 12, 1889. This execution was irregular, being made returnable in 60 days, instead of "to the next stated term of the court." Abandoning his first execution, plaintiff issued another on July 29, 1889, returnable to the October term, 1889. On that day and the next, (July 29th and 30th,) the execution was levied on the lands in question, situated in the towns of St. Albans and Swanton. On July 26th the defendant E. A. Sowles, acting as attorney for the defendant Susan B. Sowles, his daughter, brought suit in the state court against the defendant Margaret B. Sowles, his wife, and the mother of said Susan B. Sowles, and in such action attached upon mesne process the interest of Margaret B. Sowles in the lands in question. Judgment therein has since been entered, execution issued, and levy made, and sale under such execution threatened. The complainant now brings a bill in equity (1) for a decree that his proceedings are valid, and his title paramount to that of any of the defendants; (2) to annul and set aside the Susan B. Sowles attachment and levy; (3) to enjoin defendants from proceeding with sale thereunder; and, (4) if any of complainant's proceedings should be found irregular and defective, then for a decree that he may correct the same.

The theory of the bill seems to be that the Susan B. Sowles proceedings (which complainant asserts to be fraudulent) constitute a cloud upon the title which he or the purchaser at the execution sale has acquired under his own attachment and subsequent proceedings. The laws of Vermont regulating final process provide that "personal property attached on mesne process shall be held to respond to the judgment rendered on such process thirty days from the time judgment is rendered; and unless the plaintiff, within thirty days from the rendition of final judgment, takes such property in execution, it shall be discharged from such process; and real estate attached on such process shall be held five months after the rendition of final judgment, and no longer." R. L. Vt. § 1542. It is apparent that the real estate in question was taken in execution within the five months, but was not sold under the execution until after the five months had expired. It is claimed by the defendants that thereby the complainant lost his lien by attachment. In other words, the question raised is whether it is the levy or the sale which gives such a title to the property that the lien of the original attachment may thereafter be dispensed with. By this bill it is sought to have that question determined in equity, but no sufficient ground for equitable interference is shown. If the defendants' contention is sound; if the statute provides that it is the sale, and not the levy, which must be made within the five months,—then the complainant has no title to be clouded. The lien that he acquired by the attachment would in that case be gone forever, not only as against intervening lienors, but as against all the world. If, on the contrary, the defendants' contention is unsound, then there is no cloud upon the orator's title. His original attachment has reserved the property until its place was taken by his levy, and no intervening attachment or levy can in any way affect his rights. An attachment obtained by any other creditor of Margaret B. Sowles, as to

whom there might be no suggestion of bad faith or collusion, or even of actual knowledge, would have no more effect to impair the complainant's rights in that case than would the attachment which Susan Sowles obtained.

Of course, it does not constitute a cloud upon the title to real estate that those who may be in its actual possession entertain and express different views of the statutes and authorities under which the holder of such title seeks to establish it than he himself does. The fact is that the only cloud suggested in the bill is one arising from supposed defects in his own proceedings, and is in no sense created by any outstanding rival claim. The case in the supreme court cited by counsel for the complainant (*Ward v. Chamberlain*, 2 Black, 444) sustains a suit such as this only when "a title to real estate, otherwise clear, is clouded by a claim which cannot be enforced." That is not this case; the clearness or obscurity of complainant's title is not at all dependent upon any outstanding claim under Susan B. Sowles' action. It depends solely upon its own inherent strength or weakness, and the complainant should be left to develop that strength or weakness in the proper forum by action of ejectment. *Rooney v. Soule*, 45 Vt. 303. An effort is made to sustain the bill under section 1596, Rev. Laws Vt., which provides that the (state) supreme court may vacate a defective levy, and issue execution anew. Without entering upon a discussion of the objections advanced to this proposition, it is sufficient to say that the special relief contemplated by that section, when sought to be availed of to secure the fruits of a judgment rendered in a common-law action, is not to be applied for on the equity side of the court. A further objection to the maintenance of this suit is the fact that the six months allowed the judgment debtor in which to redeem the property had not expired when this bill was filed. Till that time expired, her right to redeem the land from the orator's levy could be attached or levied upon, and the attaching or levying creditor would have 15 days after the expiration of her right to redeem within which to make redemption. Laws Vt. 1884, No. 139, § 10. Susan B. Sowles merely attached and levied upon this right of her mother to redeem as any creditor or person claiming to be the creditor might lawfully do. Any creditor attaching subsequently to her might appear and contest her claim. R. L. Vt. § 1166. The orator, by making such subsequent attachment, could do the same. He is not now an attaching or levying creditor of that right which Susan B. Sowles has attached or levied upon, and, according to the allegations of his bill, has no interest in it. The demurrer is sustained.

## KAHN v. WEILL.

(Circuit Court, S. D. California. May 19, 1890.)

**MORTGAGES—DEED ABSOLUTE IN FORM—EVIDENCE.**

In a suit to declare a deed absolute on its face a mortgage, and to redeem therefrom, it appeared that O., who was complainant's mother-in-law, was indebted to defendant and to complainant; that she executed to defendant an absolute deed to all her land, which was not at the time worth more than the debt, and received from him all evidences of debt. This deed complainant claimed to have been intended as a mortgage, under an agreement by which he was to have the right to redeem the land thereby conveyed on his subsequent payment of all the indebtedness. O. testified that the deed was intended as an absolute conveyance, and letters from her to defendant and to complainant tended to show that this was the understanding. There were letters from complainant to defendant and to O., running through several years, during which he made no claim that the deed was a mortgage. His testimony was contradictory and improbable. Defendant, and other members of his firm, testified that the deed was absolute. *Held*, that the deed was an absolute conveyance.

**In Equity.**

*Jarrett T. Richards, George Pearce, and Rodgers & Munday, for complainant.*

*Stanly, Stoney & Hayes, for defendant.*

Ross, J. This is a suit in equity in which the complainant, by his bill, seeks to obtain a decree that a certain deed, of date February 24, 1881, absolute in form, and executed by one Augustias de la Guera de Ord and complainant, and purporting to convey to the defendant five certain parcels of land situated in the county of Santa Barbara, and referred to, for convenience of reference, as the "State-Street Lot," the "Cold-Springs Tract," the "Ord Garden," the "Montecito Tract," and the "Todos Santos Rancho Property," consisting of an undivided interest in the Todos Santos rancho, was in fact a mortgage, and that the defendant be permitted to redeem all of the said property. In respect to the alleged rights of the complainant, no distinction is made in the bill, which is sworn to by complainant, between the different parcels of land. Precisely the same rights are therein asserted to each. It is, among other things, in substance, alleged that, on the 24th of June, 1876, Augustias de la Guera de Ord was the owner in fee and in possession of the said five parcels of land, and that there was then existing thereon a mortgage executed by her to the defendant, as trustee for the firm of Lazard Freres, to secure an indebtedness from her to that firm, then amounting to \$11,000; that on the day mentioned Mrs. Ord paid \$4,984.65 of the said indebtedness, and the Todos Santos rancho was thereupon released from the mortgage; that Mrs. Ord was at the same time indebted to the complainant, who was her son-in-law, in a large amount of money which she was desirous of paying, and he of receiving, but, being unable to do so without further incumbering her said property, and being also desirous of aiding and advancing complainant in business, on the 30th day of May, 1877, she made and delivered to complainant this power of attorney:

"Whereas, I, Augustias de la Guera de Ord, am indebted to Moise Kahn in a certain sum of money, and whereas I am desirous that said Kahn have the management, control, and disposition of my hereinafter mentioned property, for the purpose of satisfying the above debt due by me to him, now I, Augustias de la Guera de Ord, in consideration of the above, and that said M. Kahn do accept the trust, do hereby constitute the said M. Kahn my true and lawful attorney for me, and in my name, place, and stead, to manage and control, collect the rents, issues, and profits thereof, by suit or otherwise, and receive the same, mortgage, borrow money, bond, lease, sell, or in any way dispose of all or any part of the following described premises or any interest therein, as to him may seem best, to-wit: All my right, title, and interest in and to all the certain tract of land or rancho situated in the county of Santa Barbara, state of California, called and known as the 'Todos Santos y San Antonio Rancho,' confirmed and patented by the government of the United States to the widow, heirs, and executors of William E. B. Hartwell, deceased, by decree of confirmation and letters patent dated November 20th, 1876, and recorded in the office of the county recorder of Santa Barbara county, in Book A of Patents, page 305 and 315 inclusive, which letters patent are made part hereof for purposes of description; and in my name and stead, for the above purposes, to make, execute in writing, and deliver any and all mortgages, notes, releases, and all other necessary instruments and documents, and to collect, sue for, and receive all sums of money due from any one from the management and disposition of said property.

"Witness my hand and seal, this 30th day of May, one thousand eight hundred and seventy-seven.

"AUGUSTIAS DE LA G. DE ORD. [Seal.]"

The bill alleges that the complainant accepted the power, and undertook the service; that he called upon the defendant, who was at the time a member of the firm of Lazard Freres, which firm was then engaged in the business of banking and loaning money in the city of San Francisco, and with the members of which complainant then was and had long been on intimate friendly and social relations; that defendant was willing to make the desired loan upon the execution by Mrs. Ord of a deed for the Todos Santos rancho property as security for such loan, which defendant preferred, and advised complainant to procure, and which complainant did procure to be made, and upon the execution of complainant's note as "further security;" that the loan was accordingly made, and secured by the deed from Mrs. Ord and the note of complainant, and that, by the direction of Mrs. Ord, defendant, who, throughout all of the transactions, acted for and in behalf of Lazard Freres, on the 6th of August, 1877, executed to complainant in writing this defeasance:

"I hold the promissory note of Mrs. Augustias de la G. de Ord, of Santa Barbara, state of California, dated the 16th day of March, A. D. 1876, for \$11,000, on which there is due me, principal and interest, \$6,240 92-100. I also hold the note of M. Kahn, for \$5,000, dated August 6th, 1877. And the said Ord having conveyed to me, by deed dated July 9th, 1877, all her interest in the tract of land situated in the county of Santa Barbara, and known as the "Rancho Todos Santos y San Antonio," which deed is upon its face for the consideration of \$5,000, and is absolute in form, now, therefore, this is to certify and make known that said deed, though absolute in its terms, is, in point of fact, given to secure, *first*, the payment of the said note of M. Kahn for \$5,000, with interest that may accrue due thereon; and, *second*, to further secure the principal and interest due me on said note of Mrs. Ord,

hereinbefore first above mentioned; but I agree not to subject the lands of the said Rancho Todos Santo y San Antonio to the payment of the said note of Mrs. Ord until I have first exhausted the securities I already hold therefor, and then only for any deficiency that may exist after my present securities are exhausted. And I agree that, upon the payment to me by the said Kahn of his said note, with interest, as in said note provided, and also upon the payment of the said note of Mrs. Ord, with interest, and the further payment to me of all sums of money by me for any purpose expended for the protection of said land, or for further or more effectually securing to me the interest in said lands mentioned in said deed, and all expenses and charges that I may incur or make in looking after and protecting or improving said property, and costs and attorneys' charges in enforcing the payment of said money secured by said deed, I will convey the interests so conveyed to me by said deed of the 9th day of July, 1877, to M. Kahn, pursuant to the written request of said Ord, as expressed in her letter to me of July 9th, 1877.

"Witness my hand and seal, this 14th day of November, A. D. 1877.

"A. WEILL. [Seal.]

"N. B. Before execution, the words 'of even date herewith,' in line 8, on page 1, were erased, and the words 'dated Aug. 6th, 1877,' interlined."

The bill then alleges that, about the month of January, 1881, Mrs. Ord being still indebted to Lazard Freres, and being still unable to pay complainant the amount due him, and her indebtedness to Lazard Freres being then about to become barred by the statute of limitations of California, the said Lazard Freres moved and induced complainant to and he did procure Mrs. Ord to sell all of her said property, together with her equity of redemption therein, to complainant, with the understanding and agreement that complainant should and would assume the payment of the entire indebtedness of Mrs. Ord to Lazard Freres, and join her in the conveyance and transfer of the whole of the said real property, including the said Todos Santos rancho property, all to be held by the said Lazard Freres as security for the payment of said indebtedness of complainant to them, and that this was consented and agreed to by complainant and Mrs. Ord, as well as Lazard Freres; and that the said purchase from Mrs. Ord by complainant was consummated on the 24th of February, 1881, and her said indebtedness assumed by complainant, and that complainant joined Mrs. Ord in the transfer of all of said property to Alexander Weill, as and for security for the payment of the said indebtedness of both complainant and Mrs. Ord, amounting at that time to about \$18,870, with interest, and not otherwise. The bill further alleges that the property was at that time reasonably worth \$30,000, and at the time of the bringing of this suit was worth \$100,000; that at the time of the execution of the deed of date February 24, 1881, it was covenanted and agreed between complainant and Lazard Freres that complainant be accepted as sole debtor and obligor for the pre-existing indebtedness of Mrs. Ord and himself to Lazard Freres, and that said deed should be held by them through their said trustee, Alexander Weill, as a mortgage to secure the payment, within one year from the date thereof, of the indebtedness so assumed and owing by complainant to Lazard Freres, and any further advances made by that firm to complainant on the faith thereof. The bill further alleges that, on or about

October 29, 1886, Mrs. Ord, for a valuable consideration, and in performance of her legal obligations, and for the purpose of clothing complainant with habiliment of title as the true owner of the premises, made, executed, and delivered to complainant a certain deed, wherein and whereby she conveyed to him all her right, title, and interest in and to all of said parcels of land. The bill further alleges that, since the making of the deed of date February 24, 1881, complainant has been in possession of all of the property, through himself and his tenants, and it alleges his willingness and readiness to pay the amount of the alleged indebtedness to Lazard Freres, and asks a decree permitting him to redeem the property.

Besides answering the bill the defendant filed a cross-bill, in which it is alleged that he is, and since the 4th day of March, 1881, has been, the owner in fee, and entitled to the possession, of all of the property in question; that he derived title thereto through Augustias de la Guera de Ord, who was, on said 4th day of March, 1881, seised in fee, and in the possession, of each of said parcels of land, except that referred to as the "Todos Santos Rancho Property," the title to which latter property, it is alleged, was then in cross-complainant in trust for purposes afterwards stated; that on the 16th of May, 1876, Mrs. Ord was seised in fee of each of said parcels of land, and, being so seised, did on that day, for a valuable consideration, execute to cross-complainant her promissory note for \$11,000, and as security therefor executed at the same time to cross-complainant a mortgage upon all of said property; that thereafter, and on or about the ——— day of July, 1877, cross-complainant, at the request of Mrs. Ord, released from the operation of said mortgage the Todos Santos property; that thereafter, and on the 9th day of July, 1877, Mrs. Ord, being still seised in fee of the Todos Santos property, executed to cross-complainant a deed purporting to convey and conveying to cross-complainant in fee-simple the said Todos Santos property, which deed was made and accepted in trust, first, to secure the payment by Mrs. Ord of the amount then due upon her aforesaid note and mortgage, and the payment by the defendant, Moise Kahn, to cross-complainant of the sum of \$5,000, with interest, to be thereafter advanced and loaned to him by cross-complainant; and, after such payments, in trust to convey the said Todos Santos property to defendant, Kahn, in pursuance of a written request and written instructions signed by Mrs. Ord, and addressed to cross-complainant, and delivered to him contemporaneously with the delivery of the deed of July, 1877, and as part of the same transaction, which request and instructions were in the words and figures following, to-wit:

"SANTA BARBARA, July 9, 1877.

"*Alexander Weill, Esq.*—DEAR SIR: My deed of conveyance of the date of July, A. D. 1877, conveying to you my undivided interest in the Rancho Todos Santos y San Antonio, will be handed to you by my son-in-law, Mr. M. Kahn, and to him you will please pay the consideration expressed in said deed. You will also, upon the repayment to you of your money and interest, convey by proper deed the property described in my deed to you to Mr. Kahn, and for Mr. Kahn's security give him such writings as shall evidence his right to such

conveyance upon repayment to you being made, and be mutually satisfactory to you and him. I am owing Mr. Kahn, and he is to receive the property after you are paid.

"Yours, very truly,

A. DE ORD."

The cross-bill further alleges that subsequently, to-wit, on the 6th of August, 1877, the defendant thereto, Moise Kahn, executed to cross-complainant his promissory note for the sum named in said deed as the consideration thereof, namely, \$5,000, and interest, and that thereupon and thereafter cross-complainant, in pursuance of the aforesaid instructions of Mrs. Ord, advanced to Kahn the said sum of \$5,000; that afterwards, to-wit, November 14, 1877, in pursuance of the instructions contained in said letter of July 9, 1877, cross-complainant executed to said Moise Kahn the defeasance referred to in the bill and hereinbefore set out. The cross-bill further alleges that, on said 14th of November, 1877, Mrs. Ord and Moise Kahn were indebted to cross-complainant in the aggregate sum of \$11,000, evidenced by their promissory notes mentioned in said defeasance; that thereafter, to-wit, on the 24th day of February, 1881, the said notes of Mrs. Ord and Moise Kahn were unpaid, and they were still indebted to cross-complainant in a large sum of money secured by the aforesaid mortgage and deed, to-wit, in a sum exceeding \$18,000, and the said indebtedness, and cross-complainant's right of action therefor, were about to become barred by the statute of limitations of California; that cross-complainant was therefore about to commence an action against the said Mrs. Ord and the said Moise Kahn to foreclose the said liens, and so informed them; that the value of the property was not then equal to the amount of the liens; that thereupon Mrs. Ord, acting under the advice and with the consent of Kahn, proposed to cross-complainant that, instead of foreclosing the said mortgage and liens, cross-complainant should pay to Mrs. Ord the probable costs of such foreclosure, and should surrender the said notes and evidences of indebtedness of Mrs. Ord and of Moise Kahn to be canceled, and that, in consideration thereof, and in full discharge of said indebtedness, she would execute to cross-complainant a deed conveying to and vesting in him a perfect title to each of said parcels of land free from any and all equities of the said Mrs. Ord and of Kahn; that said proposition was accepted by cross-complainant, and, on the 24th of February, 1881, a deed purporting to convey each of said parcels of land to cross-complainant in fee-simple absolute was prepared by him, in which Mrs. Ord and Moise Kahn were named as grantors, and cross-complainant as grantee, which was sent to defendant, Kahn, at Petaluma, in Sonoma county, to be executed and acknowledged by him, and that he was then and there informed by cross-complainant that he was made a grantor in said deed, because the aforesaid instrument given to him by cross-complainant on the 14th of November, 1877, had provided for a conveyance to him of a portion of the property upon payment of the said indebtedness; that, after being so informed, the defendant, Kahn, did, on the said 24th day of February, 1881, execute and acknowledge the said deed before a notary public in and for Sonoma county, and did then return the same to cross-



complainant to be executed by Mrs. Ord; that cross-complainant thereupon forwarded the said deed to Mrs. Ord, who was then a resident of Santa Barbara county, to be executed by her; that on the 4th day of March, 1881, Mrs. Ord, in consideration of the payment to her by cross-complainant of the sum of \$200, and of the release and discharge by cross-complainant of all of the aforesaid indebtedness of herself and of Moise Kahn, did sign, acknowledge, and deliver to cross-complainant the said deed, which was thereafter and on the same day filed for record and recorded in the office of the recorder of Santa Barbara county; that, upon receipt of said deed from Mrs. Ord, cross-complainant paid to her the sum of \$200, and surrendered to her her aforesaid promissory note; and thereafter, to-wit, on the 9th of March, 1881, cross-complainant did cancel and surrender to defendant, Kahn, all notes and evidences of his said indebtedness, and did discharge him from all obligations to pay the same. The cross-bill further alleges that, upon receiving said deed, cross-complainant did enter thereunder upon and take possession of each of said parcels of land, except the Todos Santos rancho property, and did hold and retain possession thereof, claiming title thereto under said deed, until some time in the month of October, 1886; that at the time of the execution of the deed of date February 24, 1881, the title of Mrs. Ord to the Todos Santos rancho property was held subject to a life-estate, then vested in one Teresa Hartnell, who died thereafter, and that upon her death cross-complainant entered upon and took possession thereof under the deed of date February 24, 1881, and held such possession until some time in October, 1886. The cross-bill further alleges that, on the 8th of October, 1886, and while cross-complainant was so in possession of each of said parcels of land, except the Todos Santos property, and claiming and having title to all of said parcels under said deed of date February 24, 1881, the defendant, Kahn, induced Mrs. Ord to execute, acknowledge, and deliver to him a deed, bearing date on that day, purporting to remise, release, and quitclaim unto him, the defendant, Kahn, his heirs and assigns, the right, title, and interest of the grantor in and, to the Todos Santos rancho property, which deed the defendant, Kahn, filed for record on the 12th of November, 1886, in the office of the recorder of Santa Barbara county; that thereafter, to-wit, on the 29th of October, 1886, and while cross-complainant was still in possession of each of said parcels of land, except the Todos Santos property, and claiming and having title to all of said parcels under said deed of date February 24, 1881, the defendant, Kahn, induced Mrs. Ord to execute, acknowledge, and deliver to him a deed, bearing date on that day, purporting to remise, release, and quitclaim to him, the defendant, Kahn, his heirs and assigns, the right, title, and interest of the grantor in and to each of said parcels of land. The cross-bill further alleges that, ever since the execution of the deeds of October 8 and October 29, 1886, the defendant, Kahn, has claimed and still claims to have acquired thereunder from Mrs. Ord, and to have, the legal and equitable title to each of said parcels of land, and denies the title and right of possession thereto of cross-complainant. It further alleges that the deeds of October 8 and October 29, 1886, were made to Kahn without consideration; that at

the time of their execution the grantor therein did not have or claim to have any right, title, or interest in or to either of said parcels of land, and that the defendant, Kahn, in accepting the same, well knew that the grantor therein had already conveyed her title thereto to cross-complainant, and that she no longer claimed to have any right to or interest therein, and that said deeds did not, in fact, operate to convey to or vest in the defendant, Kahn, any title to or interest in either of said parcels. The cross-bill further alleges that, on the 28th of January, 1887, the defendant, Kahn, caused to be published in a newspaper published and largely circulated and read in Santa Barbara county, a notice stating, among other things, himself to be the owner of all of said parcels of land, and that cross-complainant did not acquire the ownership or right of possession of any of said land by the aforesaid deed of date February 24, 1881. The cross-bill also contains allegations concerning the taking of possession of the premises in controversy subsequent to the month of October, 1886, by parties entering under the defendant, Kahn, and in respect to the bringing of actions at law by cross-complainant to recover possession from such parties. It also makes reference to the allegations contained in the bill respecting the agreement under which the deed of date February 24, 1881, was executed, and denies each and every of its allegations respecting that matter, as also the averments of the bill in regard to the deed made by Mrs. Ord to the defendant, Kahn, of date October 29, 1886; and, to the contrary, alleges that the deed of date February 24, 1881, was not intended as a mortgage or other security, but was in fact, what it purported to be, a deed absolute, conveying to cross-complainant in fee-simple all of the said parcels of land, and was so intended by all of the parties thereto; that the claims of the defendant, Kahn, in respect to the deed of date February 24, 1881, as well as to the deeds of October 8 and October 29, 1886, under which he also asserts title to the premises, constitute a cloud upon the cross-complainant's title thereto, and have and do impair the market value of said property, and embarrasses and prevents cross-complainant's enjoyment thereof. The prayer of the cross-bill is for a decree adjudging the cross-complainant to be seised in fee and entitled to the possession of each of said parcels of land; that the defendant, Kahn, has no title, estate, or interest at law or in equity in either of them; that the deed of date February 24, 1881, was intended by all of the parties thereto to be, and that it was in fact, an absolute conveyance of the premises described therein to cross-complainant, and was not intended to be, nor was it in fact, a mortgage or deed of trust; that neither of the deeds of October 8, 1886, and October 29, 1886, conveyed any right, title, or interest in or to the said parcels of land or either of them; that the deeds of October 8 and October 29, 1886, create a cloud upon the title of the cross-complainant, and that the defendant, Kahn, be required to surrender the same for cancellation, and that he be enjoined from hereafter claiming or asserting any right or title thereunder.

I shall not undertake to refer in detail to all of the evidence in the case, for the record is too voluminous to admit of such reference without

extending this opinion beyond all reasonable limits; but I will state as briefly as I can the reasons for the conclusion to which I have come, after a careful consideration of the case, which is the same conclusion to which I was inclined at the trial. If the deed of date February 24, 1881, was in fact, what it purported to be, a deed absolute, then, manifestly, those of October 8, 1886, and October 29, 1886, from Mrs. Ord to Moise Kahn conveyed nothing, and they become unimportant, except in so far as they, together with the circumstances under which they were executed, tend to throw light upon the true nature of the deed of date February 24, 1881, and except in so far as they may cast a cloud upon the title set up in the cross-bill. As has been already said, the complainant, by his sworn bill, asserts precisely the same rights to each of the five parcels of land. Yet it is not pretended that the evidence shows that, prior to the execution of the deed of date February 24, 1881, Mrs. Ord ever executed any instrument conveying to or vesting in him any interest in either of the parcels except the Todos Santos rancho, and, as to that, the only writings under which he claims to have acquired an interest are the power of attorney executed to him on the 30th day of May, 1877, and the letter from Mrs. Ord to Alexander Weill, of date July 9, 1877. In respect to the first of these instruments, the complainant, in his testimony given at San Francisco, after referring to Mrs. Ord's indebtedness to him, and his recapitulation of it to her on May 28, 1877, aggregating, as he claims, \$4,528.33, and her promise to pay it, said:

"I said, [to Mrs. Ord:] 'You have been spending your money, and in a little while you will be without anything. If you go along as you do, you will eat up all there is, and you will have nothing to pay me. Now, I promise this to you: Give me that ranch [meaning the Todos Santos rancho property] in payment of the money. I will not let you starve, and I want to get into business. I will see you do not want so long as I have anything. You give me that rancho, and so pay me all you owe me.' *Question*, (to complainant.) What did she say? *Answer*. Make out the documents. *Q*. Did you do so? *A*. I did. *Q*. What document did you make out? *A*. Power of attorney."

—That is to say, the power of attorney which has been hereinbefore set out, and which was thereupon introduced in evidence. Passing the question of the competency of this evidence of the complainant as to a parol sale by Mrs. Ord of her interest in the Todos Santos rancho, and of his claim that the power of attorney was made in furtherance of such parol sale, it is to be observed that the testimony itself is not only directly opposed to that of Mrs. Ord upon the same subject, but it is wholly inconsistent with the recitals of the power itself, by which, as has been seen, complainant was constituted the attorney in fact of Mrs. Ord, for her, and in her name, place, and stead, to manage and control the Todos Santos rancho property, collect the rents, issues, and profits thereof, and to borrow money, mortgage, bond, lease, or in any way dispose of that property as to him should seem best; all, however, for and in the name, place, and stead of Mrs. Ord, and for the purpose expressly declared in the power itself, which was that, for the reason that she was indebted to complainant, she was desirous that he should have the "management, control, and disposition" of the property, to the end, manifestly, that out

of the proceeds the debt might be satisfied. So far from the power evidencing a sale by Mrs. Ord to complainant of the Todos Santos property, it did not vest in complainant any interest therein; in other words, it was not a power coupled with an interest, for it did not purport to vest in complainant any interest in the land itself, which was the subject of the power, but only in such proceeds as might be realized therefrom by the exercise of the power. *Hunt v. Rousmanier*, 8 Wheat. 203. Furthermore, according to complainant's own testimony, he never performed a single act under and by virtue of the power of attorney. When asked by his counsel what he did with it after it was delivered to him, he answered:

"I came to San Francisco shortly after that to see Mr. Alexander Weill, and to get some money on that. I explained to him the circumstances, and what I wanted, and presented the power to him; after which he said: 'Better for your own security if Mrs. Ord make a deed of that ranch to me absolutely, accompanied by a letter from her telling me to give you the amount of money that you speak of, and that, upon the payment of that money back to me, with interest, to reconvey the property to you.' I requested Mr. Alexander Weill to have the document and deed drawn up himself, and give them to me, and I will send them to her. *Question*, (by counsel.) Did he do so? *Answer*. Yes, sir. The next day he had the papers ready, and handed them to me, and I forwarded them by mail. *Q*. What, then, did you do with the power of attorney that you have just offered in evidence here? *A*. I did not do anything; I put it in my pocket."

Mrs. Ord was at this time in Santa Barbara county, where she resided, and was therefore entirely ignorant of the preparation of the deed and letter of July, 1877, which were drawn by the attorney of Weill in San Francisco, at the request of complainant. The deed was an absolute deed in form, from Mrs. Ord to Alexander Weill, for the Todos Santos property, expressing a consideration of \$5,000, and was, according to the testimony of complainant just quoted, made to take the place of the power of attorney for the better security of complainant; whereas, according to the sworn averments of the bill, which are admitted by the answer, Weill preferred for his own security to make the loan upon a deed from Mrs. Ord to himself, and required, as further security, the execution of complainant's note for the amount of the loan,—\$5,000. The letter has been already set out in full. Like the power of attorney, not only does it fail to support the testimony of complainant that there was a parol sale by Mrs. Ord to him of the Todos Santos property in May, 1877, in liquidation of her indebtedness to him, which he claims then amounted to \$4,528.33, but in terms it excludes any such idea. It expressly recites that she then (July 9, 1877) owed him money; and it is nowhere pretended that Mrs. Ord incurred any indebtedness to complainant between the time of the execution of the power of attorney and the preparation of the deed and letter of July, 1877. It directed Weill to pay the consideration expressed in the deed, which was \$5,000, and several hundred dollars more than complainant claims that Mrs. Ord then owed him, to complainant, and that, upon the repayment of the sum borrowed, with interest, Weill convey the property to complainant by deed, the rea-

son therefor being stated in these words: "I am owing Mr. Kahn, and he is to receive the property after you are paid;" and for complainant's security Weill was, by the letter, directed to give complainant such writings as should evidence his right to such conveyance. This letter, together with the deed, was sent by complainant to Mrs. Ord at Santa Barbara, who signed and acknowledged the deed, and signed the letter, and returned them to complainant; and upon the delivery of the deed to Weill, and the execution by complainant of his note as further security for the amount, Weill paid complainant, from time to time as he called for it, the consideration mentioned in the deed, namely, \$5,000, and subsequently signed and delivered to him the defeasance hereinbefore set out.

Even if complainant had repaid the \$5,000 so loaned by Weill, with interest, and had received from him a deed for the Todos Santos property, I consider it perfectly clear that he would have held it, not absolutely, but only as security for such money as Mrs. Ord really owed him. The letter did not pretend to say that after Weill was paid complainant was to receive the property, absolutely, in payment of Mrs. Ord's debt to him; and, if it had, there was no agreement on complainant's part to receive it in such payment. Besides, in the defeasance which Weill executed to complainant, and which he accepted, it is expressly stated that the deed of July 9, 1877, was given to secure, *first*, the \$5,000, with interest, expressed as its consideration, and which was, as already said, further secured by complainant's note; and, *second*, the balance due on the \$11,000 note executed by Mrs. Ord on March 16, 1876, which balance then amounted to \$6,240.92, and which was also secured by the mortgage given at the time of the execution of the note, and which was then still existing on all of the property originally embraced in it, except the Todos Santos rancho. If, as complainant contends, the Todos Santos property was to become his, absolutely, upon the repayment of the \$5,000 borrowed from Weill in July, 1877, it is difficult to understand why it should be held by Weill as additional security for the balance due by Mrs. Ord on her \$11,000 note, of date March 16, 1876. Moreover, Mrs. Ord, in her testimony, explicitly denies that she ever sold or agreed to sell the property to complainant, or that her indebtedness to him was anything like the amount claimed by him, or that the letter to Weill was intended by her to authorize the transfer of the property to complainant, absolutely; and that such was not the fact is further evidenced by a letter to complainant, of date July 12, 1877, from Mrs. Ord's daughter Rebecca, now Mrs. Pechine, who, it appears from the evidence, conducted, on the part of her mother, her correspondence with complainant, in which letter Mrs. Pechine says:

"Regarding that document and letter [meaning the deed and letter of July 9, 1877] that my mother signed, and which you sent from San Francisco, my mother thinks it well for you to ask of Lazard Freres a 'receipt' of that letter which she signed. Pancho Gutierrez came to acknowledge her signature, and read the document [meaning the deed] which you sent, and he said it was a '*venta absoluta*,' [absolute conveyance.] I know nothing about those documents, and of course I had nothing to say to that. About the receipt of

that letter which mother signed, she says it is well for you to send it to her when obtained, because you might meet with an accident, or supposing you die, etc., it is better for her to have it."

If complainant's theory be accepted, it was no concern of Mrs. Ord what should become of the paper to be given by Weill in acknowledgment of the deed and letter. No other or further instrument or instruments were executed by Mrs. Ord in relation to any of the property in controversy, prior to the deed of date February 24, 1881, which is the deed the complainant asks to have adjudged a mortgage, and from which he seeks to redeem. A number of letters preliminary to the execution of that deed passed between the respective parties, and are in evidence, which leave no doubt as to its true intent and purpose. In January, 1881, the indebtedness to Lazard Freres not having been paid, and being about to become barred by the statute of limitations of California, that firm addressed, on the 6th day of that month, to complainant this letter:

"BANKING HOUSE OF LAZARD FRERES,  
"SAN FRANCISCO, January 6th, 1881.

"*Moise Kahn, Esq., Petaluma, Cal.*—DEAR SIR: The mortgage held by us on the Santa Barbara properties of Mrs. Ord will shortly outlaw. We beg to request that you come into the office on the occasion of your first visit to San Francisco, and arrange for its renewal. Please answer what you intend doing about it.

"Yours, truly, LAZARD FRERES, per E. J. LE BRETON."

On the 19th of the same month Lazard Freres wrote to Mrs. Ord as follows:

"BANKING HOUSE OF LAZARD FRERES,  
"SAN FRANCISCO, January 19, 1881.

"*Mrs. A. de Ord, Santa Barbara, Cal.*—DEAR MADAM: Your mortgage to Alexander Weill will be outlawed by limitation within a few months from this date. Please write to us immediately what you propose to do concerning its payment or renewal.

"Yours, very truly, LAZARD FRERES, per E. J. LE BRETON."

To which Mrs. Ord replied, by letter addressed to Lazard Freres:

"Your note of 19th inst. was duly received, concerning the mortgage to Alexander Weill. All I can say is that for the present I am unable to pay it, and if you wish for me to renew my note I will willingly do so. Please write to Moise Kahn, Petaluma, to ascertain what hopes he has of raising money for its payment, and oblige,

"Yours, truly, A. DE ORD."

On the 28th of January, Lazard Freres wrote to complainant as follows:

"BANKING HOUSE OF LAZARD FRERES,  
"SAN FRANCISCO, January 28th, 1881.

"*Moise Kahn, Esq., Petaluma, Cal.*—DEAR SIR: We are in receipt of a letter worded as follows, from Mrs. A. de Ord, Santa Barbara:

"Your note of 19th inst. was duly received, concerning the mortgage to Alexander Weill. All I can say is that for the present I am unable to pay it, and if you wish for me to renew my note I will willingly do so. Please write

to Moise Kahn, Petaluma, to ascertain what hopes he has of raising money for its payment, and oblige, Yours, truly, A. DE ORD.'

"We now beg to notify you that, unless Mrs. Ord consents to give us a deed, we shall commence to foreclose on the 1st of February. We expect therefore to hear from you by return mail.

"Yours, truly, LAZARD FRERES, per E. J. LE BRETON."

To this letter complainant replied on January 31st, as follows:

"PETALUMA, January 31st, 1881.

"Messrs. Lazard Freres, San Francisco—GENTS: Yours of the 28th inst. only reached me this evening. On account of the storm which prevailed during the last three days all communication with your city had been stopped, and this evening is the first time we received the mail. Mrs. Ord, I have no doubt, will be very glad to give the deed for the consideration of a few dollars, that is to say, the amount it would cost you to foreclose. I will write to her to this effect this evening, and upon return mail, if you do not hear from [her,] then go ahead and foreclose. I think there is plenty of time ahead. If I am not mistaken, her note will only outlaw by the middle of next month; that is to say, by middle of March. By agreeing to the above request, you will confer a favor to

"Yours, very truly,

MOISE KAHN.

"Say, to hear from her until the 8th or 10th of March."

On the same day complainant wrote to Lazard Freres the letter last quoted, to-wit, January 31, 1881, he wrote to Mrs. Ord, on the back of the letter of January 28th he had received from them, in Spanish, of which the following is a translation:

"VERY DEAR DONA AUGUSTIAS: I have just received this letter which I hasten to forward to you. I do not think that was the way to write, principally with sarcasm respecting me. I have written to Lazard Freres that you would consent to give them a deed to the properties for what it would cost to foreclose the mortgage, to which effect you should write them. I also wrote to them to wait, and I have no doubt they will do it. So that, if you wish to obtain a few hundred dollars, write to them immediately, and do not forget to do so. Caroline with the last storm took cold, and is now in bed. Without doubt nothing serious.

"I remain your son, who loves you,

M. KAHN."

On the 4th of February Mrs. Ord wrote Lazard Freres as follows:

"SANTA BARBARA, February 4th, 1881.

"Messrs. Lazard Freres, San Francisco—GENTLEMEN: I received a letter from Mr. Moise Kahn, of Petaluma, with your favor to him of 28th ulto. inclosed. I am at present in reduced circumstances, and therefore unable to redeem the property I mortgaged to A. Weill. I will most willingly give you a perfect deed of said property if you will give me the money that it will cost you to foreclose the mortgage. Thus I will save you considerable trouble, and it will greatly oblige me. I have forgotten to let you know that part of block 217 of the town property, and other small pieces adjoining, are planted in grain and barley, and I request you to let me raise the crop. As soon as you desire, I will be ready to give you the deed. Please correspond with me directly, and not with Mr. M. Kahn in this business, and oblige,

"Yours, truly,

AUGUSTIAS ORD, per REBECCA ORD."

A copy of this letter was also indorsed by Rebecca for Mrs. Ord on the back of the letter of January 28th from Lazard Freres to complain-

ant, and which he forwarded to Mrs. Ord with his letter to her of January 31st indorsed on its back. To this letter from Mrs. Ord, Lazard Freres replied, on February 9th, as follows:

"SAN FRANCISCO, February 9th, 1881.

"*Mrs. Augustias de la G. de Ord, Santa Barbara*—MADAM: We beg leave to own receipt of your favor 4th, 1881, and noted contents. We have handed the papers to our attorneys, and when they are ready we shall forward them to you for signature, with some compensation for cost of foreclosure sale. We shall not be severe about the crop, concerning which you make the request.

"Yours, respectfully, LAZARD FRERES, per E. J. LE BRETON."

Accordingly, the San Francisco attorneys of Lazard Freres prepared the deed of February 24, 1881, in which Mrs. Ord and complainant were named as grantors, and Alexander Weill as grantee, and which deed embraced all of the property which Lazard Freres, through Alexander Weill, held as security for the money due from those parties. This deed Lazard Freres first transmitted to complainant, at Petaluma, together with the following letter:

"BANKING HOUSE OF LAZARD FRERES,

"SAN FRANCISCO, February 24th, 1881.

"*To Moïse Kahn, Esq., Petaluma*—DEAR SIR: We have caused a deed to be made out from Mrs. Ord and yourself to our Alexander Weill, with the dates in blank. Please sign the same before a notary public, and see that the necessary dates, left in blank, are filled out. The reason we are obliged to make you a party to this deed is that you are mentioned in the defeasance given by Alexander Weill at the time that the interest in the Todos Santos rancho was conveyed by absolute deed to him by Mrs. Ord. Please return the inclosed deed with all possible dispatch, as otherwise we shall be obliged to commence proceedings in foreclosure, our time being exceedingly short.

"Very truly yours, LAZARD FRERES, per E. J. LE BRETON."

The deed was signed and acknowledged by the complainant, and delivered in person by him to Le Breton, who was, at that time, in the employ Lazard Freres, and who, as will have been observed, conducted the correspondence on their part. Le Breton thereupon consulted with the San Francisco attorneys of the firm in respect to the amount proper to pay Mrs. Ord under their promise to give her what it would cost to foreclose, and, the sum of \$200 being fixed upon, that sum, together with the evidences of Mrs. Ord's indebtedness, was sent by Lazard Freres to their attorney in Santa Barbara, who paid the money to Mrs. Ord, and delivered to her the evidences of her indebtedness, whereupon she signed and acknowledged the deed, and delivered it to the attorney of Lazard Freres, who thereupon filed it for record in the county where the property is situated, and notified Lazard Freres of the fact, whereupon they delivered up to complainant the evidences of his indebtedness to the firm. From that day to this, so far as appears, Lazard Freres have never claimed, demanded, or received one cent from Mrs. Ord or complainant, or held any evidence of indebtedness against them, or either of them. It is absurd to suppose that those experienced bankers would have delivered up the evidences of the indebtedness, then amounting to over



\$18,000, unless the debts for which they stood were paid; or that, when complainant received the surrender of the \$5,000 note he had executed to them, he did not know that it had been paid, together with the note of Mrs. Ord, by the conveyance of the property to Weill for Lazard Freres. At the time of the execution of the deed of date February 24, 1881, Lazard Freres already had a lien upon all of the property to secure the then existing indebtedness. There was therefore no occasion for another mortgage; nor did they want the land, for the evidence is abundant that they had been urging the payment of the amounts due, and that the complainant, acting for Mrs. Ord, had been making every effort to sell the property, but without success; and that he had informed Mrs. Ord that Lazard Freres wanted the money due them, and not the land, is shown by the testimony of Mrs. Pechine, in which she says that long before the making of the deed of date February 24, 1881, complainant had so told her mother, and that they had talked about the matter several times, and she added: "But when we gave the deed of the property to Lazard Freres [referring to the deed of date February 24, 1881] we never talked about it any more. We talked about it long ago when we were in hopes of regaining the property, but when we gave the deed we considered it an absolute deed, and didn't mention it any more." The fact is, as is clearly shown by the evidence, that during the times referred to, and for many years after the making of the deed of February 24, 1881, real estate was greatly depressed in Santa Barbara county, and there was little or no sale for it; and the probability is that, had the liens held by Lazard Freres been foreclosed, the property would not have brought the amount of the judgment. But a consummated judicial sale would have extinguished the liens, and vested the absolute title to the property in the purchaser. The deed in question was made to take the place of such sale, for an additional consideration paid by Lazard Freres to Mrs. Ord, of the estimated cost of foreclosure, at the suggestion of complainant himself, made in his letters to Lazard Freres and Mrs. Ord of January 31, 1881, and freely and gladly accepted by her, as evidenced not only by her letters already quoted, but by her testimony given in this case, as well as by that of her daughter, Mrs. Pechine, who acted for her throughout the correspondence and interviews relating to the matter, both of which witnesses appear to have testified with the utmost candor and truth, and with much intelligence as well, and both of whom say that the deed in question was intended to be just what it purports to be, a deed absolute. And that such was also the clear and distinct understanding of complainant I have no manner of doubt. Any other conclusion would be wholly inconsistent with his own letters, and with the acts of all the parties at the time and subsequently. It is not pretended that Lazard Freres took from complainant any evidence of the indebtedness he now claims to have assumed by the transaction in question, or that they ever afterwards demanded of him payment of one dollar of such indebtedness, or that he ever paid one dollar of it; yet the court is asked to believe that the indebtedness in fact existed by express agreement of the parties, and that, without demanding payment of prin-

cial or interest, Lazard Freres stupidly went to sleep until the debt had become barred by the statute of limitations. This I cannot accept as true. I am entirely satisfied that the deed in question was by all of the parties to it intended to be exactly what it purported to be, a deed absolute, without any qualifications or conditions. By its execution Mrs. Ord not only discharged all of her indebtedness to Lazard Freres, and received \$200 additional, but overpaid complainant by several hundred dollars, according to his estimate of her indebtedness to him, and by several thousand dollars, according to her estimate of it; for his note evidencing the \$5,000 he received from Lazard Freres was thereby paid and discharged, and surrendered to him, whereas Mrs. Ord's indebtedness to him, according to his own claim, was but a little over \$4,500.

Recurring to the bill which, as has been said, is verified by the oath of complainant, it is seen that it alleges, in substance, that about the month of January, 1881, Mrs. Ord being indebted to Lazard Freres and complainant, and her indebtedness to Lazard Freres being then about to become barred by the statute of limitations of California, the said Lazard Freres moved and induced complainant to and he did procure Mrs. Ord to sell all of her said property, together with her equity of redemption therein, to complainant, with the understanding and agreement that complainant should and would assume the payment of the entire indebtedness of Mrs. Ord to Lazard Freres, and join her in the conveyance and transfer of the whole of the said real property, including the said Todos Santos rancho property, all to be held by the said Lazard Freres as security for the payment of said indebtedness of complainant to them, and that this was consented and agreed to by the complainant and Mrs. Ord, as well as Lazard Freres; and that the said purchase from Mrs. Ord by complainant was consummated on the 24th of February, 1881, and her said indebtedness assumed by complainant, and that complainant joined Mrs. Ord in the transfer of all of said property to Alexander Weill, as and for security for the payment of the said indebtedness of both complainant and Mrs. Ord, amounting at that time to about \$18,870, with interest, and not otherwise. It will not be necessary to decide whether the agreement thus alleged would be valid unless evidenced by writing, for it is not supported by proof of any kind. It is not sustained by the testimony of the complainant himself, and is wholly inconsistent with his own letters. It is positively denied by Mrs. Ord, and by David Cahn, at the time a member of the firm of and manager for Lazard Freres, at San Francisco, and the person with whom complainant claims to have carried on the negotiations. So far from Lazard Freres inducing complainant to procure Mrs. Ord to sell the property in question to him upon the understanding that he would assume her indebtedness, and so far from his assuming that indebtedness, as the bill alleges, his own letters show that, when informed by Lazard Freres that the indebtedness must be paid, or they would be compelled to commence suit to foreclose the liens, unless a deed was given, for the reason that the debt was about to become barred by the statute of limitations, it was he who suggested to Lazard Freres that Mrs. Ord would, and who advised her to, give a

deed to them for the property, if they would pay her what it would cost them to foreclose; and in that deed to Lazard Freres complainant joined as a grantor, without objection, when expressly informed in the letter transmitting it to him for execution that he was made a grantor only because he was "mentioned in the defeasance given by Alexander Weill at the time that the interest in the Todos Santos rancho was conveyed by absolute deed to him by Mrs. Ord."

The complainant was examined as a witness, first at Santa Barbara, and then in San Francisco. In his examination in San Francisco he was questioned, among other things, about the letter written by him to Mrs. Ord on the 31st of January, 1881, on the back of that received by him from Lazard Freres, and he was asked by his counsel if he had written a second letter the same day to Mrs. Ord, in relation to the same matter, and he said that he had. Complainant's counsel then called upon the opposite counsel, to whom had been given by Mrs. Pechine and Mrs. Ord all the letters relating to the controversy they had or knew anything about, to produce the second letter spoken of; and the counsel replying that he did not have such a letter, and never before heard of such a one, the complainant proceeded to testify as follows:

"The contents of the letter was that I also said that by this mail I wrote to you, and the sum and substance of the letter is a repetition of the first letter just mentioned, with the following added to it, in Spanish, and it is very clear to my memory: '*Que al fin y al acabo tengo el deracho de redemir estes propiedades que no tengo cuidado.*' I recollect I wrote something else. These gentlemen don't want any property; all they want is their money."

The translation given of the Spanish above quoted is: "At all events I have the right of redemption of those properties; you don't need to fret about it." There are many reasons why I do not believe this testimony of complainant in regard to a "second letter" to Mrs. Ord, on the 31st of January, 1881: (1) If he had secured the right of redemption, and wanted to tell Mrs. Ord at all, it is highly improbable that he would not have mentioned the fact in the letter which he undoubtedly did write, and which she received, and which has been produced in evidence. (2) There would have been no occasion for his repeating in a second letter, on the same day, what he had just written in the first. (3) The testimony given in San Francisco was given in 1887. It is extremely improbable that the witness could remember the precise Spanish words used by him more than six years before, especially when, in his testimony given at Santa Barbara, he testified to but one letter, and did not then recollect that, on the 31st of January, 1881, he had written the advice to Mrs. Ord upon the back of the letter that he had on that day received from Lazard Freres. (4) Mrs. Pechine testifies that she thinks she preserved all of her mother's letters relating to business, and only one of that date was found, and that she never, to her recollection, saw the second letter referred to. To the same effect is the testimony of Mrs. Ord. (5) The letter of Mrs. Ord, of date February 4, 1881, written upon the suggestion of complainant contained in his letter to her of January 31st, written on the back of the letter of Lazard Freres to him, was man-

ifestly carrying out the suggestions of that letter, and makes no allusion to the matter of redemption which complainant claims was communicated by the second letter spoken of by him. (6) Complainant's letter to Lazard Freres on the same day, referring to his letter to Mrs. Ord, makes no reference to a right of redemption. (7) The testimony given by complainant is inconsistent with his own letters, and with the averments of the bill, sworn to by him, as already pointed out. (8) The new matter claimed to have been embraced by the second letter spoken of is not shown to have been true, but the contrary.

In his testimony complainant details the agreement he claims to have had with David Cahn prior to the making of the deed of date February 24, 1881, respecting the property. The substance of the agreement as stated by him is that Mrs. Ord was to be induced to execute the deed conveying the property to Weill, instead of submitting to a foreclosure, thereby canceling her indebtedness and receiving in money the estimated cost of foreclosure, and Weill was to hold the title so conveyed for the benefit of complainant, who was to be "carried [by Lazard Freres] at a reduced rate of interest for a year or two," and allowed to redeem the property by paying the amount of the indebtedness existing at the time of the execution of the deed, with interest at a reduced rate, and costs subsequently incurred in caring for the property. If such an agreement had been in fact made, I am unable to understand by what legal process the property of Mrs. Ord could be thus vested in complainant. It is not pretended that up to the time of the execution of the deed of date February 24, 1881, complainant had any interest in any of the property in controversy, except the Todos Santos rancho, and that he had no interest of any nature in that rancho I think has already been shown. There is no rule of law of which I have any knowledge under which such an arrangement as is stated by complainant could be made to operate to vest Mrs. Ord's title in him. Besides, a party who comes into a court of equity must do so with clean hands. That, so far as Mrs. Ord is concerned, the deed of date February 24, 1881, was intended as an absolute conveyance of all her right, title, and interest in all of the property is undisputed, even by the complainant himself. Indeed, his case is based upon that theory; and yet, while acting as the trusted agent of that lady, who was his mother-in-law and an aged woman, he claims to have made such an arrangement with the manager of Lazard Freres as that he could thereby acquire her property, in four pieces, of which it is not pretended he then had any interest, by subsequently paying the amount of the indebtedness at a reduced rate of interest. Such an arrangement, if it had been made, would have been unconscionable in the extreme, and such as no court of equity ought to enforce in favor of the party making it. But the testimony of complainant in regard to the agreement is not only inconsistent with his letters, but it is positively denied by David Cahn, who explicitly states in his testimony that he never made any agreement with complainant by which he was to assume the indebtedness of Mrs. Ord and himself theretofore existing, or by which the deed in question was to be considered other than

what it purported to be, a deed absolute, or by which complainant was to be entitled to redeem the property under any circumstances or conditions; and complainant's testimony is, in many respects, also at variance with that of various other witnesses, and upon the vital points in the case is in itself highly improbable. The conduct of the parties subsequent to the execution of the deed of February 24, 1881, was not inconsistent with the absolute ownership of the property by Weill, who, as has been stated, stood in the place of Lazard Freres. There is no doubt that they preferred the money to the land, not only at the time they took the deed in question, but for many years after; and through David Cahn gave complainant the privilege of selling it, and retaining what he could get over and above what it had cost them, with interest and expenses. During all of this time the relations of the parties continued intimate, and complainant made every effort to sell the property, but without success. At times Lazard Freres were willing and anxious to take less than the property had cost them, with interest and expenses. In July, 1885, when the amount had reached over \$31,000, David Cahn told complainant they would take \$28,000; and in July, 1886, when the amount exceeded \$35,000, he told him they would take \$30,000; but complainant was unable to effect sales. During this time, covering a period of over five years, many interviews occurred, and many letters passed between the parties. In this correspondence I have observed no letter from complainant in which he asserted or assumed that any of the property belonged to him. Only one letter during those years assumed the existence of an indebtedness from him to Lazard Freres. That letter was written on the 24th of July, 1885, more than four years after he claims to have assumed towards Lazard Freres, by a verbal agreement, the position of debtor. This letter requests Lazard Freres to send him "a memorandum of what I owe;" adding, "I will be entirely guided by what I owe," etc. This letter was answered by Altschul, one of the firm's accountants, in which it is said, "Your account will be sent shortly." Altschul testifies that he knew nothing about the understanding between David Cahn and complainant, and David Cahn testifies that he never saw the letter. The adoption by Altschul of the language of the letter he was answering, and using the term "your" instead of "the," should not, as justly observed by counsel, be accorded much significance. But this very letter of Altschul to complainant inclosed a copy of a letter written by Eugene Meyer, as attorney in fact for Weill, to a person who was supposed to be a tenant of Mrs. Hartnell, who had a life-estate in the Todos Santos rancho, proposing to rent the rancho to him, and complainant's attention is called by this letter to "the party now on Mr. Weill's property," and complainant is therein requested to "take no steps which will conflict with our direct instructions to that gentleman." In several letters from Lazard Freres to complainant they speak of the property as belonging to Weill or themselves. In a letter of October 11, 1881, after asking complainant's opinion as to "the lowest figures we should accept for the Todos Santos rancho," they say: "Let us see if they agree with ours, and if not we will have-

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to consult our friends at Santa Barbara, and accept what the ranch is worth." In one bearing date November 15, 1881, they mention certain persons who had applied to purchase "the Todos Santos rancho owned by us." In one to complainant, dated December 9, 1884, they refer to him a letter from Judge Fernald, proposing to fence the State-Street lot, and ask complainant's "opinion of this matter, as far as the fencing of Weill's property is concerned," and ask that he "excuse the trouble given." In a letter from complainant to Eugene Meyer, dated September 12, 1885, he sends a map of the Todos Santos rancho, and says: "I fervently hope that you will be able to effect an advantageous sale of the lands." In a letter of date December 1, 1885, he says, referring to the State-Street lot, "Although you do not say anything about the lot on State street, \* \* \* if you do sell I hope you will receive a good round price for it." These letters are inconsistent with the contention of complainant in the present case, but they are consistent with what I think the case clearly shows throughout, that Lazard Freres were anxious to get the money they had invested in the property out of it, and that, because of their unfamiliarity with the land, and their friendly relations with complainant, which then continued to exist, and because of the privilege they had accorded him of selling the property in order that he might make something out of it if he could, they felt justified in asking him for his views in respect to it.

It is urged that the books of Lazard Freres show that the indebtedness continued to exist against complainant after the execution of the deed of February 24, 1881. At the time of the execution of that deed, and for more than a year before, the indebtedness of Mrs. Ord and of complainant was carried upon the books of the firm under the head "Ord-Kahn," as the most convenient method of keeping an account of the moneys loaned and advanced to those parties; but, manifestly, that circumstance did not change the character of the indebtedness, which was evidenced by the promissory notes of Mrs. Ord and complainant which Lazard Freres still held, to an open account against them. When the indebtedness was paid by the conveyance of the property by the deed of date February 24, 1881, all written evidence held by Lazard Freres against Mrs. Ord and complainant was canceled and surrendered to them, but the fact of the payment was not entered in the books under the account headed "Ord-Kahn." Whether or not correct book-keeping required such entry, or whether, as is claimed, the account was properly kept open as an account against the property, to show its cost, and in which to make future entries of costs and expenses paid on account of it, I do not know. But certain it is that the account headed "Ord-Kahn" was never, after the execution of the deed in question, regarded by any one connected with the management of the bank as an account against Mrs. Ord and complainant, or either of them, nor treated as such. No money was ever demanded or received of them, or either of them, thereon, nor could have been, for the simple reason that the indebtedness had been wiped out by the sale and conveyance of the property. Besides, some of the entries made in the account after the execution of

the deed exclude the idea that it was kept alive against Mrs. Ord and complainant, or either of them, but are consistent with the claim that it was continued as an account showing the cost to the bank of the property. Certain it is, also, that if the account showed an existing indebtedness against complainant, it showed precisely the same thing in respect to Mrs. Ord; and that would prove too much for complainant's case, which concedes that Mrs. Ord's indebtedness was paid by the conveyance in question and his assumption of the debt. It is incredible that any sane bankers would have allowed so large a debt to stand until it was barred over and over again by the statute of limitations, and that, too, without even ever demanding payment of interest or principal; and it is asking too much of a court to believe that the complainant ever understood that Lazard Freres would permit him to owe them so many thousand dollars without a scratch of his pen to show for it, and without ever calling upon him for interest or principal during all the years that have since elapsed. I think the case is without any merit on complainant's part, and, accordingly, there will be a decree dismissing the bill, and awarding cross-complainant the relief demanded in the cross-bill, with costs.

### THOMPSON HOUSTON ELECTRIC CO. v. CITY OF NEWTON *et al.*

(Circuit Court, S. D. Iowa, C. D. June 24, 1890.)

#### 1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ELECTRIC LIGHT.

Under Acts 22d Gen. Assem. Iowa, c. 11, which authorizes cities to establish and maintain electric light plants when the majority of the voters of the city shall by vote approve the same, a city may erect an electric plant for the purpose of furnishing light to its inhabitants in their stores and houses, as well as for lighting the streets and public places of the city.

#### 2. SAME.

The action of a city in authorizing a private corporation to erect an electric plant for the purpose of lighting the city, without any grant of exclusive rights, does not deprive the city of the right, under said statute, to erect an electric plant itself for the same purpose.

#### 3. SAME—BONDS—SUBMISSION TO VOTE.

Where it is intended to pay for said plant by the issuance and sale of city bonds, it is proper to submit to vote the entire matter of erecting the plant and issuing the bonds in one proposition.

#### 4. SAME—ORDINANCE.

Under that provision of said act which provides that the city council may order the submission of the question of electric lighting to a vote, or that the mayor may do so upon petition of a certain number of tax-payers, the adoption of an ordinance providing for the erection of an electric plant is not a condition precedent to the submission of the question.

#### 5. SAME—CONSTITUTIONAL LIMIT OF DEBT.

Where, at the time the issuance of city bonds is authorized by vote, the issuance of such bonds would increase the city debt beyond the constitutional limit, but the bonds are not issued until the debt has been so reduced that their issuance does not bring it beyond such limit, the bonds are not void, since no debt is created till the bonds are issued.

#### 6. SAME—INJUNCTION.

The fact that city bonds were sold and delivered before the ordinance providing for issuing them took effect is no ground for enjoining their payment at the suit of a tax-payer.

In Equity. On motion for injunction.

*H. S. Winslow and Clark Varnum*, for complainant. *E. J. Salmon and J. G. Day*, for defendants.

SHIRAS, J. From the allegations of the bill filed in this cause, it appears that the complainant is a corporation created under the laws of the state of Connecticut, and is engaged in the business of erecting and operating electric light plants, and furnishing electric power; that by a contract entered into with the city of Newton, Iowa, it obtained the right to erect and maintain an electric light plant in said city, and did so erect and maintain the same, and furnished lights to private citizens, and also, by contract with the city authorities, furnished lights for the streets and public places of said city,—the latter contract terminating January 23, 1890; that, relying upon its agreement with the city, the complainant has expended at least \$20,000 in the erection of said electric light plant, and is prepared and is able to furnish all the electric light, both arc and incandescent, needed for lighting the streets and public places of the city, and to supply the wants of the people of said city, which has a population of about 3,000, and is what is termed in the statutes of Iowa a city of the second class; that said city is now proposing to erect and maintain an electric light plant with which to light not only the streets and public places of the city, but also to furnish to the inhabitants light for private use; that it is the purpose of the city authorities to issue municipal bonds to the amount of \$14,000 for the erection of such electric light plant, and to tax the property in said city, including that owned by complainant, for the purpose of paying the interest and principal of said bonds; and that the right to erect such electric plant and issue such bonds is claimed under a vote had at the annual city election held March 30, 1890. An injunction is sought against the erection of such electric plant, and against the issuance of the bonds for such purpose; the bill thus presenting two general grounds, upon which is based the relief sought.

By chapter 11, Acts 22d Gen. Assem. Iowa, it was enacted that cities should have power to establish and maintain electric light plants, or to authorize the erection of the same, "but no such works shall be erected or authorized until a majority of the voters of the city or town, at a general or special election, by vote, approve the same;" and by section 3 of the act it was provided that the city should have power to issue bonds for the purpose of establishing electric plants, subject to the restriction that the total amount of indebtedness for all purposes should not exceed 5 per cent. of the assessed value of the taxable property within the city. The theory of the complainant is that under this statute the city had the option given it in regard to electric plants, and that it could originally have erected the same by vote of the people, but, having elected to authorize private parties so to do, it is estopped from afterwards entering the field as a competitor; that while the complainant has not an exclusive right under its agreement with the city, and cannot object to the city authorizing other private companies or persons to erect and



maintain electric plants in the city, yet complainant has the right to enjoin the city from undertaking the work, because the city can, through the exercise of its taxing power over the property in the city, including that owned by complainant, raise money for the running of the plant, instead of being compelled to provide the same by charging for the use of the light, and thus the city can practically drive complainant out of the field, and destroy the value of its plant, which was erected in the city by an agreement with the municipal authorities. There is great force in the suggestion thus made. It is doubtless true that, if the city enters the field by the erection of its own plant, it will have an advantage over the complainant; yet it does not follow that the court can interpose and restrain the city from erecting the contemplated plant. As already stated, the city did not grant any exclusive rights to complainant; and the latter, when it erected its plant, took the chance as to future competition. All that is now shown is that the city proposes to erect an electric plant, and to raise the money for so doing by the issuance of bonds in the sum of \$14,000. The statute confers the right so to do upon the city; and I can see no ground justifying the court in interposing by injunction, and preventing the city from establishing its proposed plant. The suggestion that the city may use its taxing power so as to prevent complainant from fair competition on its part is a suggestion only, and not the averment of a fact. The city may establish such rates for the lights furnished by it as to enable the complainant to fairly compete therewith. If it cannot do so, and the city can supply its citizens at a lower rate, are not the latter entitled to the benefit thereof? It is entirely possible that the proposed action of the city may cause loss to the complainant. But there is no ground justifying action by the court short of holding that, by the mere action of the city in authorizing the complainant to establish its plant without any grant of exclusive rights, the city thereby deprived itself of the right to erect an electric plant for the benefit of its citizens; and this extreme ground I am not prepared to take.

It is also urged that the city has only the authority to erect an electric plant for the purpose of lighting the streets and public places of the city, and is not authorized to furnish lights for use in the houses and stores of its citizens. The act of the general assembly giving the right to cities to erect, or to authorize the erection of electric plants, makes no distinction between lights used for public or private purposes; and the right of the city in the erection of its own plant is not limited in any other way than is the right of a company authorized by the city to erect the plant. It has been the uniform rule that a city, in erecting gas-works or water-works, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use; and the statutes of Iowa now place electric light plants in the same category.

The next ground relied on in support of the right to an injunction is that the question of establishing the electric plant was not properly submitted to the electors of the city, and that the necessary authority did

not exist in the city authorities to undertake its erection. The statute requires the question of erecting an electric plant to be submitted to the voters. It appears that February 10, 1890, the city council passed a resolution to the effect that, in accordance with section 4, c. 11, of the Laws of the 22d General Assembly of the state of Iowa, there be submitted to the qualified electors of said city at the next general election, on the first Monday in March, 1890, the proposition to issue the bonds of the city of Newton, Iowa, to the amount of not to exceed \$14,000, or so much thereof as in the judgment of said city council may be needed, to be used for the construction of an electric light plant to supply light for the city of Newton and its inhabitants. Certain petitions, signed by 25 or more resident tax-payers in each ward of the city, were presented to the mayor thereof, requesting him to submit at the next general election the question whether an electric light plant shall be established in said city by the municipality, in pursuance of chapter 11 of the Acts of the 22d General Assembly, to be owned and operated by said city, and that, if it be determined by a majority of the votes cast that such plant be established, the bonds of the city be issued to the amount of \$15,000, or so much thereof as in the judgment of the city council should be needed for such work. Thereupon the mayor issued his proclamation addressed to the electors of the city of Newton, and reciting the resolution adopted by the council, and the presentation of the petitions aforesaid, and notifying said electors that at the coming general election the question as set out in the resolution of the city council would be submitted to them, and continuing:

"Those favoring such proposition—that is to say, that an electric light plant be established by said city to supply light for said municipality and the inhabitants thereof, and to provide for the payment of the same by their issuing bonds of said city in an amount of not to exceed fourteen thousand dollars, or so much thereof as in the judgment of said city council may be needed for such purpose, which said bonds shall bear interest at the rate of not exceeding six per cent. per annum, interest to be payable annually, and which bonds shall be redeemable in ten years, and payable in twenty years—shall have ballots either written or printed, and shall be in the following form, 'For electric light plant,' and those opposed to said proposition shall have ballots either written or printed, and in the following form, 'Against electric light plant.'"

The form of the ballots is in exact accordance with the requirements of section 4 of the act of the twenty-second general assembly. The objection urged to the resolution of the council, the petitions of the tax-payers, and the proclamation of the mayor is that the proposition submitted to the voters embraced two matters: (1) Should the city erect an electric light plant? (2) Should the city issue bonds in the sum of \$14,000 or less to pay therefor, running 20 years?—and that these two matters should either have been submitted at two different elections, or in two separate propositions at the same election, so that each elector could have voted as he pleased on each proposition. By reference to the act of the twenty-second general assembly, it will be seen that it provides that cities may erect, or authorize the erection of, electric light plants, provided the elect-

ors so determine, and that the cities may issue bonds for that purpose; and then, when providing for the election, it prescribes the form of the ballot to be used. When the electors of a city are called upon to vote upon the question of the erection of an electric plant, it is of the highest importance for them to know what provision is to be made for payment of the expense of such erection; and it seems to me that the true wishes of the voters can be better ascertained by submitting to them the terms upon which the council expect to be able to erect the plant, than by submitting the single question of erecting or not erecting. Voters are not prepared to vote understandingly upon such a question unless they know how it is proposed to raise the funds needed in the erection of the plant. The proclamation of the mayor submitted to the voters the exact proposition that they were called upon to decide, and in a way that could not mislead any one who would take the trouble to read the proclamation; and, while it may be true that some voters might wish to vote for the erection of an electric plant, but against the issuance of bonds for that purpose, and that they did not have the chance to express their wishes is this particular, yet such fact cannot invalidate the election that was held. The question the city council wished to have decided was not as to the abstract views of the tax-payers upon the question of the erection of electric plants, without regard to the manner of paying the cost thereof, but upon the one form of the proposition,—whether the voters favored the erection of such plant by the city when to do so the city would be required to issue bonds to an amount not exceeding \$14,000. I cannot see that substantial objection can be taken to the form of proposition submitted; and, the majority of the voters having cast their ballots in favor of the erection of the electric plant, it must be held that thereby the city was authorized to undertake the erection of the plant, and to issue bonds for that purpose.

It is further urged that the city cannot properly undertake the erection of the plant except by the adoption of an ordinance providing therefor; a resolution to that effect being insufficient. The statute of Iowa creating municipal corporations does not make clear when the municipal action should be by ordinance, as distinguished from a resolution. If the passage of an ordinance is needed to authorize the city to enter upon the work of erecting and maintaining an electric plant, such course is still open to the city. I do not think the adoption of an ordinance was necessary to authorize the submission of the question to a vote of the electors. The statute provides that the council may order the submission of the question to a vote, or that the mayor may order the submission upon petition of the requisite number of tax-payers; and this precludes the idea of the necessity of adopting an ordinance as an essential prerequisite to submitting the matter to the electors. It is the action of the voters under the provisions of the statute that authorizes the city authorities to undertake the erection of the plant; and, even though there may be force in the suggestion that an ordinance specifically providing for the erection thereof ought to be passed, I do not see that the fact that such ordinance has not yet been adopted calls for action on the part of the court by way of injunction.

It is also averred in the bill that the issuance of \$14,000 in bonds will increase the indebtedness of the city over the constitutional limit of 5 per cent. upon the taxable value of the property within the limits of the city. According to the showing made in the affidavits submitted by complainant, the indebtedness at the time the vote was taken was such that the issuance of \$14,000 in bonds would carry the amount due somewhat over the 5 per cent. limitation; but, as appears from the affidavits submitted on behalf of the city, before the city in fact issued its bonds the indebtedness had been reduced by payments thereon so that the addition of the \$14,000 to the amount existing at the date of the bonds did not reach the constitutional limit. The vote of the electors did not create an existing indebtedness. It authorized the city to undertake the erection of an electric plant. The city authorities, in carrying on this work, are subject to the constitutional limitation; but no debt was created until the bonds were issued and sold, and at that time the indebtedness was not increased over the limitation by the sale of bonds.

It further appears that on the 28th of April, 1890, the city council passed an ordinance reciting the result of the election on the question of the erection of an electric plant, and providing that the mayor and city clerk are authorized and directed to issue bonds of the city in the sum of \$14,000, 20 thereof to be of the denomination of \$500 each, and 20 of \$200 each, to be used as needed in the erection of the electric plant. Thereupon a contract for the sale thereof was made with the Citizens' National Bank of Des Moines, whereby the bank agreed to take from the city its bonds to the amount of \$14,000, paying par therefor, but the bank preferred to take bonds of \$1,000 each rather than in smaller amounts; and thereupon the city council amended the ordinance of April 28th by passing on the 23d of May, 1890, a substitute for the first section, wherein it was provided that 14 bonds of \$1,000 each should be issued. The amended ordinance took effect June 2d. On the 31st of May the city authorities delivered to the bank 14 bonds for \$1,000 each, and received the pay therefor in accordance with the previous agreement entered into with the bank; the bonds thus delivered bearing date June 2d. It is now urged that the bonds were in fact issued and delivered before the ordinance authorizing the issuance thereof took effect; and therefore the bank, which has been made a party defendant, should be enjoined from selling the bonds, and that they should be declared void. The facts do not present a case of an issuance of bonds tainted with fraud or illegality in the purpose of their issue, wherein it might be necessary, for the protection of the city or its tax-payers, that an injunction should issue to prevent the bonds passing into innocent hands. If these bonds should be delivered back, the obligation would be upon the city to execute and deliver to the bank its bonds in the sum of \$14,000, and, while it may have been an irregularity to deliver the bonds to the bank before the amended ordinance took effect, yet it was in fact done, and the city has received the full value therefor; and certainly the complainant, as a tax-payer in the city of Newton, has no ground to invoke the action of a court of equity for its protection in the premises. If the delivery of the bonds before the taking effect of the amended ordinance de-

stroys their validity, which I do not mean to affirm, that is a legal defense thereto. If there exists ground for equitable interference, it would rather be in favor of the bank than of the tax-payer.

Counsel have presented other points in argument, but none which call for particular remark. I find no substantial ground calling for the issuance of the writs of injunction prayed for; and the motion therefor is overruled, and the restraining orders heretofore granted are set aside.

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SQUAIR v. LOOKOUT MOUNTAIN Co. *et al.*

(Circuit Court, E. D. Tennessee, S. D. June 17, 1890.)

**EQUITY PLEADING—SUITS AGAINST CORPORATIONS.**

Under equity rule 94, which provides that every bill brought by one or more stockholders against a corporation and others, founded on rights which may properly be asserted by the corporation, must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the directors, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, the court has no jurisdiction of a bill to enjoin the transfer of part of the stock of the defendant to another corporation, which fails to set forth such efforts, though it allege that the directors of the one corporation are also directors of the other, that it would have been useless for plaintiff to demand that they would bring suit, and that plaintiff would have made such demand had he not known that they would refuse. Following *Hawes v. Oakland*, 104 U. S. 460.

In Equity. On motion to dismiss the bill for want of jurisdiction.

KEY, J. The complainant alleges that he is a stockholder in the Lookout Mountain Company; that said company was organized as a statutory real-estate and immigration corporation under the laws of Tennessee, with a capital stock of \$1,000,000, but that only \$600,000 of said stock were subscribed for; that about 700 acres of land were purchased by the company upon the top and sides of Lookout mountain, valued at \$600,000. Books for the the subscription of stock were opened, and \$600,000 of the stock only was authorized to be subscribed for and issued, but the remaining \$400,000 of the stock has never been subscribed for or issued. It is further alleged that the individual defendants are seven of the nine directors of the company, and that they hold a majority of the stock of the company. Complainant avers that he is the owner of 143 shares of the stock of the company, each share being \$100; that 123 of these shares were transferred to him July 14, 1887; that on the 28th of July, 1887, the other defendants, by some fraudulent and unauthorized scheme or contrivance, undertook to transfer and issue to the Chattanooga & Lookout Mountain Railway Company the \$400,000 of stock in the Lookout Mountain Company which had not been subscribed for. It is charged that those defendants intended at the time this stock was so issued and donated to become stockholders in the Chattanooga & Lookout Railway Company, and that they did be-

come such, and become seven of the railway company's nine directors, so that this stock is now claimed by these defendants, who it is alleged constitute a majority of the directors, and own a majority of the stock in both corporations. The Chattanooga & Lookout Mountain Railway Company is a Tennessee corporation, and the defendants are citizens of Tennessee. The complainant is a citizen of Ohio, and alleges that he had no notice of these transactions until May 28, 1890. The present matter for consideration is whether an injunction shall issue restraining any transfer or incumbrance of the stock. Defendants insist that this court has no jurisdiction of the cause, and that, so far from an injunction being awarded, the bill should be dismissed.

The first question with which we are confronted does not arise upon the merits of the case made in the bill, but whether the allegations of the bill are such as are necessary to invest this court with jurisdiction of the case. Rule 94 prescribed by the supreme court for equity proceedings in this court says:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one, to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

In *Hawes v. Oakland*, 104 U. S. 460, 461, the court says:

"To enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist, as a foundation of the suit, some action or threatened action of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors or a majority of them are acting for their own interest in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. \* \* \* But, in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he

must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors and of the shareholders, when that is necessary, and the cause of failure in these efforts, should be stated with particularity."

The decision and the rule predicated upon it are specific and mandatory in their requirements. The bill under consideration makes no avowal of any effort on complainant's part to secure the action he desired of either the directors or stockholders. On the contrary, the bill shows that no such effort was made. On this point the bill says:

"The board of directors of the Lookout Mountain Company is the same now, with one exception, as it was when these illegal and fraudulent acts were committed by them, and all them, except two, are the principal stockholders of the Chattanooga & Lookout Mountain Railway Company, and the board is under their control, and, of course, it would have been useless for him to make a demand on them to institute a suit to recover the stock; but he would have made said application had he not known that they would refuse."

The complainant seems to believe that a demand of the directors for suit is all that rule 94 requires. The language of the rule does not support in the slightest degree such an inference. It provides that "every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, \* \* \* must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

As to the directors or trustees, the language is positive and mandatory. The nature of his efforts and the causes of his failure must be stated, as to them, with particularity, and, if necessary, he must show like efforts with the shareholders, and the causes of failure with them. The bill may show that there was no necessity for efforts to be made with the shareholders, but not so as to the directors.

The language of the rule and of the decision in the case of *Hawes v. Oakland*, *supra*, implies, indeed more than implies, that action of the directors and trustees, as well as shareholders, complained of must almost necessarily be the action of a majority of them. Justice MILLER, in the case referred to, groups in four classes the wrongs for which bills may be maintained: (1) Some action or threatened action of the managing board of directors or trustees which is beyond the scope of their powers. (2) Such fraudulent transaction completed or contemplated by the acting managers, in connection with some other party or among themselves, or with other shareholders, as will result in serious injury to the corporation or its shareholders. (3) When the board of directors, or a majority of them, are acting for their own interests in a manner destructive of the corporation itself, or of the rights of the shareholders. (4) Where the majority of the shareholders are oppressively and illegally pursuing

a course in the name of the corporation in violation of the rights of the other shareholders.

All these classes embrace action of the directors officially, and not individually, and necessarily action by all or a majority of them, and classes 3 and 4 in positive terms embrace action by a majority of the directors and shareholders; and yet, in these cases, precisely similar to the one in hand, so far as some of them are concerned, the learned and great judge says the complainant "should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court." 104 U. S. 460, 461.

Complainant attempts to excuse and justify his failure to do these things by maintaining that when a majority of the managing directors or of the stockholders of a corporation do, or undertake to do, an illegal, fraudulent, or corrupt act, it is unreasonable to suppose they will refrain from doing the act, or will revoke it, and restore the former and just condition of things, although every possible effort be made to induce them to do so, and therefore it is unnecessary to make any effort in this direction. There is nothing to support this position, but everything is against it. It will not do to permit complainant's judgment and opinion to nullify and abrogate the rule. *Dimpfell v. Railroad*, 110 U. S. 209, 211, 3 Sup. Ct. Rep. 573; *Quincy v. Steel*, 120 U. S. 244, 248, 7 Sup. Ct. Rep. 520.

But if all these things were out of the way, does complainant's bill make a case for the injunctive interposition of the court? As the case stands, all the allegations of the bill properly pleaded must be regarded as true. Complainant says that he became the owner of all his stock but ten shares, July 14, 1887; that two weeks after, the bargain or transaction complained of between the two corporations took place, but that he never heard of it until May 28, 1890. He filed his bill June 9, 1890. Why and how he slept upon his rights for almost three years does not appear. A court, especially here in Chattanooga, must know something of the history and geographical situation of the two corporations assailed by the bill. The bill avers that the property of the Lookout Mountain Company consists of lands upon the top and sides of Lookout mountain, and we know that they are upon the end of the mountain next to Chattanooga and the Tennessee river. We know that the chief value of these lands depends upon their becoming a summer resort, and being purchased as homes for the people during the heat of summer. To bring them into profitable market, it is necessary to have easy, safe, and rapid access to and egress from them. A railroad becomes not only useful, but important, not to say necessary, in the successful disposition and use of these lands. Then, again, a railroad running from the railways at the base of the mountain up to and along its top must depend for profitable business upon the population upon the mountain. The more the peo-



ple—the more numerous the homes upon the mountain—the greater the operations of the railroad. The interests of the land company and the railroad company are so interdependent and blended as to become essentially the same, and the prosperity of one necessarily builds up and impels the success of the other. Surrounded and attended by these considerations, it was the part of wisdom and successful enterprise on the part of the directors of the land company to aid and encourage by all legitimate means the construction of a railroad to and through the property of their corporation. Another thing a judge must know is something of the reputation and standing of those who are his neighbors, and reside in the same community with him. The directors who are sued in this case are among our leading business men, gentlemen of high and honorable character, whom the law, as well as their neighbors, presumes to be honest. When we hear that gentlemen of such high character for integrity and good business judgment have represented their corporation in a transaction of confessedly great importance in promoting the interests of their corporation, we should not hastily conclude that their action was corrupt and fraudulent, although some question might arise as to whether they had power to do the act complained of. The case made by this bill shows not only the propriety, but the necessity, for rule 94. Here is a complainant whose eyes and ears were closed during the whole period during which this railroad was being constructed; but after it is completed, and the property of his corporation has received, and is enjoying the benefits of its construction and operation, he wakes up, and, within 12 days after he hears of the transaction of which he complains, he files this bill. Did not a sense of justice and fair dealing demand that he should have called upon the directors, and asked for an explanation of the transaction? Then, if they failed to satisfy him of the good faith or the legality of the transaction, he should have made an earnest effort to induce them to do what he conceived to be just in and by his corporation. Failing in this, then he might have appealed to the courts. I regard it that it is not only clear that an injunction should not be granted, but I think the motion to dismiss the bill because it fails to meet the requirements of rule 94, and of the decision in *Harves v. Oakland*, *supra*, is well taken; and, unless complainant by the rule-day in July next, shall so amend his bill as to obviate these defects and objections, his bill will be dismissed.

NORTHERN PAC. R. CO. v. ROBERTS *et al.*

(Circuit Court, W. D. Wisconsin. April 20, 1890.)

## 1. RAILROAD COMPANIES—MUNICIPAL AID—CONSTITUTIONAL LAW.

The use of a railroad, though owned by a private corporation, is public to such a degree as to authorize taxation in its support; and Laws Wis. 1888, c. 150, approving and ratifying the act of Douglas county in conveying to a railroad company lands which it held under tax-titles, to aid in the construction of the road through the county, is valid.

## 2. QUIETING TITLE—PLEADING—DEMURRER.

A bill by a railroad company to set aside deeds of various tracts of land previously conveyed to it, and to quiet the title, is not demurrable on the ground that complainant is only in actual possession of a portion of the lands, and cannot maintain the suit as to that portion of which it has no possession. The demurrer goes to the entire bill, and does not lie if the bill is maintainable as to part of the lands embraced in it.

In Equity. On demurrer.

*Cutlin & Butler*, for complainant.

*W. F. Bailey*, for defendants.

BUNN, J. This action is brought by the complainant to set aside two certain deeds of conveyance of a large quantity of lands lying in Douglas county, Wis., executed by said county to the defendant Roberts,—one on the 6th day of July, 1888, and the other on the 7th day of March, 1889,—and to establish and quiet the title to said lands in the complainant. There was a general demurrer put in by the defendants to the bill of complaint, and the case has been argued and submitted on such demurrer.

The essential facts, as appears by the bill, are as follows: That on the 7th day of September, 1880, the complainants had completed the line of road now known as the "Northern Pacific Railroad" as far eastward as the point known as the "Northern Pacific Junction," in the county of Carlton and state of Minnesota; and, being about to hold a meeting of its board of directors in New York to consider the extension of their line eastward from said injunction to some point on Lake Superior, the board of supervisors of Douglas county, at a meeting of said board duly held, adopted a resolution, and caused it to be entered of record, the substance of which was that—

"Whereas, the prosperity of the county would be greatly influenced by the manner in which, and the route upon which, said road should be extended, that, in the opinion of the board, a line of road entering the state at some point between the St. Louis and Nemadji rivers, and running thence all the way in Wisconsin, between said rivers, to a point on the bay of Superior at or near the mouth of Nemadji river, and thence along said bay of Superior to Connor's point, with sufficient docks or piers suitable for the transfer of passengers and freight from its cars to lake-going craft, and from said craft to said cars and depot at some point on said bay of Superior, between said Nemadji river and Connor's point, which said railroad company may select, and an eastern extension crossing the Nemadji river, at or near its mouth, at a point that will afford to said railroad company the best and most profitable route for its business, and best develop the county of Douglas and its re-

sources, therefore, resolved, that it is the duty and true policy of this board, by every means in its power, to promote the construction of the N. P. Railroad, the main line thereof, or a connection therewith, upon substantially such route, and that in behalf of said county, in aid of or inducement to the construction of a railroad, at an early day, in the manner and upon the route indicated in the resolutions, said board offers to said N. P. Railroad, upon condition that it accept the proposal within sixty days, and within the year 1881 construct and complete such railroad as above indicated, and make the connections therein set forth, the county of Douglas should, as soon as said road should be completed, transfer, by sufficient deed or deeds, to said N. P. Railroad Co., all the available lands or lots belonging to said county of Douglas, which have been acquired by deed, to which said county has held undisputed title during two years last past."

That this proposition was accepted by the railroad company, and the railroad built and completed within the time, according to the contract with the board of supervisors. There were some other stipulations in the contract, but enough had been set out, perhaps, to present the questions for decision. There is no dispute but that the road, with all proper docks, piers, etc., was built and completed, and all the connections properly made, by the company, pursuant to the agreement, and has ever since been maintained and operated by the complainant, and that the county board, by resolution, accepted the work, and made a conveyance of the land to the railroad company, pursuant to the resolution and agreement of the board, on January 20, 1882, which deed of conveyance was duly recorded, and that afterwards the legislature of the state of Wisconsin, in and by chapter 150 of the Laws of said state for the year 1883, approved and ratified the act of said Douglas county in so contracting with the complainant, and in so conveying the lands of the county. The bill further alleges that the complainant held such lands without question made of its right or title, paying large amounts of taxes thereon, from the time of such conveyance, in 1883, up to the month of July, 1888; that such lands were of no market value at the time of so entering into such agreement with the company for the construction of its road through Douglas county, but afterwards, by reason of the construction of such road, became of great value, and are now worth more than \$200,000; that, since said conveyance of said lands by the county to the complainant, complainant has sold and conveyed to divers persons purchasing the same in good faith, and paying value therefor, a large number of the parcels of land so conveyed to it by the county, and whose titles thereto are based upon such conveyance by the county to the complainant; that on or about July 6, 1888, the defendant Roberts, combining, etc., with other persons, induced the board of supervisors of said county to sell to said Roberts, for the sum of \$335, all the said land so conveyed before to the complainant, and to make a quitclaim deed of the same, which was duly recorded, and constitutes a cloud upon complainant's title. That, said deed to Roberts omitting, as it did, several parcels of the land so conveyed to the complainant, a second deed was made by the county to Roberts of the remaining parcels of land, which deed was for the consideration of \$50, and was duly recorded. The bill also

alleges that the complainant company, upon the execution of the deed by the county to it, took, and has since held, the actual possession of a large part of the lands so conveyed, and has occupied the same, and is still so occupying it, for right of way, depot grounds, and so forth, and that other portions of the land are vacant, and unoccupied by anybody.

There are two grounds of demurrer to the bill. The first is that, the complainant not being in the actual possession of the lands, it cannot maintain a suit to cancel the deeds to Roberts, and to quiet the title. The contention of the complainant is that, being in actual possession of a portion—some 30 pieces—of the land conveyed, and being entitled to maintain the action as to that portion, the court will retain the case, in order to do complete justice between the parties, and not turn the complainant over to his action of ejectment to recover the land conveyed by the same instruments, of which it does not have actual possession; that, to save a multiplicity of suits, the court, obtaining jurisdiction by reason of the complainant's actual possession of a portion of the lands, will retain jurisdiction, and adjudicate the entire controversy in equity.

The principle invoked by complainant is a familiar one, and may be properly applicable to this case. Whether it be so or not, I have not found it necessary to decide on this demurrer, as the demurrer goes to the entire bill; and, if the bill is maintainable as to part of the land, the demurrer will not lie. This point, if a good one, can be taken advantage of by special plea or answer, or without either plea or answer, upon final hearing; the facts appearing upon the face of the bill.

The other ground of demurrer is that the county board of supervisors had no authority, and the legislature had not the power to confer authority upon such board, to make a conveyance of the land belonging to the county, and which it held under tax-titles, to aid in the construction of a railroad through the county, and therefore the act of the legislature ratifying the act of the county board is unconstitutional and void.

It has been assumed upon the argument that the question stands upon the same footing as that determined by the supreme court of Wisconsin, in 1870, in the case of *Whiting v. Railroad Co.*, 25 Wis. 167; and I have no reason to doubt the correctness of this view. The land donated was a fund belonging to the county as a result of taxation, and making a donation of it to aid in the construction of a railroad through the county would be the same, in principle, as levying a tax for the same purpose; and though the supreme court of the United States, in the case of *Olcott v. Supervisors*, 16 Wall. 678, coming up on writ of error to the United States circuit court for the eastern district of Wisconsin, and arising upon the same state of facts, reached a conclusion directly contrary to that reached by a majority of the court in *Whiting v. Railroad Co.*, this court is now urged, for the sake of a uniformity of decision upon the same question in the state and federal courts sitting in the same state, to disregard the decision of the supreme court of the United States, and to adopt and follow the decision of the court of last resort in the state. And certainly it would be a very desirable object to make the rule uniform in the two jurisdictions, if it could be done with propriety

of judicial decorum. It is always to be deplored that residents and non-residents of the state should not be subject to the same rule of property in the federal and state courts sitting in the same state, and this court will go as far as judicial propriety can warrant to avoid such an anomalous condition in the administration by two equal and co-ordinate jurisdictions. But I more than suspect it is not within the power of this court to remedy the evil, and that the supreme court of the state is the only body that can better the situation, and put all suitors in the two jurisdictions upon the same footing of right and remedy.

The United State supreme court, in *Olcott v. Supervisors*, not satisfied with the conclusion reached in *Whiting v. Railroad Co.*, refused to follow that decision upon two grounds: *First*. It was not a local question. It was not the determination of any question of local law. It was not a question where the construction of any state statute, or any state constitutional provision, was in issue. On the contrary, it was one of general jurisprudence. It related to the general powers of any state legislature over the subject of taxation within the state, and might arise as well in one state as another. It was particularly a question whether the construction and maintenance of a railroad owned by a corporation is a matter of public concern. The taxing power of a state confessedly extended only to the raising of moneys for a public use. If a railroad was a private, as distinguished from a public, use, then the state had not authority to levy a tax for its support, or to authorize a municipality to tax itself; and this question was one of general law. It had as much reference to the constitution of any other state as it had to that of Wisconsin. Its solution, therefore, must be sought, not in the decision of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what private, and the extent of unrestricted legislative power, were matters which, like questions of commercial law, no state could conclusively determine for the federal courts. *Second*. The court had always held that if a contract, when made, was valid under the constitution and laws of a state as they had been previously expounded by its judicial tribunals, no subsequent action of the legislature or the judiciary will be regarded as establishing its invalidity. Prior to the decision of *Whiting v. Railroad Co.*, it seemed to have been well settled in Wisconsin, as elsewhere, that the construction of a railway was a matter of public concern, and not the less so because done by a private corporation. It was on this ground that the courts of the state had held that the power of eminent domain might be exercised by the state, and the citizen's land or house taken at the instance of a railroad corporation, for a right of way or for depot grounds, etc. See *Pratt v. Brown*, 3 Wis. 612; *Hasbrouck v. Milwaukee*, 13 Wis. 37; *Robbins v. Railroad Co.*, 6 Wis. 641; *Soens v. Racine*, 10 Wis. 280; *Brodhead v. Milwaukee*, 19 Wis. 652. All these adjudications, declaring the construction of a railroad to be a matter of public concern, and the use a public one, justifying the exercise of the taxing power and that of eminent domain, had been made previous to 1870, and before the county bonds then in suit were issued. The court was not concluded

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then by a decision made in 1870, after the bonds were issued, that such public uses were not of a nature to justify the imposition of taxes. As the transactions in this suit occurred long since the decision in *Whiting v. Railroad Co.* was announced, the consideration is urged upon the court, that there is not the same reason for not being bound by the decision that there was in the case of *Olcott v. Supervisors*, and it is true that the contract was made with reference to the law as it stood in 1882; so that the only question, aside from the general merits of the controversy, is whether the United States court should consider itself bound by the decision of the state tribunal upon a question of this character. But this question was conclusively determined by the United States supreme court, as has been seen in the case referred to, and as it has in many other adjudicated cases before and since that time. So that this court is powerless to make the rule uniform, so long as an appeal lies from its decisions to the United States supreme court. On the contrary, the supreme court of the state, if the question should again come before it, may, with the utmost grace and propriety, put itself in line upon this question, not only with the uniform course of judicial decisions in the federal courts, but with that of the decisions of all the state courts that have passed upon this question, with the single exception of the state of Michigan, and, I might say, with its own decisions made previous to 1870. At the time *Whiting v. Railroad Co.* was decided, the supreme court of the state was constituted of three judges, two of whom concurred in the opinion, while Justice PAINE delivered a very able and vigorous dissenting opinion, in which he met and answered fully, to my mind, the position taken by the majority of the court. In the opening sentence of that opinion, he says:

"The single question presented seems to me to have been already so thoroughly determined the other way that it ought no longer to be considered even an open one."

If that could be said at that time, it may, perhaps, with still greater reason, be said now, after the progress of 20 years of legislation and judicial opinion upon the subject, that the question should be considered settled and at rest, whatever may be thought by individuals upon the question of municipal aid to railroads as a mere question of public policy. The people will generally, in the end, have their own way upon questions of this character, and so they have in this case. They wanted to tax themselves to aid in the building of railroads for the improvement of localities, and the public acts of more than 20 states, enabling them to do so, attest the public sentiment of the country upon the matter of policy. The highest courts in all these states, with the exception of Michigan and Wisconsin, have held such laws constitutional; and the supreme court of Wisconsin, prior to the decision in *Whiting v. Railroad Co.*, had given no indication of dissent from the general current of opinion. The entire logic of the case in *Whiting v. Railroad Co.* had been repeatedly given away by previous decisions. In *Husbrouck v. Milwaukee*, 13 Wis. 43, the chief justice, speaking for the court, said:

"The power of municipal corporations, when authorized by the legislature, to engage in works of internal improvements, such as the building of railroads, canals, harbors, and the like, or to loan their credit in aid thereof, and to defray the expenses of such improvements, and make good their pledges, by an exercise of the power of taxing the persons and property of their citizens, has always been sustained on the ground that such works, although they are in general operated and controlled by private corporations, are, nevertheless, by reason of the facilities which they afford for trade, commerce, and intercommunication between different and distant portions of the country, indispensable to the public interests and public functions. It was originally supposed that they would add, and subsequent experience has demonstrated that they have added, vastly and almost immeasurably to the general business, the commercial prosperity, and the pecuniary resources of the inhabitants of the cities, towns, villages, and rural districts through which they pass, and with which they are connected. It is in view of these results, the public good thus produced, and the benefits thus conferred upon the persons and property of all the individuals composing the community, that courts have been able to pronounce them matters of public concern, for the accomplishment of which the taxing power might lawfully be called into action."

A clearer or more forcible statement of the grounds upon which nearly all the decisions, state and federal, on this question, rest, could hardly be made, and it is entirely in accord with the great weight of reason and authority upon the subject; and yet in *Whiting v. Railroad Co.* the law authorizing municipal aid to a railroad was held unconstitutional on the ground that a railroad corporation is a private concern, and the court also distinguish between cases where the municipality is allowed to take stock in a railroad corporation, and lay a tax to pay for the shares, and one where this precious privilege is not provided for,—a distinction which, so far as my researches have extended, is nowhere else made by any court. The waste of intellectual energy required for any court to maintain itself upon so narrow a basis of reason is something sad to contemplate, for any one who has any proper regard for a just conservation of these forces. If the use of a railroad is public, as had before been repeatedly held by the court, and by all other courts, and in such a degree as to warrant the exercise of the power of eminent domain, of what moment was it that the property itself, and the business, was owned by a private corporation? Was the use any the less public for that reason? If the use is a public use for the purpose of invoking the state's power of eminent domain, though the business is carried on by the agency of a private corporation, why is it not a public use for the purpose of invoking the power of taxation? The lands or houses of one person cannot be taken away, and given to a private corporation, if the business of the corporation is private. It is on the ground that the use is public, and only on that ground, that this extraordinary reserved power of eminent domain can be called into requisition; and that the use of a railroad is public seems too evident to any ordinary capacity to require argument to sustain it. And by the course of legislation and judicial opinion in the last 20 years, since *Whiting v. Railroad Co.* was decided, that use seems to have become more and more emphatically public, and railroads brought more and more under public control and regulation. The

doctrine has become, by repeated decisions of the state and federal courts, and by a long course of legislation, as firmly established as any doctrine can be, that, though the property and business of a railroad are private, its use, touching the public interests, as it does, at all points, is a matter of public concern, to such a degree as to give the states and general government a strong regulating and supervisory control, almost unlimited in extent, short of impairing the obligation of contracts, and the confiscation of private property. The state, within reasonable limits, may regulate freights, not by arbitrary enactment without regard to the question whether the sums allowed will leave a reasonable profit upon the business, because such a law would amount to confiscation, but in a reasonable manner, to conserve the interest of the railroad and the public. It may require the track to be fenced, and necessary guards placed. It may regulate the rate of speed, the building of extra or double tracks, the raising or lowering of grades at certain places, in the public interest, and a great many other things which the public good may require,—all on the ground that the incorporators have brought their property in connection with a public use, and therefore are subject to public control. Every state has its railroad commission, and now the government has taken under control the regulation of all lines connected with the interstate commerce of the country. Railroads are the great public highways of the country, and are more emphatically public than any other, unless it be ocean highways. They constitute the most important agency in carrying on the trade and commerce of the world that exists, and do more to stimulate, develop, and uphold the industries of the country, reward the labors of husbandmen and manufacturers, and add to the general comforts of modern civilized life, than any other material agency,—if, indeed, an agency may be called wholly material which attracts and draws into its circle of activities the ablest and best minds of the country. As is said by the supreme court of Illinois in *Railroad Co. v. Smith*, 62 Ill. 268:

“The benefits resulting to the people of the state from our system of railroads are untold and incalculable. The mind can scarcely grasp them. Railroads have almost superseded all other means of intercommunication between the several parts of our extensive and growing state. They have become an absolute necessity, indispensable to our increased growth, and to the removal of our immense surplus. They have added millions to our taxable property, given augmented facilities to every department of trade, enriched the mass of the people, largely enhanced the value of our lands, built up manufactures, and brought us into close proximity with the best markets of the country. All share in the blessings flowing from them. Railroads are in truth the people's highways for pleasure and business and commerce. Without them, our internal trade would languish and die, and our corn and wheat rot in our granaries.”

In *Brodhead v. Milwaukee*, 19 Wis. 658, which was a case under the state law for the raising of taxes to pay bounties to volunteers, the court held that—

“To justify a court in declaring a tax void, and arresting proceedings for its collection, the absence of all possible public interest in the purposes for which



the funds are raised must be so clear and palpable as to be immediately perceptible to every mind."

But assuming that to be the rule, though, perhaps, too strongly put, how can any court so shut its eyes and ears to things known to the commonest observation as to say that, in the construction of a line of railway, there is such absence of all possible public interest as to make the fact immediately perceptible to every mind at first blush?

Again, how does it add anything to the character of a railroad, as being of a public or private use, for a municipality to take stock in it? It is admitted that, if a county take stock in a railroad, it may then be empowered by the legislature to levy a tax in its aid, though the court intimate in one case (*Phillips v. Town of Albany*, 28 Wis. 357) that, if they had it to decide over again, the ruling might be different. But it is quite evident that the power of the legislature to raise taxes cannot rest upon any such trivial circumstance. It is not a question of a proper consideration for a contract, or, if it were, the building of the road would constitute a consideration; but it is a question of legislative power under the constitution, and the right to tax does not require that any consideration or inducement should be paid or held out to the tax-payer. In this respect the power to tax is more far-reaching, pervasive, and arbitrary than that of eminent domain, where a compensation must be paid. In *Railroad Co. v. McDonald*, 53 Miss. 245, the supreme court of Mississippi lays down what I have no doubt is the correct rule, as follows:

"There is no just distinction between a donation and a subscription for stock in such an enterprise. To recognize such a distinction is to disregard the fundamental theory of aid to railroads. That is not to make the municipality a stockholder for dividends on stock, or direct returns from an investment for profit, but to aid the enterprise for expected benefits to result to the public from its success. The end to be accomplished, and not the means of its accomplishment, by assistance from the municipality, is the matter to be considered."

The liability to taxation is one of the concessions and sacrifices for the general good which every citizen is required to make when he becomes a member of the body politic.

Again, if the question turned upon the matter of taking stock, it would follow that a city or county would be authorized to take stock in any private enterprise, like farming, insurance, or manufacture, and tax the people to pay for the same. But no court would ever hold that this could be done. The purpose must be a public purpose, and the use a public use, in order to invoke the taxing power. It is of the very essence of a tax that the money should be raised for a public purpose, and be laid according to some rule of uniformity; otherwise, it would be an arbitrary exaction amounting to confiscation. Equality of taxation means equality of sacrifice, and is required for the same reason that it ought to be in all affairs of government, which should make no distinction of persons or classes. *Mills*, Pol. Econ. (5th Ed.) 296. But if the purpose be public, and the rule uniform, it was never held that there must be any other compensation than the supposed general benefit arising out of

the public use to which the money is appropriated. If the use is public, there is no need that the county should become an owner in the corporation to support taxation. If not public, the taking of stock, and becoming part owner; would do nothing towards the support of such right. The distinction is too trivial and unsubstantial for any court to stand upon. The supreme court of Wisconsin could well afford to stand alone upon this question, if it had a considerable basis of reason and argument to support it. But, in looking through the cases that have taken that side of the question, I cannot avoid the conviction that the conclusions reached have been founded quite as much upon what might be regarded as a wholesome distrust of the legislative discretion as upon any solid legal basis. But this power of taxation must be lodged somewhere. It is properly a legislative power, and who can say that the people have erred in intrusting it, under the constitution, to the legislative will? And the decision of the question as to what is a public use, in such a degree as to authorize taxation in its support, would seem to be one as properly to be left to the politician and statesman as to a judge on the bench. There is no patented monopoly on political wisdom; and, if it is the duty of the legislature to keep within constitutional limits, it is no less the duty of the judiciary to do the same thing. Both are liable to err, but each should do its utmost to keep within its own proper jurisdiction. If the legislature abuses its discretion, as is liable to be the case, the people have it in their power, always, to correct the evil, either by choosing representatives to carry out their will, or by amending the organic act, as has been done in some of the states. so as to either limit the power of taxation for railroad purposes, or abolish it altogether. But in a majority of the states the power is still in force, and, though it may have been abused in some instances, possibly the advancement of the public interest has been as well attained and conserved under such legislation as it would have been without it; and at any rate, whatever we may think of the policy, after so many millions of lands and money have been given away by congress, and by the people of the states, it would seem almost too late now to question the authority. The power of legislation on the part of the states is general, and not specially delegated. It is broader than that of congress; and yet it is settled beyond question, by the highest authority, that the various acts of congress donating the public lands to aid in the construction of railroads are constitutional and valid laws.

It may be noted that the chief justice, in the opinion in *Whiting v. Railroad Co.*, refers to the case of *Hanson v. Vernon*, then an unreported case, by the supreme court of Iowa, since reported in 27 Iowa, 28, as sustaining the conclusions arrived at by the majority of the court in the Wisconsin case; and so it did, indeed. But after that decision the legislature of Iowa re-enacted the same statute with amendments, but not changing the principle of the law in any respect; and the supreme court, in a very well considered opinion, held the law valid, disregarding their previous decision in *Hanson v. Vernon*. See *Stewart v. Polk Co.*, 30 Iowa, 9. The act in Iowa provided "that it shall be lawful for any township,

incorporated town, or city to aid in the construction of any projected railroad in this state, as hereinafter provided." Laws 1870, c. 102, § 1. The act did not provide for the taking of any stock, or any special compensation to the towns and cities to be taxed. The court, in a well-reasoned opinion by MILLER, J., held that the taxing power is one of the sovereign powers vested in the general assembly, and not being limited, either expressly or by clear implication, by the constitution, to the condition of making compensation, the judicial power possesses no authority to thus limit it. So that about all the aid and comfort, so far as authority goes, which the courts of Wisconsin can rely upon, are the decisions in Michigan. The decisions there have been pronounced by a very able judge, and rest upon somewhat more consistent, if not broader, grounds, as they make no distinction between aid with and without subscription for stock. But Judge COOLEY, in the leading case on the subject, (*People v. Township Board of Salem*, 20 Mich. 452,) finally rests the case upon the fact that the policy of the state in respect to building railroads had changed. He says:

"Our policy in that respect has changed. Railroads are no longer public works, but private property. \* \* \* It was at one time, in this state, deemed true policy that the government should supply railroad facilities to the traveling and commercial public; and while that policy prevailed the right of taxation for the purpose was unquestionable."

To my mind, this admission gives away the entire argument, so far as the question of constitutional power is concerned. How a constitution could be changed by a change of policy, without changing the constitution itself, is not so easy to see; and how the policy was changed so long as the legislature, in plain terms and by express enactment, still continued to provide for aid by the several towns and counties of the state, is also not very apparent. Indeed, the dimensions of such an argument, "to any thick sight, are invincible." I had supposed, to render a law unconstitutional, it must contravene some express provision of the constitution, and not some supposed general policy not manifested by express terms, (*Pattison v. Supervisors*, 13 Cal. 175,) and also that if an act of the legislature may be valid or not, according to circumstances, a court would be bound to presume that such circumstances existed as would render it valid, (*Tulbot v. Hudson*, 16 Gray, 417.) The learned judge, in his invaluable work upon Constitutional Limitations, teaches us a safer and better doctrine. He says, using the language of Judge BALDWIN, of the supreme court of the United States:

"The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not, in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people, in their sovereign capacity, can correct the evil; but

courts cannot assume their rights." Cooley, Const. Lim. (5th Ed.) 201; *Bennett v. Boggs*, Baldw. 74.

Again:

"Nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the constitution, but not expressed in words. \* \* \* 'It is difficult,' says Mr. Senator Verplanck, 'upon any general principles, to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written constitution give that authority.'" Cooley, Const. Lim. 205; *People v. Fisher*, 24 Wend. 215.

Still again, Judge Cooley says:

"The legislature is to make laws for the public good, and not for the benefit of individuals. It has control of the public moneys, and should provide for disbursing them only for public purposes. Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion, which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." Const. Lim. \*129.

Now, one would suppose that it would require but a cursory view of this question upon its merits, allowing that there were no precedents on the subject, and the question was now to be considered *de novo*, to see that there is absolutely no limitation upon this power in the state constitution. I have always learned, and have never heard it questioned, that the general assembly of a state may lawfully exercise all the legislative power that any free state possesses, except so far as it is limited by the state, or by the United States, constitution. All sovereignty originally inheres in the people, and the people have divided it into three great governmental divisions,—legislative, executive, and judicial. It is quite different in that country from whence we derive our laws. In Great Britain, the parliament, and, as we might with propriety say, the house of commons, in these later times, has grown to the stature of a supreme executive as well as legislative council, besides wielding no small modicum of judicial authority. See Bryce, Amer. Com. (1st Ed.) 278. The English people are ruled by the house of commons. Bageh. Eng. Const. 206. He would be a bold judge, indeed, in England, who should refuse to enforce a statute passed by the parliament, because contrary to the English constitution, and in doing so would but marshal the way for his own impeachment. A law in England which changes the constitution is still a law, and must be enforced by the courts. Lord Coke has said:

"The English parliament may do anything which is not naturally impossible to be done. It may alter the succession of the crown, as it has done in more than one instance, or change the constitution. But it cannot prevent earthquakes, nor alter the course of the seasons."

Except in a few particular instances, such as passing upon the qualifications of its own members, punishing for contempt, and the exercise of the power of impeachment, and trial thereon, a state legislature cannot exercise either executive or judicial power. But in respect to purely legislative authority the legislature is omnipotent, unless restrained and limited by constitutional enactment; and it is not necessary, in any case, to look into the constitution, as we must into the United States constitution to ascertain the power of congress, to find the authority for legislative action. It may exercise all that grand residuum of legislative power that belonged originally to the people, and has not been conferred by them upon congress, nor prohibited to the legislature by provision of the state constitution. We look into the constitution of the United States for grants of legislative power, but into the constitution of the state to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the state was vested in its creation. *Cooley, Const. Lim.* 207. No doubt the severest limitation upon the legislative power comes through this strict division of the governmental powers of the state. Many things which parliament might do, a state legislature could not, on account of this written limitation. A court, by its judgment and execution founded on due process of law, may take the land or money of one person, and hand it over to another, though the purpose be not public at all. But this is a judicial power, and cannot be exercised by the legislature. Now, it seems quite clear that as the legislature has the general authority to raise taxes, in its own discretion, although the power to tax includes the power to destroy, as said by Chief Justice MARSHALL,—there being no limit upon the power except what comes, if at all, through this division of the powers of the state into legislative, executive, and judicial,—the courts ought to exercise great caution, and proceed upon no uncertain ground, in adjudging a law to be unconstitutional, and therefore void, which by its very enactment has been pronounced constitutional and valid by two equal and co-ordinate departments of the government. And such is the rule laid down by the courts. No law should be pronounced unconstitutional unless it is clearly so. If there is reasonable doubt, the legislative and executive departments of the state having pronounced it constitutional, and the presumption being always in favor of its constitutionality, the court should enforce the law, unless clearly convinced that the legislature has transcended its powers. The court of errors of New York, in *Clark v. People*, 26 Wend. 599, says:

"The courts ought not, except in cases admitting of no doubt, to take upon themselves to say that the legislature has exceeded its powers."

In *Santo v. State*, 2 Iowa, 208, the court said:

"Although the power is universally admitted, its exercise is considered of the most delicate and responsible nature, and is not resorted to unless the case be clear, decisive, and unavoidable."

Similar language is used by the court in *Morrison v. Springer*, 15 Iowa, 304. In *Perry v. Keene*, 56 N. H. 530, a case where the authority of the legislature to empower towns to tax themselves to aid in the construction of railroads was under review by the court, Judge LADD, speaking for the court, said:

"In one view, the duty of the court is extremely plain and simple. In another, it is very delicate, and not free from difficulty. We have not to inquire into the policy of the law, or, if the purpose be admitted to be public, whether the supposed public good to be attained was sufficient to justify the legislature in conferring upon two-thirds of the legal voters of a town the power to devote, not only their own property, but that of the unwilling other third, to such a purpose. All mere questions of expediency, and all questions respecting the just operation of the law, within the limits prescribed by the constitution, were settled by the legislature when it was enacted. The court have only to place the statute and the constitution side by side, and say whether there is such a conflict between the two that they cannot stand together. If, upon such examination, there appears to be a conflict, and if the conflict is so clear and palpable as to leave no reasonable doubt that the legislature have undertaken to do what they were prohibited from doing by the constitution, the court cannot avoid the high, though unwelcome, duty of declaring the statute inoperative, because the constitution, and not the statute, is the paramount law, and the court must interpret and administer all the laws alike."

The supreme court of Vermont, with the same question before it, has also said:

"It is obvious, therefore, in dealing with this question of constitutional power, that the presumptions are all in favor of the validity of the action called in question; and, if we find invalidity at all, it must be upon clear and irrefragable evidence that the action challenged is in conflict with some express provision of the organic law, or its necessary implications." *Town of Bennington v. Park*, 50 Vt. 191. Also, to the same effect, *Lane v. Dorman*, 3 Scam. 238; *Foster v. Bank*, 16 Mass. 245; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 227.

In any view we may take of the case, the use is a public one; and an accumulation of the different views, if there were space and need for such illustration, would serve to throw further light on the question. The owners of railroads are common carriers. They cannot distinguish between different persons. They must carry for all that come, and for reasonable rates, controllable by the public. If they refuse to receive freight that is offered, they are liable to an action in damages; and, indeed, in such case the aggrieved party would not be confined to the slow remedy by action, but might sue out a *mandamus* to compel the corporation to carry his goods. They must provide adequate and sufficient rolling stock to do the business offered, and cannot excuse themselves for not receiving freight or passengers on the ground of the lack of any of these things which it is in their power to provide. Apply any of these tests to a corporation, the use of whose property is private, and the distinction between a private and public use is apparent. Now, the

question presents itself something in this shape: Is it clear, beyond any reasonable doubt, and by evidence irrefragable, that the use of a railroad is not a public use? If the use is strictly private, then the legislature cannot authorize taxation in its aid, because it cannot take the property or money of one person, and hand it over to another, with or without compensation, for a mere private purpose. But, if the use be a public use, then it is admitted that the legislature may levy a tax to aid in the construction. It seems almost a self-evident proposition that the use of a railroad is public. It is so as a matter of common knowledge. It has been so adjudged by the United States supreme court, and by the highest courts in every state in the Union, for the purpose of invoking the power of eminent domain in the condemnation of real estate for right of way, depot grounds, round-houses, freight-yards, etc. Indeed, this power was thoroughly settled in the leading case of *Beekman v. Railroad Co.*, 3 Paige, 45, and has never been questioned since. Under the constitution of this state, and, I apprehend, all the states, this power cannot be exercised by the legislature except for a public use, and upon payment of a just compensation; and this great power the state might no doubt exercise without compensation awarded, but for such constitutional limitation. Allowing this to be the true doctrine in this and all of the states, who will say that the use of a railroad, although owned by a private corporation, is so clearly and universally a public use where the question arises as to the lawful exercise of the power of eminent domain, but that, when the kindred question of taxation is raised, it is just as clearly, and beyond reasonable doubt, not a public, but a private, use? One would think it were not in the power of dialectics to maintain such a proposition, and that the Socrates of Plato would quail at the task; and, after reading and re-reading the opinions of Chief Justice DIXON and of Judge COOLEY, where this Herculean labor is undertaken, I find it quite impossible to call to mind the reasoning by which they severally arrive at their conclusions. One would suppose, if a reason could be given for such a distinction, it might be stated in few words, and in a form to be appreciable to the ordinary understanding. But, after reading through pages and folios, there is not much to remember but words, which seem all the more difficult to fix in the mind on account of the lack of matter which attends them.

The question is well stated by the supreme court of New Hampshire, in *Perry v. Keene*, as follows:

"The argument then admits that the use is public, but holds that it is not sufficiently public, or is not public in the particular way, to bring it within the category of objects for which taxes may be imposed. Either in degree or kind, the public quality which it confessedly possesses falls short of that required by the constitution to justify an exercise of the taxing power. It is incumbent on those who undertake to maintain this distinction to point out clearly the differences on which it rests. An assertion that it does exist is not enough; nor is the argument advanced by a repetition of such assertion, even though made in confident and emphatic terms. What is the rule where-with we are to determine when a given public use is of a character to warrant the exercise of one power, and not the other? What is the principle to

be applied? No one will contend that the power of eminent domain, and the taxing power, though similar, are in all respects identical; but all agree that neither can be exercised except for a public end. Which is the higher power; or, in other words, which requires the greater public exigency to call it forth? What is the nature of those objects which lie on one side of the line, and what of those upon the other side? Where is the line to be drawn, and what are the reasons that determine its location? These are some of the questions not to be evaded or met with much speech and ingenious ratiocination, but to be answered fairly and clearly, before a court can say that the legislature have, beyond all reasonable doubt, transcended their constitutional powers in declaring that a use which is of such character—that is, public in such sense that private property may be taken and appropriated in its behalf—is also public in such a sense that taxes may be levied in its behalf. In those cases to which we have been referred by plaintiff's counsel, where an attempt to do this is made, it does appear to me the failure has been rendered only more conspicuous by the eminent ability of those who have undertaken the task; and, after a most careful examination of those cases, if we were told that a railroad, being a public use for which the lands of individuals may be taken against their consent, is not a public purpose for which taxes may be imposed, I should be utterly at a loss what sound reason to give for the distinction, or in what terms to frame a rule to govern the future action of the legislature in cases of a like description. Unless the court are to stand between the people and their representatives, and declare when the latter have misjudged in their deliberations, and set up limits to the legislative powers of the general court not found in the organic law of the state, it is clear to my mind that this law cannot be annulled by a judicial sentence or decree." 56 N. H. 540.

The state has always exercised the authority to tax the people to build and maintain highways, and the authority is not questioned. It may do so itself, or through individuals or corporations, and authorize the establishment of toll-gates. It may build a road through the state, or any part of it. It may authorize a town or county to build a town or county road, and tax its people for its construction and maintenance. This power has been recognized and practiced from very ancient days, and from the first dawn of civilized life. It was common in the times of the Roman empire, and has come down to us from immemorial days, and through immemorial usage. It has always been exercised in this country from the first settlement of the colonies. The practice and the principle are older than the common law, or the present nations of the world, and have been transmitted to us from a period now darkened to view by time and distance. Laying aside, then, the question of public policy, of which the state must judge, why should the naked authority be now questioned simply because the necessities of civilization have demanded a more commodious method of travel than the old common highway could afford? The following are some of the leading cases on the subject: *Beekman v. Railroad Co.*, 3 Paige, 45; *Brokaw v. Gibson Co.*, 73 Ind. 543; *Allison v. Railway Co.*, 10 Bush, 1; *Town of Bennington v. Park*, 50 Vt. 192; *Perry v. Keene*, 56 N. H. 514; *Walker v. City of Cincinnati*, 21 Ohio St. 14; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147; *Railroad Co. v. Smith*, 62 Ill. 268; *Hallenbeck v. Hahn*, 2 Neb. 377; *Ex parte Selma & G. R. Co.*, 45 Ala. 696; *Davidson v. Commissioners*, 18 Minn. 482, (Gil. 432; *Railroad Co. v. McDonald*, 53 Miss. 240; *People v. Mitchell*, 35 N. Y.



551; *Gibbons v. Railroad Co.*, 36 Ala. 410; *Thomson v. Lee Co.*, 3 Wall. 327; *Bloodgood v. Railroad Co.*, 18 Wend. 10; *Worcester v. Railroad Corp.*, 4 Metc. 564; *Stewart v. Polk Co.*, 30 Iowa, 9; *Town of Queensbury v. Culver*, 19 Wall. 83; *Railroad v. County of Otse*, 16 Wall. 667; *Olcott v. Supervisors*, Id. 678; *Louisville v. Bank*, 104 U. S. 489; *Fairfield v. County of Gallatin*, 100 U. S. 47; *County of Moultrie v. Fairfield*, 105 U. S. 370; *St. Joseph Tp. v. Rogers*, 16 Wall. 664; *Rogers v. Burlington*, 3 Wall. 664; *Mitchell v. Burlington*, 4 Wall. 270. The demurrer is overruled, and defendants given 30 days in which to answer the bill of complaint.

### NATIONAL TUBE-WORKS CO. v. BALLOU.

(Circuit Court, S. D. New York. October 20, 1889.)

#### On Demurrer.

WALLACE, J. The demurrer to the bill must be sustained, upon the authority of the previous decisions of this court in *Clafin v. McDermott*, 12 Fed. Rep. 375, and *Walser v. Seligman*, 13 Fed. Rep. 415. As those cases were decided by me, I feel free to say that I doubt whether they do not adopt a too technical view of the right of a creditor whose judgment has been obtained against his debtor at the place of his domicile, and whose execution has been issued there, and returned unsatisfied, to maintain a creditors' bill in a court of another state; and I may be permitted to express the hope that the present case may be taken to the supreme court for review.

### GLOBE ROLLING-MILL CO. v. BALLOU et al.

(Circuit Court, S. D. New York. May 5, 1890.)

#### CREDITORS' BILL—CORPORATION—JURISDICTION.

Judgment against an insolvent corporation in the state of its organization, and return of execution unsatisfied, will not authorize a bill by the judgment creditor in another state, where no judgment has been recovered against it, to enforce payment of a subscription to its stock.

In Equity. On demurrer.

*J. D. Brannon*, for plaintiff.

*Thomas Thacher*, for defendants.

SHIPMAN, J. This is a demurrer to the plaintiff's bill in equity. The bill alleges that the defendant subscribed to the capital stock of an Ohio railroad corporation, which subscriptions were never paid, and that he

is still liable thereon; that the corporation became insolvent; and that the plaintiff, one of its creditors, recovered judgment against it in an Ohio state court, upon which judgment execution was returned unsatisfied. The complainant now seeks, by this bill, in behalf of itself and the other creditors, to compel payment by the defendant of the amount of said subscription to the capital stock. No judgment has been recovered against the railroad corporation in the state of New York. In the three cases of *Claffin v. McDermott*, 12 Fed. Rep. 375; *Walser v. Seligman*, 13 Fed. Rep. 415; and *National Tube-Works Co. v. Ballou*, ante, 749,—Judge WALLACE held that a creditors' bill in this court could not be sustained which was based only upon a judgment obtained against his debtor in a state court at the place of his domicile, in another state, and upon an unsatisfied execution issuing out of that court, no judgment having been recovered in this state. No distinction of importance is perceived, and none has been pointed out, between the last two cases and this case. The bill does not seem to be authorized by any statute which permits the liability to be enforced by an immediate resort to a court of equity in case of the insolvency of the corporation. In the *Tube-Works Co. Case* the judge says that he doubts whether a too technical view has not been adopted in the preceding cases, and hopes that the last case may be taken to the supreme court for review, which has been done. Unless a valid distinction can be shown between the case at bar and the preceding cases, the demurrer must be sustained, in the present state of the decisions in this circuit. The demurrer is sustained.

### MASSACHUSETTS & S. CONST. CO. v. TOWNSHIP OF CHEROKEE *et al.*

(Circuit Court, D. South Carolina. June 23, 1890.)

#### 1. RAILROADS—MUNICIPAL AID—DELIVERY OF BONDS.

18 St. at Large S. C. 366, authorized certain townships to issue bonds in aid of a railroad, which was done; and they were deposited with a trust company to be delivered to complainant, which was building the railroad, when the road was shown to be complete by certificate of its engineer, indorsed by the chairman of county commissioners of the county in which the township was. The chairman refused to make such indorsement on the strength of a decision of the state supreme court that the issue of bonds was void, as there was no law conferring on townships corporate functions, they being merely territorial divisions. But thereafter the legislature passed an act (20 St. at Large, 12) expressly recognizing the bonds as a township debt, and authorizing the levy of a tax to pay them. *Held* that, as the road had been completed, the delivery of the bonds to complainant should be decreed.

#### 2. APPEAL—BOND—AMOUNT.

On appeal from such decree for the specific delivery of the bonds, the amount of the *supersedeas* bond, under supreme court rule No. 29, will be fixed to cover the coupons already due and to mature in four years, with 7 per cent. interest, 10 per cent. damage on the aggregate of interest, and the costs.

In Equity.

*Lord & Hyde* and *James N. Hart*, for complainant.

*C. R. Miles*, *Ira B. Jones*, and *W. B. Wilson, Jr.*, for defendants.

Before BOND and SIMONTON, JJ.

SIMONTON, J. In 1878 the general assembly of South Carolina incorporated the Georgetown & North Carolina Narrow-Gauge Railroad Company. This act was amended in 1882, 1883, and 1885. The only amendments which bear on this case are one by which the name of the corporation was changed into that of the Charleston, Cincinnati & Chicago Railroad Company, and the one providing that townships, on certain conditions, were authorized to subscribe to this road. This last amendment is in these words, (18 St. at Large S. C. p. 366:)

"Sec. 11. It shall and may be lawful for any county or township interested in the construction of the said railroad to subscribe to its capital stock such sums as a majority of the voters voting at an election held for that purpose may authorize the county commissioners to subscribe, which subscription shall be made at 7 per cent. coupon bonds, payable twenty-five years after the date thereof, and to be of the denomination of \$100, \$500, and \$1,000."

"Sec. 14. Such counties and townships as shall vote for subscriptions are hereby created bodies politic and corporate under their respective names, and are vested with powers necessary for carrying out the provisions of this act; and the county commissioners of any county so incorporated, or of any county in which shall be situated any township so incorporated, are hereby declared to be the corporate agents of such county or township."

At the time of the passage of this act, there was no provision in the constitution of South Carolina, or in any act of assembly of that state, conferring any corporate or other function or duty on townships. They were simply territorial names, covering a certain portion of a county, used for convenience only. On 5th September, 1885, an election was held under this act in Cherokee township, York county, and a subscription of \$25,000 voted to the capital stock of this railroad company. Thereupon the county commissioners of York county made the subscription, and prepared and executed the bonds. By an agreement made between the railroad company, the Massachusetts & Southern Construction Company, (the complainants,) and the county commissioners, these bonds were placed in the hands of the Boston Safe-Deposit & Trust Company, to be delivered to the complainant as the construction progressed between certain points in this township, so that, upon the completion of the road through the township, all the bonds should be delivered. The delivery was to be made upon the certificate of the engineer of the complainants that the road had been so completed, indorsed by the chairman of the board of the county commissioners. Under this agreement the road was built through this township. It was accepted by the railroad commissioners on the 1st day of December, A. D. 1888. Sixteen thousand six hundred dollars of bonds have been delivered to the complainants, leaving \$8,400 still in the hands of the Boston Trust Company. The chairman of the county commissioners of York county refuses to indorse the certificate of the engineer that the road has been completed through Cherokee township, although he admits this fact to be true. The Boston Trust Company have indorsed the bonds as required by the agreement, and have them in hand ready for delivery. In fact the company is anxious to deliver them, and are only awaiting the action of the chairman of the county commissioners. They have no claim upon, and no inter-

est whatever in, the bonds. The bill is against the township, setting out these facts, praying a specific performance on the part of the township of its contract, and the delivery to complainant of these bonds, and for general relief.

The refusal of the chairman of the board of county commissioners is based on this ground: The supreme court of South Carolina, at April term, 1888, after these bonds had been prepared, signed, and deposited with the Boston Trust Company, decided that township bonds prepared and issued under the provisions of an act, in this respect, like the one providing for these bonds, were issued without constitutional authority, and were void. *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. Rep. 14. It may be noted that the chairman of the county commissioners was not bound, under the agreement, to express or pass any opinion on the validity of these bonds, nor was he to exercise any discretion whatever. All that he was to do, under the agreement, was to state a fact, to-wit, that the railroad was built through the township. The consequences of that fact he was in no sense responsible for, as the board had already done everything towards the issue of the bonds upon the occurrence of the fact he was called upon to state. The case of *Floyd v. Perrin* having been decided, the legislature passed in December, 1888, an act to provide for the payment of township bonds issued in aid of railroads in this state. 20 St. at Large, 12. The constitutionality of this act has been sustained in *State v. Whitesides*, 30 S. C. 579.<sup>1</sup> The act recites that certain townships in this state have by vote expressed willingness to be taxed to pay bonds issued by them in aid of certain railroads, which bonds, by reason of a defect in the acts authorizing their issue, have been declared invalid. For the purpose of carrying into effect the expressed will of the people of these townships, it is enacted that the township bonds heretofore issued by county commissioners, as the corporate agents of any township in this state, in aid of any railroad, by vote of the township, are declared to be debts of the township which authorized the issue of the same, the interest and principal to be paid, by a tax levied annually on such township for that purpose, to the holders of such bonds, as the interest may become due according to the terms thereof. All dividends on stock received for such bonds are pledged to the payment of such interest. No tax shall be levied until the road is completed through the township, and accepted by the railroad commissioners, and no interest which accrued on said bonds before such completion is to be paid. This act distinctly recognizes and imposes on the townships these bonds as a debt of the township to be paid by the taxes levied on it, and not a debt to take effect from the passage of the act, but a debt payable, as to its interest, from the day the road is completed through the township, and is accepted by the railroad commissioners. The bonds issued before the act was passed are recognized as in existence. The issue of no new bonds is required, and such bonds are declared to be the debt of the township, according to their terms. That is to say, the bonds fix the amount of

<sup>1</sup>9 S. E. Rep. 661.

the debt, the interest payable thereon, the time for the payment of interest, the time for payment of principal, and the person to whom payable. As the taxes are to be levied annually, and when collected to be paid to the holders of said bonds, such holders are entitled to the possession of the bonds as muniments of title. Such is the result of the opinion of the supreme court of South Carolina in *State v. Neely*, 30 S. C. 605, 9 S. E. Rep. 664. If, as is contended, this is but the expression of an opinion upon a matter not necessary to the decision of a question before the court, and so *obiter dictum*, we may construe the act for ourselves, and, doing so, have reached the same conclusion. The railroad having been completed through the township, the complainant is entitled to possession of the bonds.

But the defendant insists that this right cannot be enforced under these proceedings. It objects to the jurisdiction of the court because the defendant the Boston Trust Company is a citizen of the same state as the complainant. But no relief is asked against that company, no delict of the company has been set up, no act of it complained of. The pleadings and testimony all show that it is a mere stakeholder, with no interest whatever in these bonds,—with no interest in the controversy as to their validity. It is called in to see merely that the defendant township does an act in fulfillment of its obligation to complainant. Then the trust company can complete its duty. Foster's Fed. Prac. § 18, p. 26.

It is said that the chairman of the board and the clerk of the board should be parties. The former is one of the agents of the defendant corporation, and the latter is his agent. The only act they can do is, as such agents, for and on behalf of the principal, to certify that the road has been completed through the township. Surely, when the principal is present, the court can deal with it directly, can ascertain as a matter of fact whether the road has been completed through the township, and, if upon this fact depends the delivery of the bonds to the complainant, can order and direct such delivery.

It is also alleged that complainant in this case is the assignee of a corporation of the state of South Carolina, and cannot sue a citizen of the state of South Carolina in this court. The relief sought in the bill is the possession of certain bonds to be held and used as muniments of title elsewhere. The bill does not seek to collect these bonds, or coupons on them, or to collect the debt or any interest on it. It comes wholly within *Desher v. Dodge*, 16 How. 622.

The question is as to the form of a decree. The bonds are to be delivered to complainant when the road has been completed through the township, and when the agent of the defendant certifies to that fact on the engineer's certificate. The latter is in the record. The defendants' agent refuses to indorse it. The fact remains, however, that the road has been completed through the township. The certificate providing for the delivery of the bonds was for the mutual convenience of the parties. The court cannot permit that which was intended for mutual convenience to be used by one of the parties as an unreasonable obstruction. The act of the chairman in indorsing the certificate would be an act binding

his principal as to the fact of the completion of the road. For this purpose only would it be desirable. The principal being in court, the decree can bind it as effectually to the admission of this fact as his certificate would. It is ordered that the Boston Trust Company deliver to complainant the bonds properly certified.

BOND, J., concurs.

MOTION TO FIX THE AMOUNT OF THE SUPERSEDEAS BONDS.

SIMONTON, J. The question is on the amount of the *supersedeas* bond to be given in each of these cases, an appeal in each of them having been allowed. If these cases had been brought to enforce a subscription in bonds, and if the court had assumed jurisdiction and granted this relief, the defendant could not obtain a *supersedeas* without giving security for all coupons and interest already matured, and such as may mature during the pendency of the appeal, 10 per cent. by way of damages, and the costs of the cases. This would be the extreme limit of appellees' rights, under rule 29 of the supreme court. But the actions were brought for the specific delivery of bonds and coupons now in the hands of the Boston Safe-Deposit & Trust Company as muniments of title, for the purpose of presenting the coupons for payment to the county treasurer under the act of the legislature of South Carolina, December, 1888. The granting of a *supersedeas* on appeal prevents the delivery of the bonds and coupons. The result is that, not being able to present its coupons to the county treasurer, the complainant is kept out of its money on them, payable under that act. The cases, therefore, come under the latter clause of rule 29. We must secure the complainant indemnity for the use and detention of this money, the costs of the cases, and just damages for delay, and costs and interest on the appeal. Indemnity for the detention of money, damages therefor, are measured by interest during the detention. Let it be ascertained what coupons in each case have already matured on these bonds awaiting delivery, and what coupons on said bonds will mature during four years from second Monday in October next. Let interest at the rate of 7 per cent. per annum be calculated on these coupons up to the period of four years from second Monday in October, and 10 per cent. damages on the aggregate of interest so ascertained in each case, and the costs of the case. In each case let a bond be prepared, with surety, for the aggregate so ascertained in each case; and when such bond is approved, if presented within the time allowed by law, it shall operate as a *supersedeas*.

NOTE. Several other cases presenting precisely the same question as in the *Case of Cherokee Township*, but against other townships, were submitted at the same time with this case.

BELL v. FOXEN *et al.*

(Circuit Court, S. D. California. May 19, 1890.)

## 1. EJECTMENT—PLEADING—COSTS AND DAMAGES.

In ejectment for land of which the several defendants had taken possession, each claiming a certain portion, where some of the defendants enter a disclaimer, and others, with plaintiff's consent, agree to a judgment against them without costs or damages, the remaining defendants, who only plead the general issue, are, on a general verdict against them, liable for all the costs and damages.

## 2. SAME—POSSESSION.

Ejectment lies against persons who have entered on land, and claim possession adverse to the true owner, though they are not personally in possession at the commencement of the action.

At Law. Ejectment.

*James Wheeler and Charles Fernald*, for plaintiff.

*Waldo M. York*, for defendants.

Ross, J. There can, I think, be no doubt about the facts of this case. The action is ejectment, and the land in controversy is a part of the Rancho La Laguna de San Francisco, which was a Mexican grant, confirmed and patented by the government of the United States. At the trial plaintiff deraigned title to the portion in dispute, which title vested in him long prior to the acts of the defendants complained of. In January of 1889 the defendants entered upon the land, asserting that the patent was obtained by fraud, and that the land was public land of the United States; surveyed and staked it off, each posting a notice that he claimed 160 acres thereof, and some erecting shanties and some tents upon their respective claims, and in one or two instances taking possession of small houses that the plaintiff had theretofore erected upon the premises. The case shows that the action of the defendants was in pursuance of a concerted plan on their part to assail the validity of the patent under which the plaintiff holds, and to assert a right in themselves to the possession of the land; and, although they did not long remain in personal, physical possession of the land, they continued to maintain their notices and claim to it, and, when remonstrated with by the agent of the plaintiff, continued to assert the invalidity of the patent, and that the land belonged to the government, and that they were therefore entitled to the possession of and claimed 160 acres each; and this claim was reiterated to the marshal of this district when serving the process issued in this action. The land in question is a large body of grazing land, and by these acts of the defendants plaintiff was prevented from renting it for grazing purposes, which he otherwise could have done, its rental value being \$1,500 per annum. In respect to some of the original defendants, namely, J. M. Birabent, Luis Birabent, William Foxen and J. W. Oliver, the action has been dismissed; and some of them, to-wit, Gustavus A. Davison, John T. Rice, William E. Shanklin, C. H. Mills, F. M. Tunnell, and William B. Holland have filed written consent to judgment against them, without damages or costs, to which consent plaintiff in

writing has acceded. The action has also been dismissed as to the fictitious defendants. The remaining defendants pleaded only the general issue, and, as they were all trespassers upon the plaintiff's land, which was but a single parcel, if each is made liable for all of the damages and costs it is a necessary consequence of their own conduct. In *Greer v. Mezes*, 24 How. 277, the supreme court said:

"In the action of ejectment, the plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action against several trespassers on his single, separate, and distinct tenement or parcel of land. As to him, they are all trespassers, and he cannot know how they claim, whether jointly or severally, or, if severally, how much each one claims; nor is it necessary to make such proof in order to support his action. Each defendant has a right to take defense specially for such portion of the land as he claims, and by doing so he necessarily disclaims any title to the residue of the land described in the declaration; and if, on the trial, he succeeds in establishing his title to so much of it as he has taken defense for, and in showing that he was not in possession of any of the remainder disclaimed, he will be entitled to a verdict. He may also demand a separate trial, and that his case be not complicated or impeded by the issues made with the others, or himself made liable for costs unconnected with his separate litigation. If he pleads nothing but the general issue, and is found in possession of any part of the land demanded, he is considered as taking defense for the whole. How can he call on the plaintiffs to prove how much he claims, or the jury to find a separate verdict as to his separate holding, when he will neither by his pleading nor evidence signify how much he claims? This was a fact known only to himself, and one with which the plaintiff had no concern, and the jury no knowledge. If a general verdict leaves each one liable for all the costs, it is a necessary consequence of their own conduct, and no one has a right to complain."

I think there was such a possession of the premises by defendants as will justify a judgment in ejectment. The actual personal presence of defendants on the land at the time of the institution of the action is not necessary to its maintenance. Any subjection of the property to the will and dominion of the party is sufficient. *Mining Co. v. Hicks*, 4 Sawy. 688; *Garner v. Marshall*, 9 Cal. 268. Acts by which a claim to the possession, hostile to the true owner, is asserted and maintained, and by which he is excluded from the enjoyment of the property, fairly subjects the party committing them to the action. It results from these views that plaintiff is entitled to judgment for the possession of the premises in dispute, as against all of the defendants as to whom the action remains pending, and for damages in the sum of \$1,875, and costs of suit against all of such defendants except Gustavus A. Davison, John T. Rice, William E. Shanklin, C. H. Mills, F. M. Tunnel, and William B. Holland. So ordered.



## NICKLES v. UNITED STATES.

(Circuit Court, E. D. Missouri, E. D. May 24, 1890.)

## LIMITATION OF ACTIONS—WHEN STATUTE BEGINS TO RUN.

The statute of limitations begins to run against the right of the purchaser of personal property to sue for breach of warranty of title from the time that his title is declared invalid by the court of last resort, and not from the time the mandate of such court is filed in the lower court.

## At Law.

This is an action against the government under the act of March 8, 1887, (24 U. S. St. 505,) and it has been submitted for decision on an agreed statement of facts, which obviates the necessity of any special findings, as would otherwise be required by the seventh section of the act. For a proper understanding of the case, it will suffice to say that the agreed statement shows, in substance, that on September 4, 1876, Oliver A. Patton and V. M. C. Silva, who were at the time respectively register and receiver of the United States land-office for the district of Utah, seized certain lumber for and in behalf of the United States, and advertised it for sale as government property which they had the right, as agents for the government, to so seize, advertise, and sell. In point of fact they had no right to seize the lumber in question, as it was at the time private property, belonging to one Daniel H. Wells. On September 16, 1876, Wells brought a suit in replevin for the property, and, under the writ issued in that case, it was restored to his (Wells') possession on the 25th of the same month. Three days thereafter, September 28, 1876, Patton and Silva sold the property pursuant to advertisement, though it was then in Wells' possession, and the plaintiff in this case, John Nickles, became the purchaser at the price of \$1,016, which he then and there paid to the agents of the government. At the time of the purchase Nickles knew that Wells claimed to be the absolute owner of the property, but he did not know the manner in which he had acquired title to the same, if that is at all material. Not being able to otherwise obtain possession of the lumber, Nickles, on October 7, 1876, brought a suit in replevin against Wells in the territorial court of Utah. He succeeded in that court in obtaining a judgment against Wells for the value of the lumber, but does not appear to have obtained or had the actual possession of the same at any time after his purchase. Wells appealed from the judgment so rendered against him to the supreme court of the United States, where the judgment of the territorial court in Nickles' favor was reversed and annulled on January 16, 1882. *Vide* 104 U. S. 444. It is sufficient to say that the decision of the supreme court of the United States in *Wells v. Nickles* conclusively determined that Wells was the owner of the property in controversy at the time of the sale by Patton and Silva, and that Nickles acquired no title by virtue of that sale. Though this decision was promulgated on January 16, 1882, the mandate does not appear to have been filed in the territorial court until January 29, 1884. The present

suit was begun by Nickles on January 22, 1890, and there is a plea of the statute of limitations by the United States.

*Harmon J. Bliss*, for plaintiff.

*Geo. D. Reynolds*, U. S. Dist. Atty., for defendant.

THAYER, J., (*after stating the facts as above.*) Plaintiff predicates his right to recover on the ground that a warranty of title by the United States is to be implied from the sale made by Messrs. Patton and Silva of the lumber in question on the 28th of September, 1876. But even conceding, though without deciding, that the law will imply a warranty of title when the United States, through its agents, sells property in its possession as its own, and for its full or fair value, yet in this case there is one circumstance that renders it doubtful, to say the least, whether the law would imply a warranty on the part of the government. Messrs. Patton and Silva undertook, as it seems, to sell personal property that was neither actually nor constructively in their possession, or in the possession of any agent or officer of the United States, when the sale was made; and Nickles knew at the time of his purchase that Wells, who was then in possession of the property, claimed to be the owner by title adverse to the United States. It may well be doubted whether the law would imply a warranty under such circumstances, though the purchase price was accepted, and covered into the treasury of the United States. I find it unnecessary, however, to decide that question, and would not be understood as expressing any opinion thereon, as, according to the view I have taken, the statute of limitations is a complete bar to the suit.

The first section of the act of March 3, 1887, provides "that no suit against the government \* \* \* shall be allowed under this act, unless the same shall have been brought within six years after the right accrued for which the claim is made." Admitting the general rule to be that, where personal property is sold with an implied warranty of title, and possession is delivered by the vendor, an action for a breach of the warranty will not lie until the vendee has been ousted of possession by a paramount title, or until something equivalent to an ouster has occurred, (2 Benj. Sales, Amer. Notes, 829, 830,) yet in the present case the vendor did not deliver possession to the vendee. Wells was in possession at the time of the sale, according to the agreed statement, and refused to surrender possession when Nickles made demand for the lumber on or about October 7, 1876. Assuming that the sale in question was with an implied warranty of title by the United States, it is the opinion of the court that such warranty was broken, so as to give a right of action, when Wells refused to recognize Nickles' title and right of possession; that is to say, as early as October 7, 1876. But even if that view is erroneous, and it be true, as contended, that Nickles could not maintain an action for a breach of warranty, until he had instituted legal proceedings against Wells to recover possession of the property, and had been defeated, yet it appears that he was so defeated by the decision of the supreme court of the United States on the 16th of January, 1882,

more than eight years before this suit was filed. From that time, at least, Nickles had a right of action for breach of warranty, if he ever had. I can attach no importance to the fact that the mandate was not filed in the territorial court until January 29, 1884. The agreed statement concedes that the decision of the supreme court was of such character as to extinguish Nickles' title, and such was obviously the effect of that decision, which has been made a part of the agreed case. Nickles had the right to abandon the further prosecution of the suit against Wells, if it was ever incumbent on him to bring such a suit, as soon as the judgment of the supreme court was announced. The statute of limitations in my judgment began to run against him certainly from the time his title to the property was pronounced worthless by the court of last resort, and its operation was not stayed merely by delay in sending down the mandate. If, as the plaintiff claims, he was not informed at the time of his purchase of the stipulation entered into on July 10, 1875, between Patton and Wells, the former acting as agent for the United States, by virtue of which, as the supreme court of the United States holds, Wells acquired a good title to the lumber in dispute, then it would seem that a moral obligation rests on the government to refund the purchase money, which congress might properly recognize.

For reasons stated, however, the demand is not a legal claim against the United States which the courts can now enforce. Judgment for defendant.

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### HICKMAN v. MACON COUNTY.

(Circuit Court, E. D. Missouri, N. D. May 27, 1890.)

#### ACTION ON JUDGMENT.

It is no objection to a suit on a judgment that the time within which an execution could be issued on the judgment has not expired.

#### At Law.

This was a suit in two counts, the first count being on coupons of certain county bonds, and the second count on a judgment recovered by the plaintiff against the defendant in the United States circuit court for the western district of Missouri, in the year 1883, before Macon county was attached to the eastern judicial district of Missouri. Defendant disputed the right to recover on the judgment, for the reason that an execution might yet be sued out on the judgment in the western district, and also for the reason that, under the fourth section of the act of February 28, 1887, (24 St. U. S. 425,) the case might be transferred from the western district to this, the eastern, district of Missouri.

*Thos. K. Skinker*, for plaintiff.

*Robt. G. Mitchell*, for defendant.

THAYER, J., (*orally, after stating the facts as above.*) It has been held that a suit on a judgment may be maintained in the same court in which

the judgment was recovered, although the time has not expired within which an execution may be sued out on the judgment. Such rulings, it seems, are based on the ground that the right to an execution on a judgment is merely cumulative, and does not take away the common-law right to sue on an unpaid judgment as often as the judgment creditor elects to sue. *Simpson v. Cochran*, 23 Iowa, 81, 92 Amer. Dec. 410, and cases cited. This doctrine would probably have to be accepted with the qualification that, in case of more than one judgment being recovered on the same demand, a payment of either in full, with costs, would render the judgment creditor responsible for the costs made in the other proceedings. The law seems to be very well settled, however, that suits on judgments in courts other than that in which they were recovered may be maintained at the will of judgment creditors, regardless of the fact that the time allowed, either by statute or the common-law, for taking out an execution on the original judgment, has not expired. *Simpson v. Cochran*, *supra*; *Kingsland v. Forrest*, 52 Amer. Dec. 232; *Freem. Judgm.* § 432, and citations. Judgment will be entered for plaintiff.

### SHAMPEAU v. CONNECTICUT RIVER LUMBER CO.

(Circuit Court, D. Vermont. June 25, 1890.)

1. PLEADING—REPLICATION—RELEASE—FRAUD.

To a plea of release under seal, a replication setting up fraud is bad, since such fraud, if it induced plaintiff to sign a paper different from the one he intended to sign, may be shown under a replication of *non est factum*, while if it merely deceived plaintiff as to his rights, it constitutes no legal defense.

2. SAME—ACCORD AND SATISFACTION—FRAUD.

To a plea setting up an accord and satisfaction and the payment of a specific sum in full settlement, a replication which neither admits nor denies the payment, but contains long averments to the effect that plaintiff was induced to agree to the settlement through fraud, is bad, not being responsive to the plea.

At Law. On demurrer to replication.

*Smith & Sloane* and *C. A. Prouty*, for plaintiff.

*Ide & Stafford*, for defendant.

Before LACOMBE and WHEELER, JJ.

PER CURIAM. The second and third pleas set forth a release under seal. If the facts averred in the replication are relied upon as establishing the proposition that, through some fraud practiced upon him by the defendant, the plaintiff was deceived into signing a paper other and different from that which he intended to sign, they may be shown under a replication of *non est factum*. If, however, plaintiff relies upon facts showing only that through fraud and imposition the plaintiff was deceived as to his rights, and was thus induced to extinguish a valuable claim in consideration of the payment of a trifling sum, then he can avail of them only by a direct proceeding in equity to set aside the re-

lease. *George v. Tate*, 102 U. S. 564. The replication to the second and third pleas must therefore be held bad on demurrer.

The fourth and fifth pleas set forth an accord and satisfaction and the payment of a specific sum agreed upon between plaintiff and defendant to be received by the former in full settlement of his claim. The replication neither admits nor denies the receipt of this sum. To that extent, therefore, it does not meet the issue tendered by the pleas. The replication, moreover, contains long averments to the effect that the plaintiff was induced to agree to the settlement of his claim in the manner set forth by fraud and imposition. This is merely pleading evidence. If, through any fraudulent practices of the defendant, the plaintiff was so deceived as to the character and condition of his claim against defendant that the minds of the parties did not in fact meet,—in other words, that there was no accord and satisfaction,—such facts may be shown under a replication joining issue upon the defense raised by the plea.

Demurrer to replication sustained, with leave to file a new replication within 20 days, if so advised.

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### BOWE v. UNITED STATES.

(Circuit Court, N. D. Georgia. April 29, 1890.)

#### 1. CONTRACT—EXTRAS—ARBITRATOR.

Where a government contract provides that the work done and the materials furnished shall be subject to the inspection of a certain officer, who shall have full power to reject any work or materials which in his opinion do not conform to the plans and specifications of the contract, the contractor can have no extra claim against the government for work done and materials furnished under the requirements of such officer, or for delay in the work caused by such requirements, where the officer made his requirements in good faith, in order to compel the execution of the contract as he understood it, and the contractor failed to make, at the time, any claim for extra compensation for work or material which he now insists were outside of the contract.

#### 2. SAME—ASSIGNMENT.

An agreement between a government contractor and one of the sureties on his bond, by which the surety agrees to furnish the money necessary for carrying out the contract, and the contractor agrees to divide the profits with him, does not amount to a transfer of the contract, within the meaning of Rev. St. U. S. § 3737, which declares that the transfer of a public contract shall annul it.

#### 3. SAME—ACTION AGAINST GOVERNMENT.

Under Act Cong. March 3, 1887, c. 359, which allows suits to be brought against the United States "upon contract, expressed or implied, or for damages in cases not sounding in tort," an action may be brought by a contractor for extra work done by him under the direction of the government's agent, and for damages for an improper interference by such agent with the fulfillment of the contract.

#### At Law.

Action by William F. Bowe against the United States under the act of March 3, 1887, (c. 359,) which provides that actions may be brought against the United States "upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort." Rev. St. U. S. § 3737, pro-

vides that no public contract shall be transferred by the party with whom it is made, and that any such transfer shall cause the annulment of the contract.

*Arnold & Arnold*, for plaintiff.

*S. A. Darnell*, U. S. Atty., and *E. A. Angier*, Asst. U. S. Atty.

*N. J. Hammond*, for *J. W. Jacobs*.

NEWMAN, J. This is a suit brought by William F. Bowe against the United States under the provisions of the act of congress of March 3, 1887, in which he alleges that on the 30th day of June, 1886, the said plaintiff, with *J. W. English* and *M. E. Maher* as securities, entered into a written contract with the United States, through its agents, a copy of which is attached. He further alleges that the contract was for the erection of five certain public buildings, to be used as army quarters, near Atlanta, Ga.; and, for the consideration therein named, plaintiff, being a building contractor, undertook the same. The contract refers to certain plans and specifications of the five buildings to be erected, and by one of the terms of the contract these plans and specifications were to govern in the erection of the buildings, and this was the consideration moving the plaintiff to enter into the thing. Plaintiff made his calculations accordingly, and estimated the quantity and quality of the material and work to be used, taking into consideration the character of the buildings to be constructed, and the purposes for which the same were to be used; and also the plans and specifications. Plaintiff computed the time within which, reasonably, said buildings could be completed by carrying out the contract in good faith, and according to a just and reasonable construction thereof. He went so far as to take other buildings to begin after the completion of this contract. Within a reasonable time after the execution of said contract, he began work on the same, and employed a large force of artisans and laborers, and gave orders for material, his guide being said plans and specifications, and consideration thereof, consistent with the character of the buildings to be erected. Soon thereafter the agent of defendant, one *Jacobs*, whose duty it was to represent the defendant throughout the transactions, began to change and vary the construction of said buildings from the terms of the plans and specifications in many particulars, and added considerably thereto. All of these variations and additions plaintiff made and completed at the special instance and request of said *Jacobs*, acting as a duly-authorized agent of defendant. Said extra work was for the benefit of defendant, who has since acquiesced in and ratified the same. Plaintiff has performed and completed all his duties under the contract, and defendant has paid the consideration therein stipulated. Defendant has refused, and still refuses, to pay plaintiff for the labor and material used on said buildings which were not contemplated and included in said written contract and specifications. Plaintiff avers that by no reasonable intendment could said labor and material just referred to be included under the said written contract. The discretion reserved therein to defendant's agent, *Jacobs*, of approving workmanship and material is not an arbitrary discretion,

but was to be exercised reasonably, and in the light of the whole contract, considering the purposes for which said buildings were to be used, to-wit, quarters for soldiers. Said Jacobs, as agent for, and with the subsequent ratification of, defendant, has frivolously, and without reason or just cause, condemned from time to time, during the progress of the work, much material and workmanship, requiring the plaintiff to do the same over in a different way. On account of this plaintiff lost much material and labor, having to replace that which was suitable for the purpose intended by such other material and labor as suited the whims and caprices of said Jacobs; also, at divers times, said Jacobs, acting for defendant, discharged without cause various workmen in plaintiff's employ; and secured others at higher wages, though no more competent than those discharged. The plaintiff further avers that, through the general officious, meddlesome, arbitrary, and arrogant conduct of said Jacobs, completion of the contract by plaintiff was unnecessarily delayed 12 months. All the work done by plaintiff not covered by said plans and specifications was done by plaintiff with the understanding, communicated to defendant, that the same was not covered by said contract. Plaintiff also gave notice to defendant that all rejected workmanship and material which corresponded to, and was a substantial compliance with, said plans and specifications would have to be accounted for to plaintiff, together with all extra cost incurred in making the change. Plaintiff shows that he remonstrated with defendant's said agent, Jacobs, against his unwarranted interference with work and men, which interference had caused plaintiff's payments to be delayed, and the loss of interest thereon. At this time plaintiff had no right of action against the United States in such case, and he was compelled to obey every whim and order of said Jacobs at the risk of losing his contract altogether. Then follows a specific enumeration of plaintiff's charges.

To this declaration a demurrer was interposed, on the following grounds: (1) Because no cause of action was set forth. (2) Because the suit is predicated on the act of congress approved March 3, 1887, whereas the bond on which the thing was based was executed the 30th of June, 1886, and the act is not retroactive in its terms or by intentment. (3) Because there is a joinder in the suit of an action *ex contractu* and *ex delicto*. (4) Because the suit is not verified, and does not pray for judgment, as required by the act of March 3, 1887. (5) Because the plaintiff's remedy, if he had or has one, is an appeal to the quartermaster general, as condition precedent to bringing suit. (6) Because, by the terms of the bond on which plaintiff sues, "all the material furnished and work performed shall be of the quality described in the said specifications, and subject, during the entire work, to the inspection, approval, or rejection of the party of the first part; and the said party of the first part, or his agent, shall have full power to reject any material or workmanship which in their opinion is not in every respect in complete conformity with the aforesaid plans and specifications;" also, because by an express stipulation in said bond, "that no allowance shall be made for extra work claimed to have been done, unless provided for beforehand

by written agreement to that effect, specifying the cost of the same;" and a fair construction of plaintiff's suit shows it is an attempt to vary, alter, and add to a solemn written instrument by parol; and because, under said bond and the law, said Capt. J. W. Jacobs could not enter into the verbal covenants set up by the plaintiff. (7) Because, by the terms of the contract, "the United States officer in charge, or his agent, are to have at all times access to the work, which is to be entirely under his control, and may, by written notice, require any contractor to dismiss forthwith such workmen as he deems incompetent or careless."

The first, second, third, and fifth grounds of the demurrer were expressly overruled. The declaration was amended so as to relieve it of the objections made by the fourth ground of the demurrer. As to the sixth and seventh grounds of demurrer, the court made this order: "The court only passes upon the 6th and 7th grounds of the demurrer so far as to determine to hear the evidence before passing upon the legal question raised in the contract, and the effect of the stipulations in the contract set up in the demurrer." Defendant filed a plea of general issue, and plea for payment in full for all work done for it by the plaintiff.

The court has heard evidence at considerable length from witnesses for both plaintiff and defendant on the issues involved, and on the various items embraced in the suit and the subject of contest. The following facts, as applicable to the entire case, may now be stated: From the testimony it appears that the contract price for this whole work was \$61,120. This amount was paid to Bowe, or to his authorized representatives, in full. There were several extensions of the time for the completion of the contract authorized by the war department in regard to which Capt. Jacobs testified as follows:

"This contract was entered into June 30, 1886. The work was commenced within thirty days thereafter. The contract to be completed July 1, 1887. It was not so completed, and on my recommendation the contract was from July 27, 1887, extended to 75 working days, expiring September 26, 1887. In this connection the contractor made verbal request for two months' extension. September 21, 1887, an extension of two months from September 26, 1887, was granted, expiring November 26, 1887. That was the second extension. A third extension was necessary, and that was granted from December 5, 1887, for 50 working days, expiring January 24, 1888. A fourth extension was necessary. On January 24, 1888, to May 3, 1888, work was suspended awaiting preparation of material. May 3d, work was resumed under an extension of 30 days from this date. That is four extensions. After this extension the contract was completed, and the contractor released from his obligation to the United States, June 15, 1888."

It appears that during the latter part of the work on these buildings Mr. Bowe was absent from the work the greater part of the time, and that the control of the work for some time before its completion was practically in the hands of M. E. Maher, one of his sureties on his bond to the government. It appears, also, that there was considerable loss to the contractor by this contract, which loss fell on Mr. Maher, the surety named. About the time the contract between Bowe and the government was entered into, a contract was made between Bowe and Maher, by



which Maher become interested in the contract, and was to receive a part of the profits to be derived from it. This contract was as follows:

"Articles of agreement made this July 2, 1886, between W. F. Bowe and M. E. Maher, both of the city of Atlanta, Ga. Whereas, the said W. F. Bowe having secured a contract with the United States government to build certain houses known as the 'Barracks Houses,' it is agreed that the said W. F. Bowe shall give his personal attention to said work, and superintend the same. The said M. E. Maher agrees to furnish all moneys from time to time, as needed, necessary for the successful and economical completion of the same. All moneys received from the government on account of said work by said W. F. Bowe shall be deposited to credit of said M. E. Maher on barracks account. All checks shall be drawn on said account by W. F. Bowe to the order of M. E. Maher or his attorney. No account shall be made or contract entered into on account of said work for an amount exceeding one hundred dollars without the consent of both parties. It is agreed that the said W. F. Bowe is allowed to draw one hundred and fifty dollars per month for his personal expenses, to be charged to his share of the profits when said work is completed; also that he be allowed fifty dollars per month when said work is completed, to be deducted from M. E. Maher's share of the profits, in consideration of said Bowe's personal attention to said work. That M. E. Maher shall give all personal services that may be required. All transactions and accounts of said work shall be kept in regular books, which shall be open to the inspection of both parties. When said work is completed, the profits shall be divided equally. This agreement shall apply to all contracts made, or to be made, by either party on the government reservation at Atlanta, Ga. All labor required and compensation for the same shall be agreed to by both parties.

W. F. BOWE.

"M. E. MAHER.

"Attest: W. F. MANRY, N. P., Fulton County, Ga.

"ATLANTA, GA., Oct. 22, 1887.

Whereas, the said W. F. Bowe has this day given to W. F. Manry a power of attorney for the purpose of raising money, it is not intended to vitiate this contract, but the same is to remain of full force and effect.

W. F. BOWE.

"M. E. MAHER."

During the progress of this work, Capt. J. W. Jacobs, the assistant quartermaster in charge of the work for the government, exercised a constant and careful supervision over it. He seems to have examined with great care all material before it went into the building, and all the work, and each part of it, as it progressed. He also had a superintendent, Mr. Alexander Russell, a practical man, who, under Capt. Jacobs, exercised immediate supervision over the entire work. Capt. Jacobs offered to go anywhere in Georgia with Bowe, at the expense of the government, to examine material, and decide whether it would be satisfactory or not, so that Bowe need not be put to the delay and expense of bringing unsatisfactory material on the ground. He did go with him to a place where sand was to be obtained, and pointed out the character of the sand he would be willing to receive. The orders given and decisions made by Capt. Jacobs were all positive, sometimes peremptory; and yet in every instance, so far as they have been drawn in question here, they seem to have been made in good faith, and with the sole purpose of having these buildings constructed in accordance with the contract,

and to discharge his duty as a superintendent for the government. Mr. Bowe was frequently informed by Capt. Jacobs that, if any decision made by him was not satisfactory, he could appeal from the same, through him, to the war department; but in no instance did Bowe avail himself of this right, except as to one of the applications for extension, about which he and Capt. Jacobs seem to have differed, and which the secretary of war allowed. There is a clause in the contract between Bowe and the United States making it subject to the approval of the quartermaster general.

Finding of facts by the court as to each item of plaintiff's claim are now given:

#### FACTS A.

*Item 1.* For "cutting tongue on wainscoting. The specifications required the wainscoting to be "neatly capped;" the manner in which it should be done, except that it should be neatly done, was not specified. The contractor was required by the quartermaster to put a groove in the top of the wainscoting, and to put a tongue on the cap or moulding for the top of this wainscoting. The complaint is that the "tongue and groove" required by the quartermaster was extra work. There being no specifications as to how the wainscoting should be capped, the contractor should have understood that it would be required to be well and neatly done. The specifications for building No. 9 (page 3) provided:

"This building is to be erected in accordance with the accompanying plans, and such additional elevations, sections, and drawings as will be furnished by the United States officer in charge."

When, in the course of building, this wainscoting was reached, the detail furnished by the quartermaster through his superintendent required it to be capped in the manner which furnishes the ground for the claim made in this item. No complaint was made by the contractor to the quartermaster as to the manner in which this work was required to be done at the time it was done, nor afterwards during the progress of the work, as to this item specifically.

*Item 2:* "Braces under ridge poles, \$100." It appears that the method adopted for supporting the roofs, and the manner in which the timbers were placed, were somewhat different from that provided in the specifications; and, after giving to the testimony of all the witnesses what seemed to be due weight, the evidence does not show that the manner in which the work was done involved any additional expense to the contractor over that which was specified in the plans for the building, so that the finding of facts from the evidence as to this item is that there was no extra cost to the contractor.

*Item 3:* "Screws on inside beads of 280 windows, ten to each, at ten cents per dozen, \$230." The contention as to this item is that for the purpose of fastening the strip of wood, called the "bead," which holds the window in place on the inside, screws were required instead of nails; plaintiff's claim being that, unless otherwise specified, nails only could be required, and that the excess of cost to him of screws over nails was

the amount above specified. I find the fact to be as to this item that the strips called the "bead" were delivered from the mill to the contractor at the barracks, with nails driven in them to be used for fastening them in place. The contractor was required by the government to use screws for fastening the bead, instead of nails. I adopt the testimony of Mr. Russell as to the cost of doing this work with screws or nails, and find that the excess is \$41.70. The usual way of doing such work in Atlanta is with nails. There is no evidence as to how work of this character is usually done on buildings such as these erected by the government. The reason for requiring the use of screws is that it frequently becomes necessary to remove the sash, and often, before the buildings are finally completed, to make them fit well, etc.; and the removal and replacing can be much more satisfactorily done when screws are used to fasten the bead. I do not find that any objection was made to the requirement to use screws at the time, or any request or demand that the excess of cost over nails be treated as an extra for which the contractor was entitled to compensation.

*Item 4:* For "extra work on cornices of bake-house, commissary, and service buildings, being glued up, and joints tongued, \$50." It is claimed by plaintiff as to this item that he was required to tongue and groove the ends of the planks at the joints on the cornices of the bake-house, commissary-house, and four service buildings. The manner in which this work was required to be done by the quartermaster in charge was unusual, and somewhat more expensive than the ordinary way of doing such work. It is claimed in their testimony by both plaintiff, Bowe, and his superintendent, Compton, that the cost of this work, which they claimed as extra, was \$50, but they failed to show how they arrived at this round sum. No calculation as to how this sum was reached is given. Mr. Russell, in his testimony, gives a careful calculation as to the cost of this tongue and groove work in this item, and he puts it at \$15.32. I am unable to find in the evidence, and do not recollect, any testimony as to the cost separately of the gluing. I conclude that the cost of the tonguing and grooving was that given by Mr. Russell, \$15.32. I am unable to find the cost of the gluing, for the reason stated above; and it is perhaps immaterial, as no objection was made at the time to the manner in which this work was required to be done, and no request or demand that it should be treated as an extra was made of the quartermaster by the contractor.

*Item 5:* "Extra work, plank for plumber to lay pipe on." The claim of the plaintiff as to this item is that the specifications called for pipe to be laid on top of second-story joists. It appears that, in order to get a sufficient fall for the pipes, it would be necessary to cut into the joists; and the plumber in charge of the work suggested to Capt. Jacobs that it would be better to lay the pipes on planks underneath the joists; and that this method was adopted, and the work done in accordance with the suggestion of the plumber. The plumber stated to Capt. Jacobs that there would be no extra cost about it.

*Item 6:* "Changing pulleys on proof-racks, \$10." The proof-rack is a kind of cupboard in which to dry bread. The doors in front are run by pulleys. It appears, as to this item, that the pulleys which were used in connection with the door or doors of the proof-rack would not work after they were first put in, and the contractor was required to put in pulleys that would work. No complaint was made at the time of this requirement.

*Item 7:* "Catch-pans under dormer windows, \$40." It appears that in the construction of dormer windows the slats were so placed in the frame that the rain was blown into the building through these windows, and the water came through the ceiling, and was injuring the buildings. Before they were accepted by the quartermaster, the quartermaster and Mr. Bowe's superintendent examined the matter, and the quartermaster required Bowe to construct certain "catch-pans," as they were called. It seems that a frame was required to be constructed in some way on the inside of the dormer windows, and a tin basin arranged on the wooden frame-work, so that the water coming through the slats of the dormer windows would be turned back upon the roof. It appeared that the dormer windows were constructed according to the specifications, and had been accepted by Capt. Jacobs' superintendent, Mr. Russell. No objection was made by the contractor to the requirement of the quartermaster that he should do this work at the time, or no request or demand that it should be treated as an extra, except as may be inferred from the following letters. The work was worth the amount of \$40, as claimed by the plaintiff. A letter is in evidence of the date of November 24, 1887, from Capt. Jacobs to Mr. Bowe, which is as follows:

"ATLANTA, GA., November 24th, 1887.

"*William F. Bowe, Esq., Contractor:* Referring to the tin linings for aprons for dormer windows on the two barracks buildings, you are respectfully informed that some weeks ago, finding that the lining had never been put on as ordered by me several months before, I directed the tinner to do the work, and guaranteed him the pay. I do not consider this extra work, but coming under clauses 5 and 10, general conditions of your contract, and you must accept my guaranty, and arrange for the payment on or before next payday. Please acknowledge receipt, and report actions."

To this no reply was received but the following letter was afterwards received from McLain, the subcontractor:

"ATLANTA, GA., June 15th, 1888.

"*Captain J. W. Jacobs, A. Q. M.—* DEAR SIR: Mr. Bowe assumes the payment of the tin safety pans under dormer windows, which relieves the government of that obligation.  
JAMES F. McLAIN."

*Item 8:* "Hand-smoothing, sand-papering, and scraping ceilings, 200 squares, at \$5.00, \$1,000."

*Item 8, (a):* "Hand-smoothing ceiling of verandas, \$900."

*Item 8, (b):* "Hand-smoothing, scraping, and sand-papering joists and girders of verandas, \$900."

*Item 8, (c):* "Hand-smoothing, scraping, and sand-papery inside of girders and columns, 22 squares at \$5.00, \$110."

*Item 8, (d):* "Hand-smoothing, sand-papery, and scraping ceilings of service buildings, 18 squares, at \$5.00, \$90."

*Item 8, (e):* "Hand-smoothing, sand-papery, and scraping window and door frames and cases of same, 274 windows, at .25; 41 outside doors, at .40; and 50 inside doors, at .70,—\$119."

*Item 8, (f):* "Hand-smoothing wainscoting, 175 squares, at \$2.50, \$437."

This is the principal item of plaintiff's claim. The complaint is that after the lumber with which this work was done had been delivered where the work was in progress, planed by machinery at the mills, the contractor was required by Capt. Jacobs, the quartermaster in charge, to bring the lumber to a greater degree of smoothness, and better finish, before he would allow it to go into the buildings. The contractor desired to put the lumber as delivered into the buildings, and the quartermaster objected, claiming that the lumber as delivered did not have the finish required by the specifications and the character of the work. The contractor, on the other hand, at the time insisted that all his contracts required was good mill-dressed lumber. The specifications as to the construction of the ceilings do not state how the material used in the ceilings should be finished. The language as to ceilings is this: "All the rooms in the first story must be ceiled with 7-8x5 beaded ceiling, with suitable moulding planted in the angle." One of the provisions of the specifications as to this work was: "The contractors are to provide all materials and labor necessary for the complete and substantial execution of everything described, shown, or reasonably implied in the drawings and specifications, including all transportation, scaffolding, apparatus, and utensils requisite for the same; all materials to be of the best of their respective kinds, and all workmanship to be of the best quality." Another of the specifications is as follows: "In a word, each class of work must present a finished appearance, whether specified on plans or in specifications, harmonize throughout, and be entirely satisfactory to the officer in charge." The testimony shows that mill-dressed lumber, such as was delivered at the government location, is used without further finish in buildings of ordinary character in Atlanta, but that for buildings of a better and more expensive class a greater degree of finish is required to be given the lumber used in work of the character embraced in this item. When a greater degree of finish than that given by ordinary mill dressing is required, it is usual to provide for it in the specifications.

*Item 9:* "Scraping and sand-papery wainscoting, 175 squares, at \$2.50, \$437."

*Item 10:* "Scraping and sand-papery verandas, \$200."

The claim as to the above two items is the same as that contained in Item A and its subdivisions, and the facts as to that item may be applied to these two items.

*Item 11:* "Extra work on stairs, \$150."

The facts appear to be, as to this item, that Mr. Russell, Capt. Jacobs' superintendent, selected two men from the contractor's force of workmen to work on the stairs, and the claim is that he required the stairs to be constructed in a way that made them more expensive than they would have been if constructed in some other way, which other way does not clearly appear. No objection was made to the manner in which this work was done, so far as the evidence shows, at the time.

*Item 12:* "Extra cost of Yale locks, \$100." The claim as to this item is that the contract provided for certain doors to be finished with "Yale Standard Draw-Lock, No. 961," and that locks of this description were secured by the contractor; but it was found that the barrel was too short to go through the doors, and that, therefore, it became necessary to exchange them for other locks with a longer barrel. In a letter which is in evidence from Mr. Bowe to Capt. Jacobs, dated March 5, 1887, among other things, is this statement: "The Yale lock was an error which I will have corrected." It is claimed by counsel for plaintiff that he did not mean by this to say that it was his own error; but I am unable to concur in this view, and I think he meant to say in this letter, written at this time, that the error was his own, or of those from whom he purchased. There certainly is nothing in this language, or elsewhere in the letter, to indicate that he claimed any error on the part of the quartermaster, or attached any blame to him for the misfit of the lock. Certainly, no objection was made, and no claim for the allowance of any additional cost as an extra was made, at the time, by the contractor.

*Item 13:* "Extra cost of putting on neck mould after column was set, in which manner one hand could put on only six per day, whereas, otherwise, one man could have put on eighteen per day,—an excess of .26 each above cost, and loss of profit of .09; 280 columns at .35, \$100." It appears that the contractor desired to put what is called the "neck mould" around the columns before the columns were put in place, and that he was required to put up the columns, and put the neck mould on afterwards. The claim is that it was more expensive to do this work as it was required to be done than in the manner the contractor wished to do it. It appears that the columns were not sufficiently seasoned at the time they were put up, and that Capt. Jacobs allowed them to be placed in position in this unseasoned condition in order to enable Bowe to proceed more rapidly with the work, which he did not think would injure substantially the buildings; and that, if Capt. Jacobs had insisted on the columns being seasoned before they were put in position, it would have retarded the progress of the work, and caused some loss to the contractor. The unseasoned condition of the columns was the reason given by Capt. Jacobs and his superintendent for not allowing the caps to be put on the columns before they were placed in position. No claim was made for extra compensation as to this work at the time.

*Item 14:* "Work on board and wainscoting, \$75." The claim as to this item is that Jacobs required Bowe to dry his planks to be used for wainscoting too thoroughly, and that after the wainscoting was put in place the fact that the lumber was too dry caused it to "buckle out," and

that this was caused by the absorption of the moisture by the lumber after being placed in position. The base-board could not, therefore, fit up tightly against the wainscoting, as the board struck only the extended joints, and left crevices between. This necessitated much work in smoothing off the high points so that the base-board would fit up tightly. No claim was made for any extra allowance for this work at the time, and no complaint, so far as can be gathered from the evidence, of any kind was made as to this work.

*Item 15:* "Mould around 44 doors, \$100." The claim as to this item is that the contractor was required to put moulding around the frames of 44 doors to hide the cracks left between the door-frame and the brick-work. It appears that the door-frames were put in place before the brick-work around them was done; that this was necessary, for the reason that an iron dowel was to be run from the stone up the frame, which required the frame to be placed in position before the bricks were laid. On account of this method of doing the work the crack was left between the brick-work and the door-frame from one-eighth to one-fourth of an inch wide. The contractor was required to put moulding around the door-frame to hide this crack. This moulding does not seem to have been required by the specifications. The quartermaster states that when he objected to the work as it stood, the cracks showing between the door-frame and the brick-work, that "they" (alluding to the contractor and his superintendent, as I understand) suggested this moulding as a remedy for the defect, and that he accepted it, and made no further objection. To this I find no denial.

*Items 16, 17, 18, and 19* may be considered together. They were for damage to lumber by being exposed to the weather by order of Capt. Jacobs. The contention of the plaintiff is that Capt. Jacobs and his superintendent, Russell, ordered all dressed lumber to be exposed in the open air, stacked up in what is called "wig-wam fashion." It is said that this exposure caused the lumber to warp, and get in bad shape for use, which made it necessary to rework it, at considerable expense to the contractor. The total amount claimed in these items is \$1,550. It appears as a fact, from the evidence, that a considerable amount of the lumber to be used in the buildings erected by Bowe was stacked up in what is called "wig-wam fashion" in the open air. It further appears as a fact that this injured the lumber, causing it to warp, and get in bad shape for use. To find as a fact who is really responsible for this is very difficult, in view of the conflicting character of the testimony. It appears that on February 6, 1888, Capt. Jacobs wrote a letter to Bowe, in which, among other things, direction was given as to certain lumber as follows:

"\* \* \* You are also informed that an examination of the commissary building after the recent storm convinces me that the seasoning of the flooring is much retarded by being stored in the building, instead of exposure to the air out of doors, and all lumber so stored must be at once removed, and the practice of turning a building into a drying kiln, and the building of large fires therein, must also cease. During a storm all the buildings must

be closed, and during fair drying weather the windows must be raised or lowered. This precaution to prevent deterioration has been much neglected by you in the past."

In view of the fact that the burden is on the plaintiff to establish his case where there is a conflict by preponderance of testimony, my conclusion is that the only order given by Jacobs as to how the lumber should be dried was that contained in the paragraph given above from this letter. It appears clearly that Capt. Jacobs required the lumber to be exposed to the open air, but not satisfactorily as to how it should be exposed. As to Mr. Russell, Capt. Jacobs' superintendent, and as to whether he gave orders requiring this lumber to be stacked in the manner it was, there is a more decided conflict in the evidence than as to Jacobs. He overlooked the work of placing the lumber in this position, and made suggestions concerning it. He suggested the fact that lumber had been dried for work under his supervision in that way at Hot Springs. The fact is not satisfactorily established by the evidence that he gave any positive orders that the lumber should be stacked in this way.

*Item 20:* "Extra work on mantels, \$200." The details of this item are unboxing, setting 32, 1,000 fire-brick, fire-clay, 3,000 common brick, mortar and drayage, iron for mantels, and superintendence. The specifications in reference to mantels was as follows:

"Provide for setting up, in all the rooms having open fire-places, mantels, grates, and hearths, to cost, complete, not less than \$20.00 each, the pattern and size to be selected by the officer in charge. Grates must be set in the most approved style, with full backing of fire-brick or soap-stone, as may be directed. In the day mess and wash rooms mantels need not be furnished."

It is claimed by the plaintiff that the cost of the mantels complete, including the setting and all the cost of same, should not, under this specification, have been required to exceed the \$20 each named in the specification. The quartermaster construed this specification as providing that the mantels, with everything necessary, should cost not less than \$20; but the correspondence in evidence shows that he made a concession to the contractor in this respect, and that the cost of the mantels, without the cost of setting them up, instead of being \$680, as it might have been, was only \$509. The work of setting the mantels, and the material used in setting, was in addition to this.

*Items 21 and 22.* These two items may be consolidated. They were for 20,000 extra brick in bake-house and commissary buildings more than required by the specifications, at \$20 per thousand, \$400. The contest of the plaintiff as to these items is that the plans for these buildings showed them to be on level ground, and that the ground sloped so that to comply with the specifications, and to place the floor at the proper elevation above the highest point, required the extra amount of brick mentioned in the above item. It is shown quite clearly by the evidence that at the place where these two buildings were erected a considerable amount more of brick-work was necessary than would have been had the buildings been on level ground. It also appears that the attention of Mr. Russell, Capt. Jacobs' superintendent, was called to the matter,



and that at one time he agreed to allow something for it, but that soon afterwards he withdrew the agreement, saying that he intended to complete this work without any extras. It appears further, from the evidence, that Bowe had ample opportunity to examine the ground where the buildings were to be located, and that he could easily have ascertained this before making his bid. Mr. Bowe was interrogated about this matter:

*“Question. Didn't you go there and examine this ground before you made a bid? Answer. I don't remember whether it was before I bid or not. Q. Didn't you examine that map before you bid? A. I just say that it may be so; that it may have been. I will not assert that it was. Q. Don't you think it was before you bid? A. I cannot answer whether it was before or afterwards. If I remembered, I would just as lief acknowledge one time as the other. The time I saw it, I think more particular was for some grading than it was for the ground. Q. You knew the map was in existence before you made the bid? A. I think so.”*

There is more of this testimony on this subject. This is enough, however, to show that it is more than likely, even from his own statement, that he examined the ground before bidding. It appears, further, that Bowe's contract with the government was dated June 30, 1886, and that on the 15th day of May, before that, the quartermaster issued a circular in reference to these buildings which contained the following:

*“The buildings are to be located on the sites indicated on the map accompanying the plans and specifications, unless otherwise directed by competent authority.”*

Mr. Bowe was asked if he had read that circular before he made his bid. His answer was: “I more than likely did.” This question was then asked him: “I wish it to be understood that you admit you read it?” *Answer: “I would rather admit that I read it. I did not want to assert that I did not read it, or that I did read it.”* So that it appears quite probable that Bowe examined the ground before bidding, and, as there was a map indicating the location of the various buildings on the grounds, that he could have ascertained, even if he did not, the exact location proposed for these buildings.

*Item 23: “Extra cost of painting not required by specification, two coats of hard oil, instead of one, on 117 wardrobes, \$158.”* The facts in reference to this item are somewhat difficult to find. It seems, however, that the contract originally required the wardrobes to have three coats of paint, and that the work was really done in a different way, and a material which Bowe calls “hard oil,” and Capt. Jacobs “varnish,” was used. The change, it appears, was suggested by the foreman of the contractor. So far as appears from the evidence, no objection whatever was made at the time to the change, nor was any claim made that there should be extra cost or expense attached to it; on the contrary, the only proof on that subject is the testimony of Capt. Jacobs, who states that the foreman told him it would not cost any more.

*Item 24: “Trimming with red, instead of a different shade of the same color as body, as first ordered, \$300.”* Claim for this item was abandoned by the plaintiff.

*Item 25:* "Extra cost of tinning not required in specifications; amount retained by Jacobs for alleged defects, which retention is in violation of contract, and when there were no defects, \$235." It appears, as to this item, that the tin roof of certain buildings erected by Bowe for the government were not satisfactory to Capt. Jacobs because of leaks. The entire correspondence in reference to this item is in evidence, and is as follows:

"ATLANTA, GA., August 3, 1887.

"*William F. Bowe, Contractor:* I consider the roofs of the double and triple barracks in bad condition, and requiring much work before I can accept them. I shall require indisputable proof that all roofs are water-tight before I make a final settlement with you. In doing so I shall require all the standing lock-joints worked over again."

"ATLANTA, GA., August 27, 1887.

"*William F. Bowe, Contractor:* I can see no speedy prospect of the verandas going up, and covered with tin, and, in conjunction with the work, the roof of the main buildings repaired, as indicated in my letter of the 3d instant. You will therefore have tinner commence immediately repairing the roofs of buildings Nos. 23 and 25. I shall wait only long enough for you to get them from Cincinnati in the speediest manner, when I shall order the work done by parties in the city, and charge the cost to you. When I commence the work, I shall complete it, whether your tinner are on hand or not. The ceilings of these buildings are already, I fear, discolored, and injured beyond repair, and I cannot wait your dilatoriness any longer."

To this there is no reply.

"ATLANTA, GA., December 12, 1887.

"*William F. Bowe, Contractor:* You are respectfully informed that late rains develop a number of leaks in the barracks buildings, and that I shall make no final settlement until all roofs are water-tight. Satisfactory evidence of this fact shall be an examination subsequent to a heavy rain."

"ATLANTA, GA., January 4, 1888.

"*William F. Bowe, Contractor:* You are respectfully informed that after having waited some seven months for you to stop palpable leaks in the buildings under your contract, notwithstanding my urgent demands from time to time for you to do so, and being convinced that further patience would be prejudicial to the interests of the U. S., I have this day contracted to have the roofs overhauled and made water-tight for the sum of \$220.00. You will therefore cause any men you may have working on the roofs to stop work, as I shall at once take charge of the tin-work under your contract, and complete it."

In response to this a letter was received from Mr. Bowe, which is as follows:

"SAVANNAH, GA., January 6, 1888.

"*Captain J. W. Jacobs, A. Q. M.*—DEAR SIR: Yours of January 4, '88, just to hand. I am sorry I was unavoidably detained at court, and could not be in Atlanta in reference to the subject-matter before you had reached your decision. I knew there were some leaks showing, and the hands had been working on them, and have reported to me that they were stopped, and, whenever any showed again, immediately proceeded to find it, and work on it. From your letter, I judge some leaks have shown again, and we are ready and willing to stop them. I am endeavoring to get away to-night, in which case I shall see you by the time this reaches you. But, to provide against my not

arriving in Atlanta in the morning, I by this mail send your letter to Mr. McLain, my subcontractor for the tinning. The amount contracted by you, \$220.00, appears to be very high, tho' of course I am unaware of the amount of work contracted for."

"ATLANTA, GA., January 11, 1888.

"*Captain J. W. Jacobs, A. Q. M.*—DEAR SIR: In reply to yours notifying me that you had given a contract to other parties for \$220.00 to repair tin roofs on buildings under my contract, I beg leave to respectfully protest against such action, as being in violation of my contract, and unnecessary, and submit the following facts for your consideration: That my subcontractor on tinning did work on the roofs, and did seek to find the leaks whenever they showed; that the foreman of the carpenters, the subcontractor and boss tinner have often searched under the roofs at night during the rains for the purpose of finding the leaks, and that they were supposed to have been stopped, and that the roof was tight; that an extremely heavy rain showed other leaks, or some of the old ones anew; and that the fact that the roofs are an A No. 1 job is a reason why any leaks are difficult to find; and that without allowing me an opportunity or directing me to have my subcontractor repair them, or to have them repaired without reference to the subcontractor, you made this aforesaid contract; that I am now and always have been willing to fully comply with my contract in every respect; that I have never refused to work on these roofs when called on, either myself or foreman or subcontractor or the boss tinner; that all of us have been desirous of making the roof satisfactory; that, furthermore, the aforesaid contract provides for the roof to be resealed by hand; that I have never been informed that this was your desire, and had no opportunity to refuse to do so; that the hand-seaming of the standing edges is useless, and detrimental to the roof; that there are no leaks showing to come from the standing edges; that the bake-house, commissary-house, and all verandas do not show any leaks, and are perfectly tight; that the hand-seaming as is being done is useless, I am prepared to prove by abundance of evidence. For all which reasons I do most earnestly protest against your action, and hereby refuse to abide by it, and deem it my duty to notify you that the contractors working on the roof absolve me from all liability concerning them, and that therefore I shall consider that part of the work as finished, and accepted by you. Regretting the necessity of this protest, I am,

"Very respectfully, etc.,

WILLIAM F. BOWE."

The amount specified, \$220, was retained by Jacobs from the amount due Bowe under his contract, and applied to having these roofs reworked, as indicated in his letter of January 4, 1888.

*Item 26.* This is plumbing not required by specifications, running gas-pipes from meters to the outside of buildings, \$25. It appears that the quartermaster required the contractor to run the gas-pipes from each of the buildings outside the walls of the buildings, so that the connection with the outer gas-pipes could be made there. It is claimed that the Gas Company of Atlanta is willing to run through the walls of the building, and connect with the meter inside, and that the pipe required to go from the inside of the building to the outside was unnecessary and unusual. The testimony of an expert in plumbing, whose evidence was offered in the case was:

"Where it would be very hard to get to it after the house was completed, why, I would certainly run them outside the wall. It would necessitate cut-

ting through the wall, and taking up the floor, to put the pipes in after the house is completed; whereas, before the floor is done, it is a very easy matter to lay the pipe."

*Item 27:* "Extra cost of oven casting, etc., \$100." This item was abandoned by plaintiff on the hearing.

*Item 28:* "Grates and ash-fenders, over and above cost specified for mantels, \$25." It appears that, when the buildings were about to be turned over by the contractor to the quartermaster, that 19 fenders were missing. The fenders in connection with the mantels, etc., had been ordered by Capt. Jacobs, under the authority given him in the contract, from Hunnicutt & Bellingrath, of Atlanta. When the matter of these missing fenders was investigated, Hunnicutt & Bellingrath claimed to have delivered them. An affidavit was made by their employe, charged with the delivery of these articles at the government reservation, stating that they had been delivered, and describing the fenders, and exactly what he did about them. Thereupon the following correspondence took place between the quartermaster and the contractor:

"ATLANTA, GA., June 18, 1888.

"*William F. Bowe, Esq., Atlanta, Ga.*—DEAR SIR: You are respectfully informed that the preponderance of evidence I have been able to obtain concerning the 19 missing fenders for the barracks buildings under your contract goes to establish the fact that Hunnicutt & Bellingrath delivered them to your agents, and, unless you can furnish evidence to the contrary, I shall have to hold you responsible for them. Please let me hear from you as soon as practicable."

To this Capt. Jacobs received the following reply:

"ATLANTA, GA., June 20, 1888.

"*Captain J. W. Jacobs*—DEAR SIR: Yours of the 18th instant just handed me on the eve of my departure from the city for a few days. Immediately on my return I will undertake to present you the other side of the case.

"Respectfully,

W. F. BOWE."

When the contract was closed and final payment was made, the quartermaster reserved \$25, which he had ascertained would be the cost of these fenders; and, receiving no further evidence from Bowe on the subject, on the 4th of August he paid Hunnicutt & Bellingrath, who had delivered the fenders, the \$25.

*Item 29:* "Delay of carpenter work, \$1,500." It is claimed by the plaintiff, as to this item, in his bill of particulars, that he was not allowed by Capt. Jacobs to rush or push his carpenters, and that he was prevented in that way from getting as good work out of them as he would have obtained if he had not been interfered with. The contention is that by this interference the amount named in this item, and more, was lost to the contractor. Capt. Jacobs admits that he frequently objected to work as being improperly done, requiring it to be done over; and the probable result of this was that, in order to do it in a satisfactory way, it would be necessary to do it more carefully, and consequently more slowly. No question seems to have been made by the contractor as the work progressed as to the right of the quartermaster, under the contract, to pass

on the character of the work as it was done. This strict supervision of the work by Capt. Jacobs would undoubtedly cause it to be done more carefully, and, naturally, somewhat slower, than it otherwise would have been.

#### CONCLUSIONS OF LAW.

The facts as to each item embraced in this action have thus been given separately, and as briefly stated as possible. The conclusions of the court upon all questions of law involved in the case may now be stated.

1. The first position assumed by the plaintiff through his counsel is that extras may be recovered for on a *quantum meruit*, independently of and outside of the express contract; that "extras are paid for on the same principle as if there were no express contract. Extras constitute a separate account. The government's original obligation was to pay certain money; contractor to work according to certain specifications. If the contractor's work is increased by extras, the government's obligation to pay is enlarged. An order for extras may be considered either as an addition to or enlargement of the old contract, and is a separate contract in itself; but in either case the pay is a reasonable valuation." If the power of Capt. Jacobs to bind the government as to matters outside of the contract could be conceded, and if the contractor had placed himself in the proper position under the contract, during the progress of the work, to claim the various items involved as extras, to so much of the work as could be considered extra plaintiff's contention would be proper enough, and the principle he contends for would be applicable. Other questions are involved, however, which must control the case independently of the general principle thus contended for.

2. In article 1 of the contract under which these buildings were erected is a clause as follows:

"Also, no allowance shall be made for extras claimed to have been done, unless provided for beforehand by written agreement to that effect, specifying the cost of the same."

It is said that this clause is for the government's benefit, and one which the government can insist on seeing carried out, or waive; and that, if extra work is ordered by the government, that the government cannot protect itself from payment by this clause, even though the order be verbal, and there is no written agreement. Supposing that Jacobs had authority to bind the government for the payment of work which was clearly outside the contract,—that he stood in the position of an individual having work done for himself,—the position assumed would seem to be correct. Even though having a contract covering a piece of work, and having a clause in it such as this, it would be unjust to allow the other party to receive the benefit of the contractor's work and material upon a verbal order, and then shield himself under a clause such as this, which at the time of the order he had failed to invoke. To make this principle applicable, however, it would be necessary that the work done or material furnished should be extra, and so understood and treated at the time. The real question then would be, was any work ordered and

done with the understanding at the time that it was outside the contract, or even with notice from the contractor to the officer in charge that the work was extra, and that it would be so treated by him? And then, what was Jacobs' authority under the law? Upon the last-named question, that is, as to Jacobs' authority, the case must come within a well-recognized rule. It is stated by the supreme court in the case of *Whitely v. U. S.*, 93 U. S. 247, as follows: .

"The government is not bound by the act or declaration of its agent unless it manifestly appears that he acted within the scope of his authority, or was employed in his capacity as a public agent to do the act, or make the declaration for it."

And, in addition, the court states:

"Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity."

What Jacobs' authority was is discussed later.

3. Further position assumed by counsel for plaintiff is that as Jacobs claimed, as to the various items in dispute, when question was raised about them during the progress of the work, that they were within the specifications, and covered by the contract, that he thereby waived the requirement that Bowe should give notice that these items would be treated as extra, and that the matter be reduced to writing. The effort has been made to analogize it to a case something like that of an insurance policy, and a positive refusal to pay, whereby formal proofs of loss would be dispensed with. This position is clearly unsound. Where the officer in charge required work to be done in a certain way, and, upon the contractor objecting, the officer insisted that the specifications required it to be done as he had requested, and then the contractor proceeded to do the work in accordance with the officer's requirement without further objection, or any notification that the work or material would be treated as extra, what would be the effect? The officer, of course, would have the right to presume that that was the end of the matter, when the contractor acquiesced in his decision. If the officer had notice that the contractor protested, and would treat the work or material as outside the contract, and would claim additional compensation for the same, he would have an opportunity to determine whether or not, under that view of the matter, he would insist on the work proceeding as he had indicated, or refer the matter to superior officers for determination. As Capt. Jacobs was by the contract constituted the arbiter to decide as to the character and the sufficiency of the work as it progressed, when the differences arose as to the manner of doing the work or the character of the material, his decision, of course, became necessary, and the decision thus given would be final, in the absence of notice by the contractor that it would be so considered, and that a claim would be interposed for the work or material as extra. To allow the contractor to apparently accept the decision of the officer, and proceed to do the work in accordance with the decision, and afterwards attack the decision as incorrect, would be a fraud on the officer. It is assumed, for the purpose of this conclusion, that no mistake was made in reference to the work or material, and that

Capt. Jacobs acted in good faith in making his decisions. As cases applicable to this and preceding paragraphs, see *Miller v. McCaffrey*, 9 Pa. St. 245; *Cemetery Co. v. Coburn*, 7 Md. 202; *Trustees v. Platt*, 5 Ill. App. 567. See, also, the following cases cited by plaintiff's counsel as applicable to this general subject: *Amoskeag Manuf'g Co. v. U. S.*, 17 Wall. 592; *U. S. v. Smith*, 94 U. S. 214; *Clark v. U. S.*, 6 Wall. 543; *Mueller v. U. S.*, 113 U. S. 155, 5 Sup. Ct. Rep. 380.

4. This leads to the consideration of the question presented by the language used in closing the preceding paragraph, as to what must be shown in order that Capt. Jacobs' decision should not be final and conclusive as to any questions arising during the progress of the work. The provisions of the contract under which this work was done is as follows:

"And it is further mutually agreed to by the parties of this contract that all the materials furnished and the work performed shall be of the quality described in said specifications, and subject, during the entire work, to the inspection, approval, or rejection of the party of the first part, or of such other person or persons as may be designated for such duty; and the said party of the first part, or his agent, shall have full power to reject any materials or workmanship which in their opinion is not in every respect in complete conformity with the aforesaid plans and specifications; and that the said materials or workmanship thus rejected shall be immediately removed from the premises by the party of the second part."

Very broad power was given Capt. Jacobs by this clause of the contract; in fact, it was stipulated very clearly, by this provision, that the work and material should be of a character satisfactory to Jacobs. What would be necessary, then, to impeach Jacobs' decision, and justify the court in permitting the contractor to go behind it, and set up a claim for compensation such as is presented here? In the case of *Downey v. O'Donnell*, 86 Ill. 49, a question like this arose, and the conclusion of the court is stated in this language:

"When it is provided in a building contract that the decision of an architect shall be final on all questions of difference arising under the contract, his decision that the work is completed in conformity with the terms of the contract is conclusive until impeached for fraud."

In the same case again before that court, as reported in 92 Ill. 559, the ruling upon this question was unchanged, and the case of *McAuley v. Carter*, 22 Ill. 53, cited as authority. In the case of *Snell v. Brown*, 71 Ill. 133, a similar question arose over a contract for work in building a railroad. The court uses this language:

"By reverting to the provisions of the contract, relating to measurements and estimates, it will be recollected that the work was to be executed under the direction and supervision of the chief engineer and his assistants, by whose measurements and calculations of quantities and amounts the several kinds of work performed under the contract should be determined, and whose determination should be conclusive upon the parties, and who should have full power to reject or condemn all work or materials which, in his or their opinion, did not fully conform to the spirit of the contract. This may seem to be unfair and oppressive towards appellees. It is nevertheless their own contract, voluntarily entered into, and they cannot evade or disregard it, unless for fraud, clearly proved."

See, also, the cases of *Trustees v. Lynch*, 5 Gilman, 521; *Herrick v. Belknap*, 27 Vt. 673. The controlling authority as to the correct rule for this court on this question is the case of *Kihlberg v. U. S.*, 97 U. S. 398. A quotation from the syllabus will be sufficient to show the scope and character of the ruling:

"A contract between the United States and A. for the transportation by him of stores between certain points provided that the distances should be 'ascertained and fixed by the chief quartermaster,' and that A. should be paid for the full quantity of stores delivered by him. Annexed to the contract, and signed by the parties, was a tabular statement fixing the sum to be paid for each one hundred pounds of stores transported. The distance as ascertained and fixed by the chief quartermaster was less than by air line, or by the usual and customary route. Held, (1) that his action is, in the absence of fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, conclusive upon the parties."

It will be perceived that it is stated in that case as a fact "that the distance as ascertained and fixed by the chief quartermaster was less than by air line or by the usual and customary route;" and yet, in the absence of fraud or mistake, his decision as to the distance was held to be final. Applying that rule to the case under consideration, it might be admitted that Capt. Jacobs in some instances required a better class of work or material than was called for by the contract. Yet it would seem that if he acted in good faith, and with an honest desire to discharge his duty to the government, and obtain for the contractor work of the character which he believed the contract and specifications called for, and no more, and, in the language of the case just cited, there was "no such gross mistake as would necessarily imply bad faith, or failure to exercise an honest judgment," his decision could not be attacked. The contention on this point by plaintiff's counsel is that the authority and the discretion vested in Jacobs, by the contract, to pass on the character of the work and material should have been exercised reasonably, and in the light of the contract, and that unreasonable decisions would be void. He cites the following authorities: *Fletcher v. Railroad Co.*, 19 Fed. Rep. 731; *Chism v. Schipper*, 16 Atl. Rep. 316; *Boiler Co. v. Garden*, 4 N. E. Rep. 749, 54 Amer. Rep. 709-711, note; *Chapman v. City of Lowell*, 4 Cush. 378; *Tetz v. Butterfield*, (Wis.) 11 N. W. Rep. 531; *Hudson v. McCartney*, 33 Wis. 331; also the case of *Kihlberg v. U. S.*, *supra*. Counsel rely greatly on the case of *Fletcher v. Railroad Co.*, decided by Judge PARDEE. Examination of the case shows that decision to be in entire harmony with the cases heretofore cited. There the engineer of the railroad seems to have been by the terms of the contract the arbiter as to the work done for the company by the contractor, and the ruling is that averments that the engineer's decisions were "in bad faith," and that there was "a failure to exercise an honest judgment," and that the decisions were "arbitrary, unreasonable, and wrongful," were sufficient to authorize the admission of evidence. The judge there says:

"And it seems to me with the relation between the umpire and the defendant existing as seen above, that charging the action of the umpire to be ar-



bitrary, unreasonable, wrongful, and in bad faith would include all the charges of fraud, collusion, and gross mistake necessary."

There is no difference, therefore, whatever between this decision and the general line of authorities on the subject; and the same is true of all cases that were cited by the plaintiff on this question, so far as I have been able to examine them.

5. It is insisted on behalf of the plaintiff that some of the heaviest items here are not for extra work, in the sense of the contract, but are for damages resulting from Jacobs' improper interference with Bowe. This states a more proper classification of much of this claim than that in which it has so far been considered. Such, clearly, is the item in reference to the alleged order that the lumber should be placed in the position heretofore named, in the open air, and probably that as to the finish required to be placed on the lumber used in inside work. To such part of the claim as comes more properly under this latter classification it is that the rule just discussed is especially applicable. Where a claim is for an improper interference with the work, or for an improper requirement as to the finish of the work, the rule as to the necessity of showing fraud or mistake would certainly apply. Where, however, the item can more properly be classed as a claim for the compensation for work done or material furnished outside the contract its merit can be tested by ascertaining whether any claim was made at the time by the contractor that it was extra, as well as by the good or bad faith of the officer in his decision.

6. In the course of the argument the act of congress of June 2, 1862, (12 St. at Large, 411,) and its effect on this case, have been discussed. This is an act making it the duty of the secretary of war, the secretary of the navy, and the secretary of the interior, "to cause and require every contract made by them, severally, on behalf of the government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof, a copy of which shall be filed," etc. It is claimed that even if Jacobs had so intended he had no power or authority to bind the government by contract not in writing. If Capt. Jacobs had ordered an additional house to be built, or a room additional to those provided for in the contract and specifications, or any other piece of work to be done clearly outside of, independent of, the contract, an inquiry as to his power to bind the government by a verbal agreement for additional work done by the contractor would be pertinent; but in the view taken by the court of this case it is unnecessary to determine it. I would be unwilling, however, in any way to commit myself to the position that this officer could bind the government by verbal contracts for material additions to these buildings, or so involve the government in considerable extra expense. The above-named act of congress is discussed in the case of *Salomon v. U. S.*, 19 Wall. 17, and in *Clark v. U. S.*, 95 U. S. 539. See, also, *Camp v. U. S.*, 113 U. S. 648, 5 Sup. Ct. Rep. 687. As pertinent just here it may be added that the last article in the contract between Bowe and the United States is as follows: "Article 8.

This contract shall be subject to the approval of the quartermaster general,"—and the contract was approved the quartermaster general United States army. Was not Bowe by this put on notice that the scope of Jacobs' authority did not extend to making, even in writing, additions to the character or cost of these buildings?

7. Suits such as this, under the act of March 3, 1887, against the United States, must be brought in the district where the plaintiff resides, and the question was raised as to the residence of Bowe at the time this suit was instituted. His testimony must determine that question, as it is the only evidence on the subject, and he testified that at the time the suit was brought he resided in the northern district of Georgia.

8. It is urged that the arrangement between Maher and Bowe, under their contract of July 3, 1886, which has been copied above, amounted to a transfer by Bowe to Maher of this contract, or of such an interest therein as to come within section 3737 of the Revised Statutes of the United States, as to cause the annulment of the contract between Bowe and the United States, and that the effect of the same, as I understand the argument, is to deprive Bowe of any right to use his contract with the government as a basis for this proceeding. I do not think the proper construction of the agreement between Bowe and Maher brings it within the section of the Revised Statute cited. Even if the agreement amounted to such a transfer of the contract, or an interest therein as to bring it within this law, it is too late now for the defendant to make that question. After treating Bowe as the contractor, and responsible as such all through this work, and until its completion, and after an acceptance of the entire work as satisfactory, and a final settlement by the government with Bowe, it certainly ought not to be allowed now to make the objection that Bowe was not a lawful contractor.

9. The only question of law raised in this case, and remaining to be disposed of, is as to what class of suits may be brought against the United States under the act of congress of March 3, 1887. It is immaterial here further to allude to this matter than to state that this entire case arises out of a contract, and the claim of the plaintiff is based either upon an implied promise to pay for work by ordering and accepting it, or for damages to one party of the contract by the improper interference of the other party with its fulfillment. It may be that an exception should be made as to the item claiming that the lumber was ordered to be placed in the position named therein in the open air. But even as to this, if the plaintiff had any rights, they would seem to grow out of the contract, and be based on a violation by Capt. Jacobs of his duty under the contract. It is further contended in this connection that part of this suit, "sounding in tort," cannot be sustained, and that the plaintiff has improperly joined contract and tort. Of course, any part of the case, "sounding in tort" purely, would go out on that ground, but, as has been stated, the whole claim of a right of action arises out of a contract, and under the liberal rule as to the pleading adopted by the court of claims (which, it would seem, should be followed here in actions of this kind) the objection to the pleading and the character of the action can-

not be sustained. *Clark v. U. S.*, 95 U. S. 539; *Peirce's Case*, 1 Ct. Cl. 195, and other court of claims cases.

10. It may be proper to add that in the view taken of the facts in this case, and the principles of law controlling it, it is not necessary to determine the effect of the final receipt given by Bowe through his attorney in fact to the government when the contract was completed. There has been some discussion as to its effect and as to Capt. Jacobs' power to bind the government to change in any way the legal effect of the receipt by his statement to Bowe's attorney in fact that the receipt was simply "for so much money." It is immaterial as to what its effect is in view of the rulings of the court in the other questions in the case.

Having found the facts, and stated the conclusions of the court upon questions of law involved, the conclusions of the court as to plaintiff's right to recover, considering each item separately, will now be stated. The following items of plaintiff's claim are without merit, and should not have been allowed if claim for extra compensation had been made and insisted upon at the time and notice given in accordance with the view hereinbefore expressed by the court.

*Item 1.* The manner in which this work was required to be done was not unreasonable. The requirement of the "tongue and groove" was not such additional work to that required by the specifications that it could be fairly claimed as extra.

*Item 2.* The facts do not sufficiently show any extra expense to the contractor.

*Item 5:* "Plank for plumber to lay platform." The statement of facts disposed of this item.

*Item 6:* "Change of pulleys on proof-racks. The quartermaster required that certain doors should be made to work properly. He was right in so doing.

*Item 20:* "Extra work on mantels. The quartermaster was right in his construction of the specifications in question that the \$20 complete referred to the mantel, and everything that was necessary for the mantel, as laid down at the building, and he was right in requiring the work of setting, as additional to this, of the contractor. Consequently the contractor was required to do no more than the specifications called for.

*Items 21 and 22:* "20,000 extra brick in bake-house and commissary building." After the ample opportunity and means given the contractor to know the location of these buildings, if he failed to know the point at which they were to be erected, and the character of the ground, it was clearly his own fault, and there was no ground for the demand for pay for brick-work required by the character of the ground.

*Item 23:* "Extra cost of painting," etc., "wardrobes." The change complained of seems to have been suggested by the foreman in charge of the painting, with the statement that it would involve no extra cost. As to the following items the plaintiff is not entitled to recover, because no claim for extra compensation was made at the time the work was done, and no notice given that any of the work would be regarded as extra. As to all of these items the decision of the quartermaster was

acquiesced in, and the work done in accordance with his requirement without any notice to him that his determination of the matter was not final and conclusive. These items hereinafter named, as well as those heretofore named, are controlled by the conclusions of the court heretofore expressed.

*Item 26:* "Running gas-pipes from meters to the outside of buildings."

*Item 3:* "Screws on the inside bead of 280 windows."

*Item 4:* "Extra work on cornices," etc.

*Item 11:* "Extra work on stairs."

*Item 13:* "Extra cost for putting on neck mould," etc.

*Item 14:* "Work on board and wainscoting."

*Item 15:* "Mould around 44 doors."

*Item 8, (a, b, c, d, e, and f):* "Hand-smoothing, sand-papering, and scraping ceilings," etc.

It will be perceived from the quotations from one of the specifications in the statement of facts that it was required that "each class of work must present a finished appearance, whether specified on plans or in specifications, harmonize throughout, and be entirely satisfactory to the officer in charge." It would seem that while the contractor knew that a large amount of the work to be done under the contract was inside wood work, and, with such a specification as that just mentioned in the contract, leaving the character to be determined by the officer in charge, that he would have made some inquiry and investigation in advance as to the character of finish that would be required for the work. No such inquiry seems to have been made, and the question as to what was required by the contract and specifications, and a fair construction of the same, seems only to have arisen between the officer in charge and the contractor about the time this part of the work was to be commenced, in addition to the general reason given elsewhere as to the failure of the contractor to claim this as an extra at the time, and to request that it be so treated and reduced to writing, which applies to this item as to the others. It is not at all clear that this lumber was required to be brought to any greater degree of smoothness and finish than the character of the work and a fair construction of the specifications required. It is unnecessary to determine this question, however, as it is held that the claim as to this item is controlled by the general reasons given elsewhere as to failure to make any claim for extra compensation.

*Items 9 and 10.* These two items may be considered together. They are of the same character as Item 8, and are controlled by what is stated above.

*Item 12:* "Extra cost of Yale locks." Even if the mistake as to locks was on account of a defect in the plans, and there was no error on the part of the contractor, he failed to make any claim whatever for compensation for his loss at the time.

As to Item 7, for catch-pans under dormer windows, there is more difficulty, although involving a small amount, than as to any other item in the controversy. It appears from this letter of November 24, 1887, that Capt. Jacobs decided that this work was not extra, in which, it seems

from the evidence, he was mistaken. If these dormer windows were constructed as they seem to have been, in accordance with the specifications, although the result was that the rain entered the building, it does not seem that it was the contractor's fault. It seems, however, from McLain's letter of June 15, 1888, that Bowe acquiesced in Jacobs' decision by assuming the payment of these catch-pans. Why no settlement of the matter was made from the date of Capt. Jacobs' letter (November 24, 1887) to the date of McLain's letter (June 15, 1888) does not appear, and the conclusion must be that in the mean time the matter had been arranged in some way to Bowe's satisfaction, and consequently he assumed the payment of the amount involved. While this item is more meritorious than any other involved in plaintiff's claim, it is subject to the general objection of failure at the time to give any notice of the claim for extra compensation. In addition to this, my conclusion is that Capt. Jacobs acted in entire good faith in making his decision on the subject, and, even though he erred, as Bowe seems to have acquiesced at the time, the conclusion is that even as to this item plaintiff cannot recover.

Items 16, 17, 18, and 19 may be considered together. They are for damage to lumber by being exposed to the weather by order of Capt. Jacobs. The conclusion as to the matter embraced in these items is that neither Capt. Jacobs nor his superintendent, Mr. Russell, had any authority whatever to give the contractor orders as to how his lumber should be dried. Their only authority extended to accepting or rejecting lumber when offered for use in the building. No such authority is given the representative of the government by the contract, and it cannot be inferred from anything stated therein. If Jacobs or Russell had given any such orders as claimed by the plaintiff, and Bowe, feeling bound to do so, had followed them, it is clear that the government would not be bound by their action. It seems from Bowe's testimony that he knew that Jacobs had no such authority as this; but, even if he did not, he can take no advantage from it here. While the facts found hardly render the foregoing statement necessary, it is made as covering the item and disposing of it, even though the facts are as strongly with the plaintiff as contended for.

*Item 25:* "The amount retained by Captain Jacobs for alleged defects in tin roofs." It will be perceived from the statement of facts as to this item that Bowe protested earnestly against this action of Capt. Jacobs at the time. If the action of the quartermaster was not justified by the condition of the roofs, the government will owe Bowe this amount. Bowe's attention was first called to these leaks August 3d, and on August 27th he was warned that the quartermaster would have the work done and charge the same to him. After Bowe's attention was again called to the matter, in December, in January the quartermaster made the contract alluded to. It seems from Bowe's letter of January 6th that he knew that there were some leaks, though he says the hands had been at work on them, and had reported to him that they were stopped. There seems unquestionably to have been great delay on Bowe's part in

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remedying the defects in the roof, and I am unable to find that the action of the quartermaster was unjustifiable. Article 4 of the contract between Jacobs, acting for the United States, and Mr. Bowe, has this provision:

"That if the party of the second part, Bowe, fails to comply with the stipulations of this agreement according to the true intent and meaning thereof, then the party of the first part, Jacobs, for the United States, shall have the power to complete the entire work, or any part thereof remaining to be completed, either by special contract, days' labor, or open purchase, as the said party of the first part shall deem to be best for the interest of the public service, and the party of the second party shall be charged with any expense thus incurred by reason of failure on the part of the party of the second part; and the amount of such expense may be deducted from any moneys due, or which may become due, said party of second part."

*Item 28:* "Amount retained for 19 missing fenders."

I am unable to see how Capt. Jacobs could have adopted any other course than he did; that is, to investigate the matter and see who was responsible for the missing articles, and to put the expense of buying them where it justly belonged. He seems to have investigated the matter impartially, and to have endeavored to determine fairly where the responsibility rested. It is impossible for the court to determine here and now whether he decided the matter correctly or not, and, after waiting from June to August for evidence from Bowe on his side of the question, I do not see how he can be blamed for paying over the money as he did to Hunnicutt & Bellingrath. No objection appears to have been made by Bowe at the time to the retention of the money by Jacobs until the matter could be investigated, and no real effort seems to have been made to produce evidence showing that the fenders were not delivered. I fail to find any merit in this item.

*Item 29:* "Delay to carpenter work."

I think there is no claim by plaintiff—there certainly cannot, in justice, be any—that this supervision of the quartermaster, and interference, if it may be so called, was for any other purpose or with any other intent than to hold Mr. Bowe to a strict compliance with his contract as to the character of the work. Bowe had by the contract given him this authority, and it seems too late now to complain of its exercise, unless for bad faith, or otherwise actuated than to faithfully represent the government and obtain for it its just rights in the erection of these buildings.

*Item 24:* "Trimming with red instead of a different shade of same color as body, as first ordered."

*Item 27:* "Extra cost of oven castings," etc.

The two last-named items were abandoned by the plaintiff on the hearing.

It may be proper to add that the court does not desire that the inference shall be drawn that the other items, except those first disposed of above, would have been meritorious if they had been properly claimed at the time. Where this has been clearly true it has been stated, and where not alluded to it was because they were controlled by other rea-

sions, irrespective of the merits of the particular item if it had been properly urged when the question arose during the progress of the work. I have thus endeavored to find the facts in this case and the conclusions upon questions of law involved, as well as the conclusions as to each item of the plaintiff's claim. The court has been very greatly aided in all this by the careful and able argument by the counsel on both sides. The court has been specially benefited by the carefully prepared argument and brief submitted by the junior counsel for the plaintiff, enabling the court, as it has by its references to the testimony, to find without difficulty such parts of the voluminous testimony in the case as have been most material in its consideration. The conclusion in this case is that the plaintiff is not entitled to recover in any amount, and that the judgment must be rendered in favor of the defendant, with costs of suit.

## HARRISON v. FINK.

(*Circuit Court, N. D. Georgia. June 21, 1890.*)

1. **CARRIERS OF PASSENGERS—EJECTION OF PASSENGERS—REFUSAL TO PAY EXTRA FARE.**  
Where a passenger sought to buy a ticket, but could not, because the agent had left the office, and gone to meet the train, then standing at a water-tank some 206 feet away, and the passenger refused, willfully and captiously, to pay the conductor 25 cents in excess of the regular fare, and take a rebate check, (the requirement of the conductor being in accordance with his instructions, and having the sanction of the railroad commission of the state,) and this refusal being persisted in until the train was stopped, the conductor was authorized to put the passenger off the train.
2. **SAME—OFFER TO PAY AFTER EJECTION.**  
A passenger, who knew the duty of the conductor, and willfully and captiously refused to pay extra fare demanded of him because he had no ticket, cannot restate himself, after the train has been stopped to put him off, by offering to pay.
3. **SAME—ASSAULT BY CONDUCTOR—PROVOCATION.**  
A passenger cannot claim damages on account of the conductor drawing a pistol on him, and speaking of him as a coward to the other passengers, if the conductor's conduct was provoked and caused by the acts of the passenger.

At Law.

*Hall & Hammond*, for plaintiff.

*Bacon & Rutherford*, for defendant.

Before PARDEE and NEWMAN, JJ.

NEWMAN, J. This is a motion for a new trial. At the conclusion of all the testimony, both plaintiff and defendant having introducing evidence, the court directed a verdict for the defendant, for the reason that, under the most favorable view of the evidence for the plaintiff, he was not entitled to recover. The facts in the case were substantially as follows:

On the 11th day of February, 1886, the plaintiff, accompanied by his friend, Mr. Allen,—both being traveling salesmen,—came from Monticello, in a private conveyance, to Flovilla, a station on the railroad operated by the defendant as receiver at that time. They came to Flovilla to take

the train for the purpose of going to Jackson, a station on the same road, 15 miles from Flovilla. When they were out in the edge of the village of Flovilla, they heard the train on which they wished to take passage coming, between a quarter and a half mile distant. They drove up to the station, and got out of their vehicle, and went over to the railroad. The plaintiff went to the ticket-office in the depot to get a ticket to Jackson; Mr. Allen remarking to him at the time that he had a 1,000-mile ticket. The plaintiff did not find any one in the ticket-office, after looking all round, although the window of the office was open, and he was unable to get a ticket. At this time the train was standing at the water-tank, which was distant, as appears by actual measurement, from the depot, 206 feet and 4 inches. It appears from the evidence of the railroad agent there, which is uncontradicted, that he had been in the ticket-office for some time before the train came up to the water-tank, and that he left the office, and went down to the water-tank to meet the train, for the purpose of transacting his business with the train. He saw the plaintiff and his friend as he came out of the office, and started to meet the train, but did not think, from their appearance, that they wanted anything. The train drew up in a few minutes to the station, and plaintiff and his friend got aboard. When the conductor came around to take up the tickets, Mr. Allen offered him his 1,000-mile ticket, when the conductor inquired if the plaintiff was traveling for the house for which the ticket was issued, and was informed that he was not. The conductor then informed Mr. Allen that he could not take his friend's fare out of that ticket. It is not disputed that the conductor was right about this. The plaintiff then told the conductor that he was unable to get a ticket in Flovilla, and offered him 15 cents to pay his fare to Jackson. The conductor stated to him that he was not authorized to receive the 15 cents only, as he had no ticket, but he would have to require him to pay 25 cents additional, for which he would give him a rebate check. It appeared that conductors had orders to require the payment of this 25 cents extra from all passengers without tickets, and to give them a check indicating the payment of it, which would be cashed at any office of the company. The rule of the company on this subject had been approved by the railroad commission of the state, and was printed and hung up in the cars. The plaintiff knew of the existence of the rule, as he stated to the conductor that he "did not want a rebate check; that he frequently lost them, or failed to collect them." Plaintiff stated to the conductor that, as he had been unable to get a ticket, he did not think he ought to charge him more than 15 cents, the regular price. The conductor replied—according to the plaintiff, in a very gruff way—that he had nothing to do with the ticket agent; that, if he did not pay 40 cents, he would put him off the train, but, if he paid it, he would give 25 cents rebate check; and the plaintiff replied, as stated above, that he did not want a rebate check, that he frequently lost them, etc., and the conductor said, "Well, I'll put you off." The plaintiff said, "Go ahead." The conductor then walked forward to the front of the coach, pulled the bell-cord, and stopped the train, and turned around, and started towards



the plaintiff. The plaintiff, then, after the train was stopped, offered to pay the 40 cents, saying—as he said, in a joking way—that he did not feel inclined to walk back to Flovilla. The conductor, according to the plaintiff, got very angry at that, and replied that, as plaintiff had stopped the train, he could not ride on that train to Jackson for \$100, and he would have to get off anyway. To this the plaintiff said: “I replied that he could not put me off, and the conductor answered he would show me about that, and went forward, out of the coach.” In a few minutes the conductor returned with several men the plaintiff presumed to be trainmen, as most of them had on the uniform. Plaintiff’s supposition that these trainmen were brought back with him by the conductor is contradicted by the conductor, who says that he did not bring them with him; but it seems that these men observed that the train had stopped, and the conductor go forward and return, and came, as a matter of curiosity, after him. The conductor then walked up to where the plaintiff was sitting, and requested Mr. Allen, who was on the same seat, and next to the aisle, to get up, so that he could put the plaintiff off the train. When Allen got up, the conductor walked up, and, according to the plaintiff’s evidence, caught him by the coat sleeve, and said, “Come, get off.” The plaintiff had a newspaper in both hands at the time, which he had been reading. With his right hand, he shoved the conductor’s hand back. The conductor then grabbed the plaintiff, in a very rough way, by the collar of his coat; and plaintiff again shoved his hand back, and said that if he hurt him, he would kill him. The conductor then put his right hand back to his hip pocket, and, before the plaintiff knew what he was going to do, pulled out his pistol, and leveled it at him, close to face, exclaiming: “Let him hit me! Let him hit me!” The plaintiff was still sitting in his seat, with the newspaper in his hand, but made no motion whatever of violence towards him. Several parties then pushed him aside, one of them being one of the trainmen, in uniform, who came up, and caught hold of the plaintiff’s coat collar, and said “that he would have to get off the train.” The plaintiff replied: “All right. I cannot help myself, but I do not want to be hurt.” He continued holding the plaintiff’s coat collar, and lead him out by the collar, and put him off the train. This is substantially the plaintiff’s account of the transaction. The plaintiff’s friend, Mr. Allen, who was examined as a witness for him, gives an account of the transaction somewhat different in detail from the plaintiff.

His testimony as to the immediate occurrence on which the case turns is as follows:

“Mr. Harris told him that he could not accept the fifteen cents, and they had a little discussion; and he went on to explain to him about the rebate check, and told him that the rule of the company was that, when a passenger got on the train without getting a ticket, he charged him an excess fare of twenty-five cents, which would be refunded at any station. Mr. Harrison told him that he could not occupy his time running around looking up ticket agents, when he got to stations, to get it cashed; that he might lose it, and it would be a waste of time, and he was not going to pay only fifteen cents. The conductor told him that he could not accept it, and he would have to put

him off. After he had tendered the fifteen cents, and the conductor would not receive it, he told him he would have to put him off. He says: 'That's all right. That is all I am going to give you.' The conductor pulled the bell-cord, and walked to the front of the car, and came back, and told him he would have to get off. Mr. Harrison told him: 'You will have to put me off, for I am not going to give you any more.' The conductor stopped the train, and went out into the baggage-car; and, when the train slacked up, he came back,—I was sitting by him,—and he says: 'Will you please move, and let me put this man off?' I got on the opposite side of the car, and he says, 'You have got to get off,' and caught hold of Harrison; and he jerked his hand loose. *Question.* Who jerked his hand loose? *Answer.* Harrison jerked his hand loose. *Q.* Where did he catch him? *A.* About the collar or arm. He says: 'Come, my friend. You have to get off.' I think he caught him twice, and he knocked his hand loose. He says: 'Don't you hurt me. I will kill you.' In the mean time we were sitting together,—he was on the other side of the seat; and, when I got up and moved on the other side of the car, he was still sitting in the corner next to the window, with a paper in his hands. I saw there was going to be a little scuffle, and he says, 'Well, Captain, rather than, to have to walk, I believe I will pay the fare,' or offered to pay it. *Q.* He offered him the money? *A.* He offered him the money. *Q.* What did he offer him? *A.* He offered him silver, I suppose; and then the conductor told him—he says: 'One hundred dollars would not pay your fare from here to Jackson. You have caused me to stop the train, and caused delay, and you have to get off.' Some one in the car caught him, and led him out to the door; and he got off the train, and went on down to Flovilla. I afterwards met him coming in a buggy. *Q.* What else did Mr. Harris do during that controversy? *A.* In reference to the pulling of a pistol on him? *Q.* Yes, sir. *A.* When Mr. Harrison told him that, if he hurt him, he would kill him, then the conductor pulled the pistol out. *Q.* Where did he get his pistol from? *A.* I don't know whether it was in his coat pocket or pistol pocket. *Q.* What did he do with it when he pulled it out? *A.* Presented it right at Harrison. *Q.* What part of his body? *A.* Up along about his face somewhere. *Q.* How far was the pistol from Mr. Harrison's face? *A.* Not more than a foot. He was next to the window, and the conductor was standing near the edge of the seat, pretty close together. A gentleman standing in the aisle caught his hand, and held it up. *Q.* What was Mr. Harris' manner at the time? *A.* Mr. Harris seemed to be determined, sir. He had stopped the train for that purpose. *Q.* Did he put him off? *A.* Yes, sir. *Q.* State what Mr. Harrison's manner was during that time. *A.* He did not seem to be excited, much,—was laughing most of the time. When he found he would have to get off, he went on towards the door with the paper in his hands. *Q.* State what his manner was throughout the entire conversation,—as to whether he was excited or not. (Defendant objected to what his manner was. Objection overruled.) *The Witness.* *A.* He seemed indifferent, rather, as to the paying of the fare; determined not to pay it. I did not see any boisterousness. Neither one, I think, was boisterous. Just like two determined men,—when one man is determined not to do a thing, and the other is that he shall. There was not any loud talking. It seemed that both were bent upon what they intended to do. I never heard any swearing or any oaths, or anything of the kind. I do not think there was any uttered in my hearing. *Q.* State whether Mr. Harrison made any movement, or offered to draw a pistol. *A.* I do not think he did. He had a paper in his hands, and held the paper before him. *Q.* Do you remember what he did about it? *A.* I am positive he did not draw any pistol. He made the remark: 'If you hurt me, I will kill you.' *Q.* Where were you sitting, in reference to Mr. Harrison? *A.* After I moved out of the seat, I moved to the opposite side of the aisle. During

the occurrence, I was right here, and the conductor was between me and Mr. Harrison. He was next to the window, sitting in a double seat with the seats thrown apart. Q. State whether or not Mr. Harrison made any effort to draw a pistol. A. He did not, sir. Q. Did he make any motion in that direction? A. No, sir; he did not. Q. If he had made it, would you have seen it? A. I would have seen it, because he had a paper in both of his hands. Q. What was he doing with the paper? A. Reading the paper. Q. What did he do? State his manner,—as near as you can, exactly what he did when Mr. Harris drew the pistol in his face. A. He kind of got up, in a half-stoop position,—sort of this way,—[indicating,] and looked at the conductor, when he had the pistol on him. It was all done so quick. Some one was standing there, and caught his arm, and threw it up. There were gentlemen in the aisle, and several of them jumped up, and caught his hand, and held it up. Some one says: 'You will have to get off, and you had better get off.' He says, 'All right,' and they led him to the front door, and he got off."

On cross-examination, among other things, Mr. Allen said that the plaintiff, in reply to the conductor's statement that he would have to put him off, said, "Go ahead, and do your best;" and also states that he supposed that he braced himself, in some way, so that he could not pull him up. There was other testimony for the plaintiff, which does not change the character of the evidence, however, in any material respect; and there was considerable evidence for the defendant. This evidence of the defendant's, including the testimony of the conductor himself, made a much more favorable case for the defendant than that presented above, as given from his own evidence and Allen's. The case was considered as standing on his own evidence and Allen's, as Allen, being in the seat with him, must have known all that transpired; and, being introduced by the plaintiff as a witness, his evidence was taken, in connection with the plaintiff's, in arriving at the most favorable view for the plaintiff of the transaction. There was no difference, however, between their testimony on the material points on which this case turned; nor was there, indeed, any conflict in the evidence as to the facts upon which the court directed the verdict for the defendant. It was conceded that the plaintiff had no ticket, and it was perfectly clear that it was the duty of the conductor, under his instructions,—which instructions were legal and proper,—to require the 25 cents additional, and give him a rebate check. It was clear that the conductor had no alternative but to comply with his instructions, and require this extra amount, and that it was the duty of the plaintiff to pay it. It is also undisputed that the train had stopped before the plaintiff offered to pay the amount required. Now, the train having been stopped on account of his refusal to pay what was lawfully required of him, and under his statement that he would not pay it, and that the conductor could "go ahead, and put him off," the simple question, under the authorities on the subject is, did Harrison act in good faith in his refusal to pay the amount required of him, or was his conduct, on the other hand, willful, factious, and captious? If he had acted in good faith throughout the whole transaction, believing himself to be right in the matter, although he had caused the train to be stopped, there is authority for the position assumed by the counsel for the plaintiff that he could even

then reinstate himself by offering to pay the fare. If, on the other hand, a passenger knows the duty of a conductor, and willfully, stubbornly, and captiously refuses to do that which he knows it is the duty of the conductor to require of him, and this act causes the train to be stopped, he cannot then acquire the right to proceed by offering to pay. There are excellent reasons, found in good policy, for this rule. Trains running on railroad tracks are liable to meet other trains, and trains are following them; and, where a passenger, having the money in his possession to do so. (as it is shown this plaintiff had,) refuses to comply with a reasonable and lawful regulation, which, at the most, would cause him but the slightest inconvenience, and does so stubbornly and captiously, to gratify a mere whim, he not only inconveniences the officials of the road and the other passengers, but, by causing such a stoppage, he brings about a condition of things which, without great care on the part of the officials, may result in serious danger to human life. It would be unreasonable to hold that a passenger could thus act, and afterwards acquire any right by offering to pay his fare. If it could in any way be properly inferred from the facts, as stated by plaintiff and his witness, Mr. Allen, that he acted in good faith in the transaction, and especially in causing the train to be stopped, it would be his right to go to the jury on that question; but there is not a particle of evidence to justify any such inference. His own evidence excludes the possibility of any such conclusion being justifiably reached as to his action.

It is said that the plaintiff should have been allowed to proceed with his case, in order to recover, not only for his expulsion from the train, but also for the indignity put on the plaintiff by the manner in which he was removed,—that is, by drawing a pistol on him, and presenting it at him,—and on account of certain exclamations which the conductor says in his evidence he made to passengers in the car at the time he drew the pistol, which were: "Do not be alarmed, ladies. He is a coward." It is undisputed that the conductor first endeavored quietly and peaceably to get the plaintiff to leave the car. Harrison himself says that he laid his hand on his coat sleeve, and said, "Come, get off the train." Mr. Allen said he said: "Come, my friend. You must get off the train." The plaintiff then knocked his hand off, and, when the conductor took him by the collar, knocked his hand off again, and then, still occupying the seat and refusing to move, told him that, if he hurt him, he would kill him. Now, whether it would have been better for the conductor, under all circumstances, not to have drawn the pistol and used the language complained of in reference to the plaintiff, it is clear that all this action of the conductor was provoked and caused by the acts of the plaintiff himself. Can he, after having acted in the manner above narrated, complain of any act of the conductor's not going any further than those stated. We are not sure that any just criticism can be made of the conductor's acts or words, but it is certain that the plaintiff is in no position to claim anything on that account. Says Chief Justice BLECKLEY, in the case of *Peavy v. Railroad, etc., Co.*, 81 Ga. 485, 8 S. E. Rep. 70, involving a similar question:

"Did he have a cause of action for the shooting? But for his fault, the conductor would not have been brought into a state of excitement, from danger and insult, which unfitted him for discharging his proper duties, either to the company or to the passenger. Whether the conductor was more or less in fault than the plaintiff was, in shooting, certainly the plaintiff was more in fault than the company, because the plaintiff was there upon the ground, stirring up excitement, and bringing on danger both to the conductor and himself. He unfitted the conductor for exercising the care and prudence that were essential to guarding the interest of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff. The plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the conductor was out of tune; and, though the conductor might not be altogether excusable for the shooting, (according to his own evidence, however, he was excusable,) the company was not in fault for it; and it would be unjust for the plaintiff to recover of the company, when he boarded its train, violating the law, as we can well infer, by carrying upon his person a concealed weapon; violating the law again by swearing and using obscene language; violating the law again by committing an assault upon the conductor with a pistol, drawing the pistol, and presenting it at him; and violating the law by general disorder and misconduct throughout the transaction, up to the moment he was shot."

This quotation expresses very clearly, in our opinion, the correct rule on this subject. Our conclusion is, therefore, that the plaintiff is not entitled to recover, under the most favorable view of the facts of this case, for his expulsion from the train, or for the manner of his removal; and consequently the direction of a verdict for the defendant was right, and the motion for a new trial will be overruled.

PARDEE, J., concurs.

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THE ATLAS.<sup>1</sup>

HARRY v. THE ATLAS.

(District Court, S. D. New York. May 26, 1890.)

**SEAMAN—WAGES—LIEN—PILOTS.**

One who is engaged and ships as pilot of a vessel, whereon another stands as registered master, has a lien on the boat for his wages, although he may be in entire charge of her navigation.

In Admiralty.

*Wing, Shoudy & Putnam* and *Mr. Burlingham*, for libelant  
*Alexander & Ash*, for claimant.

BROWN, J. The libelant claims a lien upon the proceeds of the vessel for his wages as a pilot. The defense is that he was master, and, as such,

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

not entitled to a lien. The evidence shows that the libelant was engaged and shipped in the quality of pilot, and not in the character of master. Mr. Moquin was registered as master of the tug, and his name so appeared in the papers on board. Although Moquin did not at this time sail on the tug, he and his agent performed all the duties of master, except the duties of navigation, which the plaintiff, as pilot on board, performed. The libelant did not engage or discharge any of the men. He made no contract for the tug, determined none of her trips, and collected no bills, except such as were paid on the spot. In the case of *The M. Vandercook*, 24 Fed. Rep. 472, the libelant's name appeared on the enrollment of the vessel as master, and he made the usual master's oath. In *Willard v. Dorr*, 3 Mason, 92, Mr. Justice STORY says that the reason generally ascribed for denying to the master a privilege for his wages is that, when he contracts, he trusts to the personal credit of the owner; or, as Sir WILLIAM SCOTT says, he is supposed to stand on the security of his personal contract. If this be so, it is plain that when he contracts expressly for the position of master, and so enrolls himself on the ship's papers, *prima facie*, at least, there can be no lien, as in the case of *The M. Vandercook*, above cited; but that when he expressly contracts as pilot only, and another person stands as registered master, whether the latter sails on the tug or not, there can be no such *prima facie* assumption that he contracts on the personal credit of the owners. The presumption is plainly the other way, viz., that, having expressly engaged in the capacity of pilot only, both parties understood that he should be entitled to a pilot's privilege on the ship. Notwithstanding the circumstances adduced by the defense, such, I think, was the intention, as it was plainly the form, of this contract. The lien should therefore be allowed. Decree for libelant, with costs.

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BOWRING *et al.* v. THEBAUD *et al.*

(District Court, S. D. New York. July 23, 1890.)

1. GENERAL AVERAGE—PERIL—DELAY—NO DANGER TO SHIP OR CARGO.

The primary requisite for a general average charge is some peril common to ship and cargo; next, some sacrifice, or some expense voluntarily incurred by one part interest, beyond that chargeable to it by law, for the safety of the whole. The nature of the requisite peril is some threatened physical injury, not mere delay or loss of expected profits, nor the mere prosecution of the voyage, where no danger to ship or cargo has arisen.

2. SAME—WARRANTY OF SEAWORTHINESS WHEN SHIP SAILS.

A carrier by sea, under his implied warranty of seaworthiness, is bound to have his ship seaworthy at the time she sails. He, and not the shipper of the goods, takes the risk of accident to the ship while loading, and is legally chargeable with the whole burden of repairing.

3. SAME—ACCIDENT WHILE LOADING—REPAIRS—EXPENSE OF DOCKING.

The ship T., while loading at New York, along-side the wharf, after returning from a voyage to Mexico, was found when nearly loaded with her forward compartment full of water, arising from a hole in one of the plates, from some cause unknown. A tight bulk-head protected the cargo from injury, or danger of injury. For the purpose of repair, she was docked with her cargo on board to avoid the

greater expense of unloading; and, after the repairs were completed, she finished loading, and sailed on her voyage. An average bond was given by the cargo owners to pay any average charge that might be due from them. On the facts, it being found that the ship was seaworthy when the loading began, and that the hole was made through some harbor peril during the loading, *held*, that neither the repair, nor the expenses of docking, nor any part of either, was a general average charge on the cargo, (1) because, notwithstanding the hole, there was no peril whatever to either the ship or cargo; (2) because there was no extraordinary expense incurred by the carrier, beyond that which devolved on him by law to pay, under his implied warranty of the seaworthiness of the ship at the time of sailing, and hence no act of sacrifice on his part for the common safety; (3) that the case presented no analogy to that of repairs in a port of refuge, since in the latter the general average allowance is founded solely on a deviation, as an act of sacrifice, made in order to avoid a common peril arising after the voyage had begun, and here there was no voyage begun, and no deviation, peril, or sacrifice; and the libel was dismissed.

(*Syllabus by the Court.*)

In Admiralty. Libel to recover assessment under a general average bond.

*E. B. Convers*, for libelants.

*Carter, Rollins & Ledyard*, for respondents.

BROWN, J. On the 10th July, 1885, while the steamer Thorne Holme was lying at Union Stores, Brooklyn, loading with a cargo of grain, her fore-peak was found to be full of water, from a cause unknown. Before proceeding with the voyage, it was necessary to repair her, and for that purpose to place her in the dry-dock. She was nearly fully loaded; and, to avoid the large expense of unloading and reloading the cargo, it was agreed that she should be docked with her cargo in her. The respondents were owners of the cargo, and were insured in the Atlantic Mutual Insurance Company. The arrangement of docking the vessel for repairs, with her cargo in her, was made upon consultation with the underwriters, and with their approval. Upon docking her, a hole, oval in shape, was found through one of her iron plates on the port bow, about nine inches by twelve. Repair was made by placing over the hole an iron patch the whole width of the streak, securely bolted, so as to make the ship as seaworthy as before. After the repair the loading was completed, and the vessel sailed upon her voyage. An average bond, dated 18th July, 1885, and approved by the underwriters, was executed by the respondents, which recited that, "through recommendation of survey, the vessel was put in dock, with the cargo in her, in order to save the expense incident to the discharge and the extra handling of the cargo, \* \* \* by which means certain losses and expenses have been incurred, \* \* \* which may, according to the usage of the port of New York, constitute a general average on the vessel, cargo, and freight;" and the respondents, by said bond, agreed "to pay their part of such loss, damage, or expense as should appear to be due from them, to be stated and apportioned, in accordance with the established usage and laws of this state, by Jacob A. Telfair or others, competent adjuster of marine losses." An adjustment was afterwards made under Mr. Telfair's direction, by which the cargo was assessed for general average \$816.05, for which sum this libel was filed. The answer denied that any claim of general average had

accrued; the defense on the original hearing being that the cause of the leak originated on a prior voyage, before the loading commenced; and further, that the repairs made were permanent repairs, and not temporary, for the purpose of the voyage only. Objection was also made to the mode of adjustment.

1. *The cause of the leak.* If the hole in the bow was made before loading was commenced, plainly, the cargo could not be subject to any average charge for the expense of repairing it, since the carrier was bound to have his vessel seaworthy when loading began, or else take the risk of making her so before sailing. At whatever time this hole was made, the forepeak, which was previously empty, must have been at once filled with water up to the water-line, and the trim and management of the vessel thereby at once seriously affected. There is no direct proof either as to the cause or the time of the injury. There are circumstances on each side that I have found it impossible to reconcile satisfactorily, whichever conclusion be adopted. Without specifying these in detail, I find that the preponderance of probability is in favor of the libelants; that the hole was made while the vessel was loading, and probably upon the 10th of July, the day when it was discovered. The vessel was unseaworthy in that condition; and repair, either permanent or temporary, became necessary. As no negligence by the ship is shown to have been the cause of the injury, and the specific cause is undiscoverable, the damage must be set down to harbor perils. If, upon such facts, the case is entitled to be treated like one arising in a port of refuge, sought in order to make necessary repairs of damages caused by a sea peril, then, according to the law of this country, the docking of the cargo, as an expense substituted in place of unloading and reloading, would be a general average charge, as well as merely temporary repairs of the ship. *Hobson v. Lord*, 92 U. S. 397, 407; *The Queen*, 28 Fed. Rep. 755, 760; *The Joseph Farwell*, 31 Fed. Rep. 844; *L'Amerique*, 35 Fed. Rep. 835, 846. Upon the original hearing that phase of the case was not considered. The attention of the court was not called to the question whether, even if the hole in the bow was made after the loading began, the case would or would not be within the principles of general average contribution. It was assumed that it would be. On the reargument, this question has been exhaustively treated by counsel on each side; and, after much consideration, I have come to the conclusion that the case is not one of general average, but is excluded therefrom by several of the fundamental conditions of that doctrine, and that it would be the same even if the repairs had been merely temporary, and the cargo had been unloaded for the purpose of such repairs, instead of being docked with the ship. No parallel case has been cited; but such analogies as the adjudicated cases afford seem to oppose any average contribution under circumstances like the present. There are three characteristics in this case, all of which seem to me to be vital. In no case in which a general average charge against the cargo has been sustained have I found these three circumstances all concurring, viz.: (1) The absence of any imminent peril common to ship and cargo, and in fact the absence of any peril to either:



(2) The injury and consequent unseaworthiness happening before the vessel sailed, and while she was loading at her dock: (3) No act of sacrifice, properly so called, or anything equivalent thereto, because the carrier's warranty of seaworthiness extended up to the time the ship sailed, and therefore bound him to make and pay for needful repairs up to that time, and all the charges incidental thereto. Repairing was, therefore, not an act of sacrifice. I must infer the absence of any peril to either ship or cargo from the proved circumstances of the case, because there has been no suggestion of actual peril or danger to either, and because there is no indication of danger to either. The fore-peak was filled with water up to the water-line, but this was separated from the cargo by a firm and tight bulk-head; and although the ship was thereby rendered unseaworthy for the voyage until repaired, and was obliged to be repaired before sailing, yet both ship and cargo, so far as the evidence indicates, could have remained at the dock as they were, without injury and in safety, as long as the owner of either desired.

The primary requisite for a general average charge is the existence of some common peril to be averted; next, some sacrifice voluntarily made, or some expense voluntarily incurred, by one part interest, beyond that chargeable to it by law, for the safety of the whole. The quantum of common danger necessary to justify a general average act, i. e., a voluntary sacrifice of a part for the safety of the whole, is not nicely scrutinized. When the sacrifice happens in the course of the voyage, the determination of the amount of danger that requires it is left to the judgment of the master, to be exercised reasonably, and in good faith. Here the voyage had not commenced, and the master's characteristic duties had not begun. The nature of the requisite danger is not that of mere probable pecuniary loss, such as delay in reaching a market, or loss of expected profits, but some threatened physical injury. "*Periculi imminentis evitandi gratia*," says the ancient statute of Marseilles, (Emerigon, Ap. c. 12, § 39, p. 603,) and such was the Roman law, (1 Pardess. Lois Mar. 107.) Lownd. Av. (6th Ed.) 352. And in text-books and decisions this primary condition of a common peril threatening the safety of the whole is constantly reiterated, (Gourl. Gen. Av.; 2 Lownd. Gen. Av. 39; 2 Arn. Ins., 6th Ed., 855; per STORY, J., in *Insurance Co. v. Ashby*, 13 Pet. 331, 339; GRIER, J., in *Barnard v. Adams*, 10 How. 270, 303; *Hobson v. Lord*, 92 U. S. 397, 399.) In the case last cited, Mr. Justice CLIFFORD says, (page 399):

"Property not in peril requires no such sacrifice, nor that any extraordinary expense should be incurred. \* \* \* Where there is no peril, such sacrifice presents no claim for such a contribution; but the greater and more imminent the peril, the more meritorious the claim against the other interests, if the sacrifice was voluntary, and contributed to save the adventure from the impending danger, to which all the interests were exposed."

It is unnecessary to multiply citations. They all import an impending danger of physical injury as the primary condition and initiative of a general average charge. The mere completion of the voyage, where that is in no way necessary to the safety of the cargo, is not sufficient

for a general average charge. That doctrine was expressly repudiated by the supreme court in the case of *Insurance Co. v. Ashby*, 13 Pet. 331, and the point was necessarily involved in the decision; for contribution was there allowed for a total loss of the ship by voluntary stranding, although the voyage, also, was wholly lost. STORY, J., says, (page 340:) "It is the deliverance from an imminent impending peril \* \* \* which constitutes the essence of the claim." The Roman law, he says, shows this. "In truth," he continues, "it is the safety of the property, and not of the voyage, which constitutes the true foundation of general average. If the whole cargo were thrown overboard to insure the safety of the ship, the voyage might be lost, but nevertheless the ship must contribute to the jettison." MATTHEWS, J., in *Sonsmith v. The J. P. Donaldson*, 21 Fed. Rep. 671, 673. Chancellor Kent says: "Before contribution takes place, it must appear that the goods sacrificed were the price of safety to the rest." 3 Comm. \*234. *Royal Mail S. P. Co. v. English Bank*, 19 Q. B. Div. 362, 371. In the case of *The Alcona*, 9 Fed. Rep. 172, where the vessel was stranded on the bank of a river, and lay there without danger of serious damage to herself or cargo, it was accordingly held that charges for unloading a part of the cargo in order to lighten and remove her, and for towage services, were not general average. In *L'Amerique*, 35 Fed. Rep. 835, 838, that case was followed by this court. So in the case of *Nesbitt v. Lushington*, 4 Term R. 783, where a tumultuous band of famished persons took possession of a vessel in order to obtain her wheat and coals, and the captain was compelled to sell the cargo at a sacrifice in order to regain possession, Lord KENYON held that that was not a case of a general average sacrifice, "because the whole adventure was never in jeopardy," there being "no pretense \* \* \* that the persons who took the corn intended any injury to the ship, or to any other part of the cargo but the corn, which they wanted \* \* \* to prevent their suffering." There could, therefore, be no contribution from the ship. It is upon the same ground that the recent English cases refuse to extend general average charges in a port of refuge, sought in consequence of a sea peril, beyond the time of unloading the ship, because when that is accomplished the cargo is no longer in danger. *Scensden v. Wallace*, 13 Q. B. Div. 69, 72-85, 91; *Hallett v. Wigram*, 9 C. B. 580; *Royal Mail S. P. Co. v. English Bank*, 19 Q. B. Div. 362.

The practice in this country, largely sustained by our courts, is to include in the general average expenses of a port of refuge all extraordinary expenses until the ship regains the high seas, including reloading, and such repairs to the vessel as are merely temporary, and for the purposes of completing the voyage. *Hobson v. Lord*, *supra*; *The Joseph Farwell*, 31 Fed. Rep. 844, and cases there cited. The libellant contends that the present case is analogous to that class of cases, and that the principles applicable to the *Thorne Holme*, in this case, are the same as if she had arrived along-side of a wharf in a port of refuge, with a similar hole in her bow, and had taken the same measures for continuing her voyage. But this contention overlooks the ground upon which such charges in a port of refuge could be sustained at all, viz., a previous imminent common

peril, happening during the prosecution of the voyage, and a deviation to the port of refuge as an act of sacrifice, in order to escape the common danger. These circumstances would constitute the foundation, and the sole ground, of the general average claim; but, in the present case, every one of these circumstances is wanting. The English and American courts regard such deviations from the voyage, though caused by a sea peril, as an extraordinary expense, not within the contemplation of the contract of carriage, or the price paid therefor; and, being voluntarily incurred by the master to insure the common safety of ship and cargo from an imminent common danger, such charges are treated as general average. The American courts, contrary to the later English decisions, extend the general average charges in a port of refuge, under such circumstances, to all expenses, save permanent repairs, until the ship regains the high seas, on the view that they are all parts of one continuous operation attached to and consequent on the original act of deviation or sacrifice. But this difference touches one of the most debatable subjects in the maritime law, about which there have been for centuries conflicting views, and in which the practice of maritime nations is very diverse. 1 Pars. Ship. & Adm. 382, 385. Whether the very liberal American practice rests on any sufficient principle, whether it is likely to be modified, as the earlier English decisions have been modified after most careful discussion, or whether even all port of refuge expenses made necessary by sea perils should not be borne by the carrier, as is required in some maritime nations, and as Lord BLACKBURN, in the House of Lords, seemed inclined to think should be the law, (*Svendsen v. Wallace*, L. R. 10 App. Cas. 404, 420,) need not be here considered, because, as above stated, all port of refuge cases presuppose a voyage begun, and a common peril to ship and cargo arising in the course of it, to escape which the deviation or sacrifice was made. Here there was neither voyage nor peril nor deviation. The analogy wholly fails in the present case; nor could our doubtful practice as to the broad extent of enforced contribution in port of refuge cases, where there has been an escape from a sea peril, with any propriety be still further extended to port charges incurred before the voyage began, where there has been no peril, and no escape.

2. Under any view of the law of general average, expenses incurred, in order to be treated as a sacrifice, must be such as form no part of the carrier's own obligation. Lownd. Av. 147; 1 Pars. Shipp. & Adm. 382; Gourl. Gen. Av. 18. This is the very point where the authorities divide as to the right of the carrier to make a general average charge for any port of refuge expenses caused by sea perils. Those who disallow such charges hold that the putting into port for safety, and the repair of sea damage, with all its incidents, are parts of the carrier's own risk, included and paid for in the contract of carriage; while the opposite view is that such acts and expenses, save permanent repairs of the ship, are not within the ship's undertaking, but are within the exceptions of perils of the sea, and therefore extraordinary, and outside of the carrier's duty to pay. In the

case of *Dupont de Nemours v. Vance*, 19 How. 162, 172, Mr. Justice CURTIS says:

"If the sacrifice be made to enable the vessel to perform the voyage by paying what the owners are bound to pay to complete it, the charge is on the vessel and its owners. If it be made to relieve the adventure from a peril which has fallen on all the subjects engaged in it, the risk of which peril was not assumed by the carrier, the charge is to be borne proportionately by all the interests."

How can it be contended in the present case that the risk of any accident to the ship only that might render her unseaworthy while loading, and before breaking ground, was not a risk assumed by the carrier? It is an implied warranty in carriage by sea that the ship shall be seaworthy at the time she sails. "When she first sails on the voyage," says Lord MANSFIELD in *Bermon v. Woodbridge*, 2 Doug. 781, 788. *Macl. Shipp.* (3d Ed.) 400, 418; *Marsh. Ins.* (5th Ed.) 109; 2 *Arn. Ins.* 652; *Purvis v. Tunno*, 2 Bay, 492; *Cohn v. Davidson*, 2 Q. B. Div. 455; *The Eugene Vesta*, 28 Fed. Rep. 762; *Sumner v. Caswell*, 20 Fed. Rep. 249, 252; *Crow v. Falk*, 8 Q. B. 467; *Valente v. Gibbs*, 6 C. B. (N. S.) 270. The risk of such accidents to the ship as this, while loading, falls, therefore, upon the carrier, and consequently the expense of repair, whether temporary or permanent, as well as all the incidental charges connected with it. This was not, therefore, an extraordinary expense, within the meaning of the law of general average, incurred for the benefit of the cargo, or for its safety, or to rescue it from peril. It was one of the carrier's ordinary risks, which he alone was bound to bear. He could not undertake the voyage without making his ship seaworthy at the time she sailed; and his implied warranty of seaworthiness to the cargo owners bound him, therefore, to bear all such charges without calling on the cargo for contribution. The repair of the ship in this case was not in itself, therefore, any act of sacrifice, and there was no other such act. In the case of fire on a vessel at a dock before the commencement of the voyage, where a general average has been allowed, there was not only danger of the loss of both ship and cargo, but also some voluntary act of sacrifice or expense made or incurred to rescue from that danger, such as scuttling, jettison, salvage services, etc., which caused the charge that was distributed as general average. Here nothing of that kind existed. For the above reasons a decree should be entered for the respondents, with costs.

FARMERS' NAT. BANK v. McELHINNEY *et al.*

(District Court, S. D. Iowa, E. D. June, 1890.)

## COURTS—JURISDICTION—ACTIONS AGAINST NATIONAL BANKS.

Under Rev. St. U. S. § 563, giving district courts jurisdiction "of all suits by or against any association, established under any law providing for national banking associations, within the district for which the court is held," and Act Cong. Aug. 13, 1888, § 4, making national banking associations, for the purpose of all actions, citizens of the state wherein they are located, "and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state," district courts have no jurisdiction of an action on a promissory note, brought by a national bank in a district other than that in which the bank is located.

At Law. Action on a promissory note, submitted on question of jurisdiction.

*G. S. Skinner and W. B. Collins*, for plaintiff.

SHIRAS, J. The plaintiff corporation is a national bank, carrying on its business at Princeton, in the state of Illinois, and the defendants are citizens of Iowa, residing in Louisa county. Under the statutes now in force, has the district court, under any circumstances, jurisdiction of an action by a national bank to recover a debt due upon a promissory note, when such action is brought in a district other than that in which the banking association is located? In section 563 of the Revised Statutes it is provided that the district courts have jurisdiction "of all suits by or against any association, established under any law providing for national banking associations, within the district for which the court is held." By the act of July 12, 1882, it was enacted that the jurisdiction for suits by or against any national bank, except as to suits between the United States, its officers and agents, and the bank, should be the same and not other than the jurisdiction by or against banks not organized under the laws of the United States. Section 4 of the act of August 13, 1888, provided "that all national banking associations, established under the laws of the United States, shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state." According to the provisions of this section the plaintiff in this case is to be deemed to be a citizen of the state of Illinois, and, the action being brought in a district other than that in which the bank is located, the test of jurisdiction in the district court is just the same as it would be in case the plaintiff was a natural person. I do not understand it to be claimed that A. B., a citizen of Illinois, can bring an action on a promissory note against C. D., a citizen of Iowa, in the district court of the United States for either district of Iowa. This being so, it seems to me that the act of 1888 was intended to make one rule determine the jurisdiction, or, in other words, it was intended to give to a

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national bank just the same privilege and right in this particular that is enjoyed by the individual citizen.

It is urged in argument that the statute of 1888, by using the words "and in such cases the circuit and district courts shall not have jurisdiction other than," etc., intended to provide that whenever, by reason of diversity of citizenship, the circuit court would have jurisdiction, the district court would likewise have jurisdiction, without, however, the limitation as to the amount involved. The argument made in support of this view is certainly ingenious, but fails to convince me that such was the purpose of congress in enacting the section in question. The declaration—that "the circuit and district courts shall not have jurisdiction other than"—was not intended to enlarge this jurisdiction of the latter courts, but to bring both courts within the same rule in regard to jurisdiction over suits by or against national banks; and as district courts are not infrequently clothed with circuit court jurisdiction and powers, the intent of the statute was to declare that neither the circuit nor the district court should take jurisdiction of suits by or against national banks, except under such circumstances as would confer jurisdiction upon the particular court in case the suit was between natural persons.

It is also urged that the provisions found in section 563 of the Revised Statutes, cited *supra*, are not repealed by any subsequent enactments, and that the district court can exercise the jurisdiction therein conferred wherever the action is between a national bank and a citizen of another state; and that section 4 of the act of 1888 only modifies the jurisdiction of the district court created by the former act, by limiting it to actions between the bank and a citizen of another state. As I understand clause 15 of section 563 of the Revised Statutes, it is confined to suits by or against national banks established in the district wherein the court is held. What effect the statutes of 1888 would have upon the jurisdiction of this suit if it had been brought in the district in which the bank is located need not be considered. The bank is not suing in the district wherein it is located, but has come into another district for that purpose; and, under the act of 1888, it comes as a citizen of the state of Illinois, and on the question of jurisdiction can be viewed in that light only; and, as the district court has not jurisdiction of actions to recover debts between individual citizens, it has not jurisdiction of a similar action simply by reason of the fact that the plaintiff is a national bank, located in the state of Illinois. The case must therefore be dismissed for want of jurisdiction, and it is so ordered.

## HIRSCHL v. J. I. CASE THRESHING MACH. CO.

(Circuit Court, S. D. Iowa, E. D. June 26, 1890.)

## REMOVAL OF CAUSES—CITIZENSHIP OF CORPORATIONS.

A petition for removal of a cause by a corporation of one state sued in the courts of another state is not sufficient unless it alleges, in addition to the usual averments as to citizenship, that it is a non-resident of the state in which it is sued.

At Law. On motion to remand.

The defendant is a corporation organized under the laws of Wisconsin. It was sued in the district court of this state, in and for Cedar county; service of process being made, under section 2613 of the Code of Iowa, upon an agent. The cause was removed to this court upon a petition which averred the necessary citizenship of the parties, but which contained no averment that defendant was a non-resident of the state of Iowa. Plaintiff moves to remand because of the absence of this averment.

*W. J. Roberts*, for plaintiff.

*Craig, McCrary & Craig*, for defendant.

MILLER, Justice. A corporation is a citizen of the state under whose laws it is organized. For the purpose of suing and being sued, it may become a resident of each state in which it does business under state law. The rule, under the removal act of August 13, 1888, as to natural persons, is applicable to corporations. When a corporation of one state is sued in the courts of another state, a petition for removal by it is not sufficient unless it alleges, in addition to the usual averments as to citizenship, that it is a non-resident of the state in which it is sued. The motion to remand is sustained.

ROBINSON *et al.* v. TAYLOR.

(Circuit Court, N. D. Mississippi, E. D. June 18, 1890.)

## 1. RECEIVERS—APPOINTMENT.

On motion for the appointment of a receiver of the property of a decedent in possession of one claiming to be his son and heir, complainants alleged that they were the next of kin and collateral heirs of decedent, who died without lineal heirs, and that defendant was his illegitimate son. Defendant answered that he was decedent's legitimate son and heir, and there was evidence showing that decedent had lived for many years with defendant's mother, recognizing her as his wife, and defendant as his son. After living thus together, defendant's mother entered into illicit intercourse with another man, and was repudiated by decedent, and afterwards both he and the woman stated that they had never been married. Decedent deeded all his property to defendant, and the deeds were attacked by complainants as invalid. *Held* that, as defendant could suffer no great harm by holding that complainants had established a *prima facie* right to the estate, a receiver would be appointed until final hearing on the merits of the case.

## 2. SAME.

In such case, defendant, being shown to be competent to manage the estate, was appointed receiver on giving bond.

In Equity.

*Mr. Bristow and Inge & Birge, for complainants.*

*Bogle & Young and Jordan Boone, for defendant.*

HILL, J. The questions now for decision arise upon complainants' motion for the appointment of a receiver to take charge of, preserve, and manage the property and estate described in the bill. The allegations in the bill are that complainants are the only next of kin and heirs at law of Alonzo H. Taylor, who died intestate in Alcorn county in this state; that he died seised and possessed of the real and personal estate described in the bill, and that the defendant is unlawfully in possession of the same, and holding it adversely to the claims of complainants, and that defendant is insolvent; that the complainants' interests require the appointment of a receiver to take possession of, hold, and manage said estate during this litigation. The answer of the defendant denies that complainants are the next of kin and heirs at law of said decedent, A. H. Taylor, and entitled to the estate and property described in the bill, or that they have any title, claim to, or interest in the same. The answer further states that defendant is the legitimate son, and only next of kin and heir at law, of said A. H. Taylor, and as such is entitled to, and is the owner of, all the estate, real and personal, of which said decedent died seised and possessed, and admits that he died intestate. The answer further avers that the said A. H. Taylor, in his life-time, conveyed all of the real estate, personal property, choses in action, etc., described in the bill, by two deeds filed as exhibits to the answer, and asked to be made parts of it.

A very large number of affidavits and exhibits have been filed as testimony on both sides; and the questions have been argued at great length, and with great ability, by the distinguished counsel on both sides, as if the cause were on final hearing. The answer of the defendant throws the burden upon complainants to produce strong *prima facie* evidence that they have the title, legal or equitable, to the estate and property described in the bill; otherwise their motion must be denied. The affidavits show that complainants are the daughters of John C. Taylor, who was a brother of said A. H. Taylor, and who died before A. H. Taylor; that said A. H. Taylor left surviving him no father, mother, brother, or sister, or descendant of such, except complainants; and that, in the absence of a child, widow, or descendant of such, the complainants are the next of kin and heirs at law of said A. H. Taylor. The defendant, John W. Taylor, in his answer, avers that he is the lawful and legitimate son of decedent, and as such is entitled to the inheritance of all the estate, real and personal, of which he died seised and possessed. If this is established by the proofs, then complainants have no claim thereto. The burden of showing that defendant is such legitimate son, next of kin, and heir at law of the decedent, is upon defendant,—not in this proceeding to that degree of certainty that will be required upon final hearing, but so as to rebut the *prima facie* title of complainants; which brings us to consider the proof which has been presented on both



sides, mostly by *ex parte* affidavits, and which shows the following facts:

Some time about the year 1857 or 1858, decedent resided in the town of Houston, in this state, and was engaged as a broker or money lender. At the same time a young woman by the name of Jane Hoskins was engaged in teaching music in a female academy in the same town. The former was from the state of New York, and the latter from the state of Vermont. Both occupied respectable positions in society, and, as was natural, the parties became intimate as friends, if not as lovers. Some time after their acquaintance commenced, it was public talk that their intimacy had become unlawful, which resulted in her dismissal from her position as music teacher; and she thereupon left the town of Houston, and never afterwards returned to that place. The next information shown by the proof of her whereabouts was that, some time before the year 1861,—the precise time does not appear from the proof,—said A. H. Taylor and Jane, formerly Hoskins, were boarding together in the city of Yazoo, in this state, representing themselves as husband and wife, and having a daughter, whom they called Lonnie, then some two years old, and whom they represented as their child. Decedent spent a portion of his time with his reputed wife and child, and a portion of his time attending to his business at that place, but saying nothing there about his connection with Jane, formerly Jane Hoskins. The proof shows him to have been very reticent in relation to his family and business relations. The proof further shows that when in Yazoo City the parties passed as husband and wife, without any suspicion that they were otherwise, and that they were so received and considered by the most respectable portion of that community; that some time during the year 1861, decedent, with his reputed wife and child, went to Jacksonville, in the state of Alabama, where they represented themselves as husband and wife, and their child Lonnie as their child, and where they were so received and treated by the respectable portion of the community, with no suspicions to the contrary; that during their stay in Jacksonville the defendant, John W. Taylor, was born, and was recognized by them as their child; that during this time the little girl Lonnie died. Decedent during all this time spent part of his time with his reputed wife and children, and part of his time in Houston, looking after his business at that place. The proof further shows, that some time during the year 1865, decedent went with his wife and defendant, then a small child, to the state of New York, and procured a residence for the time on Bond street, in the city of New York, where they resided a portion of the time, visiting and remaining for some time in the town of Carmel, his former home, and the home of his family, at that time occupied by his sister; that he represented Jane as his wife, and the defendant as his son, and that they were considered as such by his family and friends; that, in the fall of 1866, decedent sent Jane to Europe, to complete her musical education, and especially to train her voice,—her natural talent for vocal music being unusual, and highly appreciated by the decedent; that this was carrying out a purpose which he had expressed some time before that; that defendant was left with the sisters of A. H. Taylor, who

took great interest in him, and attended to all his wants; that these sisters—one of them being a widow without children, and the other a maiden lady—were very much devoted to him, and that they reared him, and attended to his education, until he was placed by his father in Carmel University, where he remained until he graduated; A. H. Taylor furnishing his said reputed wife with all the funds she needed until her return the last of 1871. A. H. Taylor, after 1866, returned to this state, and looked after his interest in Houston and the surrounding country, making his head-quarters in Houston, until 1869, when he removed to the city of Corinth, where he established the Tishomingo Savings Institution, of which he was the principal stockholder, president, and principal manager. He was at the same time the owner of numerous tracts of land in different counties in this state. About the last of the year 1871, Mrs. Taylor, as she was known, returned to the United States, and came to the city of Corinth, where A. H. Taylor then resided. He stated to a lady friend who had known him in Houston that his wife would soon return. When she came, she brought with her a boy whom she called her son, then some four or five years of age. She was received by A. H. Taylor, and treated as though she were his wife, until some time in the latter part of 1872, when an illicit intercourse was entered into between said Jane and one R. T. Dunn, which being made known to A. H. Taylor, he repudiated her; and from that time forward the relationship which had before that time existed between them ceased, and was never afterwards renewed. In fact, feelings of hostility between them continued; and there is testimony showing that each stated that they were not man and wife, and had not been married. But Jane claimed that decedent was under obligations to pay her money, or to support her; that a settlement and compromise was made between them, by which decedent gave her his obligation to pay her \$250 quarterly during her life-time. Afterwards, decedent declined to continue this payment, and suit was brought in the circuit court of Alcorn county against him on his written obligation. This was in the name of Jane Hoskins, *alias* Jane Taylor. A. H. Taylor pleaded that it was procured from him under a threat that he would be prosecuted for living with her in open and notorious lewdness, and a suit for damages for breach of marriage contract. Taylor also pleaded payment, to which no replication was filed; but replication was filed to the first plea, denying the statements made in the plea. The transcript furnished is very imperfect, but from it it appears that the suit was brought 30th May, 1874. The obligation was dated 4th April, 1873. The cause was continued until the January term, 1876, and again to the February term, 1876. There appears in the transcript a contract of agreement, signed in the name of Jane Hoskins, transferring the written contract upon which the suit was brought to her attorneys, Curlee & Stanley and William F. Doud, to secure a fee of \$1,000 to Curlee & Stanley, and \$1,000 to said Doud. The transcript, without dates, shows a continuance by consent, and then a verdict for the defendant by a jury, and judgment against plaintiff and her security for the costs. This verdict and judgment does not state when rendered,

does not show that any judge presided, or on what issue the finding was had.'

These are all the facts that need be stated on the question of the marriage of A. H. Taylor and Jane Hoskins, and on the legitimacy of the defendant, John W. Taylor, and from which I am satisfied that there was a rumor that there was an illicit intimacy between A. H. Taylor and Jane Hoskins, on account of which Jane Hoskins left Houston, and never afterwards returned to those with whom she had once had a fine social standing. This was natural. There is no direct proof that such unlawful connection existed between them, but it may be inferred from the circumstances, and if it did exist the presumption is that it continued until the parties took upon themselves a new relation; that is, the relation of husband and wife. This could have been done by marriage in good faith, had according to the statutes of the state, or under the rules of the common law; that is, by agreeing with each other to be husband and wife, and to live and cohabit together as such during their joint lives, this agreement being entered into in good faith. Such an agreement would have constituted a valid marriage, and especially so when followed by cohabitation as husband and wife; and relation might be inferred from the long cohabitation, and continued declarations that they were husband and wife, if nothing else appeared in the evidence. Not that the cohabitation creates the marriage, of itself, but it is evidence of the agreement between them that they did in good faith agree to become man and wife, and did evidence the agreement by the cohabitation as such. Taking it for granted that the relation which existed between these parties at Houston was an unlawful one, the question is, is there evidence that that relation was changed? Then, they did not represent themselves as husband and wife. Afterwards, they did so represent themselves, and were so considered and treated by those who knew them, and by his family and kindred. And, if there were no other evidence in the case, I am of opinion that the common-law marriage between these parties might be presumed; the presumption of law being that when a man and woman live together as husband and wife, and declare themselves to be such, they are lawfully married, and their children born while so living are legitimate children. But for this presumption, I could not establish the marriage of myself and wife, which took place nearly 57 years ago, as the records of the marriage are doubtless destroyed, and there is not a living soul who witnessed it; and the same may be said of thousands of others. If a common-law marriage between the parties did take place, then no declaration on their part could annul it.

The next question is, do the conduct and the declarations of the parties after Jane went to Europe rebut this presumptive evidence of a common-law marriage between the parties? It is insisted by complainants' counsel that the absence from A. H. Taylor for so long a time, of itself, rebuts this presumption. But it is not denied that A. H. Taylor furnished the money for her support during all this time, and of this there is proof. If it is unusual for a husband and wife to be sep-

arated so long, it certainly would be more unusual for a paramour to furnish the money to support his mistress for so long a separation. So that this fact is not sufficient to rebut the presumption of marriage; and this is especially so since it appears that he received her, and treated her, as his wife upon her return. But it is insisted that the son she brought with her was an illegitimate child, and that, if the parties were legitimately married, A. H. Taylor would not have received her, and represented her as his wife. But the age of the child when she returned, and the time of the absence, do not show that A. H. Taylor was not his father. There is more force in the conduct and declaration of the parties after the illicit intercourse commenced, and was known, between Jane, the reputed wife of the decedent, and R. T. Dunn. This illicit intercourse estranged the parties towards each other. After this, decedent did not like to admit that she was his lawful wife, and did not desire to be responsible for her debts, or anything else growing out of the marriage relation. He undoubtedly hated her, and desired to repudiate her, for this want of fidelity towards him, the first which the proof shows. Dunn had, by his arts as a seducer, won her affections; and in proportion as he had enamored her, and drawn all her affections from A. H. Taylor, in this proportion she hated him, and did not like to admit that she had broken her marriage vow. I do not believe there was a statutory marriage between the parties; and it is possible that they did not, when this changed relation between them occurred, believe that anything short of a statutory and formal marriage, solemnized by a minister or a civil officer, was a legal marriage, although a common-law marriage had existed between them; and hence they made the declaration that they had not been married.

But it is insisted on the part of complainants that the bringing of the suit in the name of Jane Hoskins, and the pleadings, verdict, and judgment in the circuit court of Alcorn county, are conclusive that these parties were never married. The bringing of the suit in the name of Jane Hoskins was the only way in which it could have been brought, and especially so under the changed relations which the parties had assumed towards each other; and while it is a circumstance to be considered, tending to show that a marriage had not taken place between the parties, the history of the lawsuit, as shown by the transcript, verdict, and judgment, falls far short of establishing that A. H. Taylor and Jane Hoskins were never married. Taking the whole proof together, if the case were on final hearing, on proof regularly taken, I would hesitate long in pronouncing that the proof as now presented, if regularly taken, establishes, or does not establish, a valid marriage between these parties; and this doubt is much greater when on *ex parte* affidavits mostly written by the parties or their counsel without cross-examination. But, as the defendant can suffer no great harm by holding for the present that complainants have established a *prima facie* right to the estate in litigation, and as a mistake against them might work an injury to complainants, I will, for the purpose of the motion, hold that they have a *prima facie* right to the property in litigation.

This brings us to the consideration of the validity of the deeds of conveyance exhibited with the answer of John W. Taylor. There is a good deal of doubt, under the proof, as to whether or not the deed of 1871 was ever delivered so as to vest the title in defendant. It is to my mind very clear that he did not intend that it should be known that such a deed had been made unless a controversy respecting a tax-title, and the plea of the statute of limitations, should arise; and I must hold it very doubtful as to the validity of the conveyance.

But the question as to the validity of the deed of 1889 is much more difficult, and the correct decision of it is of all importance in this case; for, if valid, the question of legitimacy, under the proof, becomes of little importance to either party, as it will dispose of all the valuable interest involved in this litigation. This deed is dated April 26, 1889, was written by the defendant, John W. Taylor, at the dictation of A. H. Taylor, and was on the same day taken by A. H. Taylor, the grantor, to the clerk of the chancery court of Alcorn county, and it was acknowledged by him before said clerk that he had signed and delivered on the day and year mentioned, as his official act and deed, and for the purposes therein mentioned. But it was not then filed for record. A. H. Taylor took the deed away with him. The clerk did not read the deed, and did not know its contents; nor was it known, so far as the proof shows, that such an instrument had been executed to any one save the grantor and the grantee until after the death of the grantor, when it was produced by the grantee, and placed on record. Very shortly after the death of A. H. Taylor the defendant stated to several persons that his father had made a deed conveying all his estate to him. The defendant, in his answer, which is responsive to the bill, states as follows:

"And for further discovery in this behalf, in response to said bill, respondent says he found, without the assistance of any other person, the conveyances referred to, of date April 26, 1889, in his iron safe, where he himself had previously placed the same, after he had written it at the request of said A. H. Taylor, deceased, and after its execution, acknowledgment, and delivery to him by said A. H. Taylor, deceased, for the purposes therein expressed, and that he came into possession of said instrument in no other way, and under no other circumstances."

This answer must be taken as true, unless rebutted and overcome by sufficient evidence; and, while the affidavit of the chancery court, stating that defendant made some inquiry of him, after the death of decedent, as to whether or not decedent had acknowledged a deed of conveyance before him, may raise some doubt on the subject, it is not sufficient, with the other facts stated in the affidavits, to overturn the answer in this particular. While it is true that this conveyance, so far as it purports to be a conveyance by the Tishomingo Savings Institution, states \$9,000 as the consideration for the transfer, I am satisfied it was intended as a deed of gift. It is not shown that any money was paid, or intended to be paid, at a future time; and, as to that part of the conveyance purporting to convey the private estate of the grantor, it was evidently intended as a deed of gift. The rule of law is that deeds of gift

and settlement between the parties, and in no way affecting the rights of others, will be held as executed and delivered on less evidence than such conveyances for value, and which may affect the rights of creditors, and of others than the parties. So that I do not believe the objection to this deed, that it was never delivered, is maintained under the present proof.

It is insisted on the part of complainants that that portion of the conveyance which purports to be a conveyance by the Tishomingo Savings Institution of the assets of that institution is inoperative and void. This institution is a corporate body, an artificial person, entirely created by the act of the legislature and the action of the incorporators; and its powers can only be exercised by the board of trustees provided in the act of incorporation or charter. The stockholders or shareholders, if they have paid their capital stock, are not further liable for the debts or obligations of the corporation. The property and means of the corporation can alone be looked to, to meet the liabilities of the corporation. Hence the corporation cannot divest itself of its property and means only in the ordinary business for which it was created, for the payment of its liabilities, including dividends on its income, or, on final dissolution, to refund to the stockholders the capital stock paid in. In other words, it cannot commit suicide by making any other disposition of its means than is provided in its charter, which would be the result of holding this part of the conveyance valid. But, in addition to this, all other objections out of the way, the conveyance, to be valid, would have to have been made in pursuance to an order or resolution of the board of trustees, and under the corporate seal of the corporation. So that, without further comment, I must hold that this objection is well taken.

The next objection is that it does not purport to be the act and deed of A. H. Taylor as an individual, and does not purport to convey his individual property and estate, and is therefore inoperative and void as a conveyance thereof. At the conclusion of that portion of the conveyance purporting to be a conveyance by the corporation of its property and assets, the second clause is as follows:

"And further, I, A. H. Taylor, president of the Tishomingo Savings Institution, for the consideration of one dollar, do convey and transfer to J. W. Taylor all of my property and possessions whatever, both personal and real, consisting of all my right, title, interest, and stock in the Chattanooga Land, Coal, Iron, and Railway Company, and the Central Land Company of Chattanooga, Tennessee; the Sheffield Land, Iron, and Coal Company, Alabama; and the Tishomingo Savings Institution of Corinth, Mississippi; also, all my notes, mortgages, deeds of trust, and all my real estate, consisting of houses and lands situate and being in the states of Mississippi and New York. Witness my signature, as president of said Tishomingo Savings Institution, this 26th of April, 1889.

TISHOMINGO SAVINGS INSTITUTION.

"A. H. TAYLOR, President."

It must be admitted that this is a most unusual document, which, perhaps, has no parallel. I am, however, satisfied that it was the purpose of the grantor to convey all the personal estate and property mentioned in the last paragraph of the instrument to the defendant, as well

as that mentioned in the first paragraph. I am further satisfied, from all the proof in the cause, that, while A. H. Taylor intended that all of said property and estate not disposed of, and vested in other property and means, remaining at his death, should by the operation of said conveyance pass to John W. Taylor, his son, the reason he did not place the deed on record was that he did not desire that it should be known until his death, or until he should desire to make it known, that he had divested himself of the title to the property and means described in this conveyance, fearing that such knowledge by the public would interfere with his business, and knowing that in the mean time the rights of creditors and all others, except himself and son, the grantee, could not be affected by the conveyance; and that the instrument was intended, as between the grantor and grantee, to convey the property described, and such as might be received in place of it, or its proceeds, to the defendant, and that the defendant should have complete control of it at the death of the grantor, or sooner if he desired; that in this particular it was intended, so far as it affected the rights of others, to be a substitute for a last will and testament.

If the cause were now on final hearing, under the same testimony, it would be a question of uncertainty as to how far it should be decided; and I will not now undertake to decide it the one way or the other. To decide it in favor of the complainants might do the defendant injustice; and, on the other hand, to decide it in favor of the defendant might do injustice to the complainants. And its decision now is not necessary to the disposition of the present motion. So the question is not now decided.

The remaining questions are shall a receiver be appointed; and what portion of the estate and property described in the bill shall be placed in his charge, if one shall be appointed? The question of the appointment of a receiver in any case is left to the sound discretion of the court, and such appointment is only made to preserve the property and assets for the benefit of all parties in interest. Sometimes it is necessary to collect the debts due; sometimes, to continue the business. This is especially so in railroad cases, manufacturing establishments, and other cases in which an immediate cessation of the business would work an injury, such as the completion and gathering of crops; and, in other cases, where real estate is to be leased out, rents collected, and taxes paid. The Tishomingo Savings Institution is not a party to this suit. Consequently the receiver, if one is appointed, will not be entitled to interfere with that corporation, its means, or its management. The other estate and assets described in the bill consist of town lots, lands, capital stock in the corporations mentioned, and debts due decedent's estate or the defendant, as the cause may be finally decided. It is necessary that the real estate be rented out, the rents and other debts collected, and the taxes paid; and it may become to the interests of all parties that portions of the real estate be sold, and that debts be compromised, also that the stocks, or some part of them, be sold, and other changes made, which cannot well be done, without sacrifice, only by the approv-

al of the court. For these reasons, more than any others, I am of opinion that it is best that a receiver be appointed to manage the estate and assets under the order of the court, which necessity exists regardless of the solvency of the defendant. But as the defendant is admitted to be competent to manage the estate, and as nothing is shown why he should not be appointed, a decree will be entered, appointing him as such receiver, upon his entering into bond, with two or more sureties, in the penal sum of \$25,000, payable to the United States, for the use of whosoever may be entitled to the same, and conditioned for the faithful discharge of his duties as such receiver, as directed by the orders and decrees of the court. Said bond and sureties to be approved by a judge of the court, or, in the absence of a judge, by the clerk of the court.

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WALLACE v. GODFREY *et al.*

(*Circuit Court, N. D. Mississippi, W. D. June, 1890.*)

**MARRIAGE BETWEEN SLAVES—CHILDREN ENTITLED TO INHERIT.**

Act Tenn. May 26, 1866, providing that "all free persons of color who were living together as husband and wife in this state, while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired, or that may hereafter be acquired, by said parents, to as full an extent as the children of white citizens are now entitled by the existing laws of this state," makes legitimate and capable of inheriting the child of slave parents, whose marriage was void under the restrictions growing out of the institution of slavery, though one of the parents may have died during slavery.

In Equity. On demurrer.

*D. C. Standifer, J. T. Lowe, and W. S. Chapman*, for complainant.

*F. A. Montgomery, Jr., St. John Waddell, Sullivan & Whitfield, and M. A. Montgomery*, for respondents.

HILL, J. The questions now presented for decision arise upon the demurrer of Edward Godfrey, R. C. Kyle, James Tyson, and W. J. Kyle, defendants in this cause, to complainant's bill. The bill, in substance, states that, in the year 1851, Sam Stone and Cynthia Ruffin, with the consent of their master, they both then being slaves, were, in the state of Tennessee, lawfully married; that in the year 1852 the complainant, Candis Wallace, was, as the fruit of said marriage, born, being the legitimate child of said Sam Stone and Cynthia Ruffin, as far as the same could be under the laws of the state of Tennessee, where her parents then lived, and where she was born; that some months after her birth her mother died; that her father, said Sam Stone, ever afterwards, and up to his death, recognized and treated her as his lawful child, as much so as could be done under his condition as a slave, and under the laws of said state; that complainant and her father remained slaves until emancipated by the thirteenth amendment to the constitution of the United States, and continued to reside in said state as citizens thereof until some time



in the year 1867 or 1868, when her father removed to the state of Mississippi, complainant remaining a citizen of Tennessee, where she still resides, and is the wife of—— Wallace; that on the 26th day of May, 1866, and while complainant and her father were citizens of Tennessee, the legislature of said state passed an act in the following words: "All free persons of color, who were living together as husband and wife in this state while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired, or that may hereafter be acquired, by said parents, to as full an extent as the children of white citizens are now entitled, by the existing laws of this state," (Laws 1865-66, c. 40, § 5;) that, some time after her father removed to Mississippi, he married another woman, by whom he had two children, George and Martha; that some time during the year 1880 her father died intestate in Tunica county, in the state of Mississippi, possessed and the owner in fee of the W.  $\frac{1}{2}$  of section 15, in township 6, and range 11 W., now worth \$7,500; that her father, the said Sam Stone, left surviving him, as his heirs at law, his three children, the complainant, and said George Stone, and said Martha Stone, the latter having been married to Henry Clay; that her brother, George Stone, and Martha Clay have both since departed this life; that George Stone left neither wife nor child; that Martha Clay left as her heir at law her husband, Henry Clay, and her two minor children, Ida Clay and Davis Clay; that complainant is informed that Edward Godfrey, Jim Tyson, R. C. Kyle, and W. J. Kyle, defendants, claim some title to said lands, or some part of them. The bill prays that the defendants answer the allegations in the bill; that commissioners be appointed to partition the said lands; and that complainant have, by a decree of this court, her interest in said land set off to her. The bill charges that the complainant is the heir at law of her father, Sam Stone; that as such she is entitled to one-third in value of the lands described in the bill, and prays that the same be set off to her as aforesaid, and that, if this cannot be done without impairing its value, the land be sold, and, after the payment of the costs and expenses, the one-third thereof be paid over to her. The demurrers aver, in substance, that the bill on its face shows that complainant was born of slave parents, who were never legally married; that she is therefore an illegitimate child, and incapable of inheriting any part of the land described in the bill; that she is barred by the statute of limitations; that the bill does not set out the interests of the demurrants in the land described in the bill.

The question thus raised, and which has been ably argued by the learned counsel on all sides, is of first impression in this court, and, in some respects, in any other court to which I have been referred. The validity of the marriage between the complainant's parents, and the legitimacy of complainant as their child, must depend upon the statutes of the state of Tennessee, where the marriage took place, and where the parties resided when the act of May 26, 1866, was passed and became a law as construed by the supreme court of that state, and upon the statutes of this state on the subject of descent of real estate of persons dying

intestate. The law of the states regulating the validity of marriage, and the legitimacy of children born of the marriage, is governed by the laws of the state where the marriage takes place and the children are born, and the law of descent by the statutes of the state in which the land is situated. This is the rule in all the states, when not against the public policy of the state.

I have been referred to but two decisions made by the supreme court of Tennessee in reference to the subject of marriage between slaves while they were such, and as to the effect of the act of 1866. The first is the case of *McReynolds v. State*, 5 Cold. 18. This was a case in which the defendant was indicted for the crime of bigamy. The defendant while a slave married a woman who was also a slave at the time. They lived together as husband and wife until after the emancipation act, when he abandoned his wife, and married another colored woman. For this marriage he was indicted. It was held by the court in that case that while a slave he was incapable of making a valid contract, and that the marriage was void, and that it was his privilege to treat it as a nullity as soon as he was capable of making a valid contract; yet, if he continued to live with the woman he had married when a slave, after emancipation, it was a ratification of the marriage. A mutual recognition of each other, after the emancipation, as husband and wife, completes the act of matrimony between those who had been married according to the custom of marriage between slaves during the time of slavery. Under this decision, the mother of the complainant having died before the emancipation, the legitimacy as the heir at law of her father could not be maintained.

But this question came before the supreme court again in the case of *Andrews v. Page*, 3 Heisk. 653. The facts in that case were as follows: On the 3d day of December, 1857, (the statement in the report by mistake puts it 1867,) Henry Page, a free man of color, bought of the complainant three slaves, said to be his wife and two children, for the sum of \$3,200, and took a bill of sale from the complainant, the vendor. Henry paid part of the purchase money, and was to pay the residue in one, two, and three years; and having absconded privately, and left the country to parts unknown, as the bill alleged, an attachment in chancery was issued and levied upon the real estate of Page, to recover the unpaid purchase money. The bill was filed in January, 1861. Henry Page died in October, 1864. No further steps had been taken in the cause until February, 1866, when a decree was rendered in favor of the complainant for the balance due in August, 1866, at which time Dilly Page, the widow of Henry, and his children, filed a petition to reopen the case, which was granted. The widow set up her claim to dower in the lands, and the children set up their claims, as heirs at law, all of which claims were resisted by the complainant. The court examined the case with great care, and Justice NELSON delivered an elaborate opinion, in which it was held that the general doctrine held in the slave states, that the municipal law did not hold as valid marriages between slaves, had not prevailed in the state of Tennessee, and in that particular overruled the case of *McReynolds v. State*. The court further held that the power to

validate marriages and legitimate children by the general laws existed in the legislature of the state, and the act of May 26, 1866, legitimating marriages of slaves, was valid, and the children of slave marriages were capable of inheriting by the act of 1866; that the purchase by Henry of his wife gave her an inchoate right of freedom, only requiring the assent of the state to complete it, which her emancipation effected, and that it related back to the time this inchoate right was acquired; that Dilly was entitled to dower in the lands, and that, after the payment of the purchase money due the complainant, the children, as the heirs at law of their father, Henry Page, were entitled to the remainder. The opinion in this case states that "the act of 1866, having been passed to ratify marriages, good during the institution of slavery by the prevailing usage of this state, and to create a right of inheritance conformable to such usage, and the changed condition of the slave, was in furtherance of good morals, and of the best interests of the state, and, where no other rights have intervened, was eminently constitutional and proper."

I understand this decision of the supreme court of Tennessee, and the last one on the subject, to hold: (1) That marriages between slaves in Tennessee, which would have been valid under the common law but for the restrictions growing out of the institution of slavery, were valid marriages, as far as the condition of the parties as slaves would permit, and that the children born of such marriages were not bastards, but legitimate, and capable of inheriting the property of their parents, as far as that could be done under the law. (2) That the purpose of the act of 1866 and its legal effect was to give to such marriages full effect so far as might be without interfering with vested rights; and to give to the children, born of such marriages, while slaves, all the inheritable rights to which they would have been entitled had their parents been legally married white persons. Henry Page died in 1864, before the act of 1866 was passed, though their master was their father, and a portion of them must have been born while Andrews was their owner. Notwithstanding this, they were declared, under the provisions of the act of 1866, to be the heirs at law of their father, and entitled to an inheritance in his estate. The legislature, at the time this act of 1866 was passed, passed another act, directing that all administrators and other persons having money in their hands, to which children of parents married when slaves, and the children born in slavery, aside from slavery, would have been entitled, shall pay the same over to such children; which shows the intention of the legislature to have been to place such marriages and children in the position of lawfully married persons, and their children as born in lawful wedlock, and entitled to inherit the estate of their parents. Under this construction of the act of 1866, and its effect, I am of opinion that as to slave parents, when one of them died during slavery, the meaning of the act is that such parents shall be held as having been lawfully married, as husband and wife, and their children born of such marriages their legitimate children, and entitled to an inheritance of their parents' estate, when they may have died intestate.

Applying these rules to the case now under consideration, I am brought to the conclusion that the complainant, Candis Wallace, must be held as having been born in wedlock, as the child of her father and mother, and entitled to inherit an undivided portion of the lands of which her father died seised and possessed, with his other lawful heirs. The statute of this state (section 1271, Code 1880) provides that when any person shall die seised of any estate of inheritance in lands, tenements, and hereditaments, not devised, the same shall descend to his or her children, and their descendants, in equal parts, the children of the deceased child or grandchild to take the share of the deceased parent in equal parts among them; and there shall be no distinction between the kindred of the whole and half blood, except that the kindred of the whole blood, in equal degree, shall be preferred to the kindred of the half blood in the same degree. In this case the complainant and her half brother and sister were all the children of their father, Sam Stone, so that there is no distinction between them or their descendants, to whom their rights have descended. According to the statements of the bill, upon the death of the father each of his three children was entitled to take a one-third interest in the land. Upon the death of the brother, his interest descended to his sister, which gave her a two-thirds interest, and upon her death this interest descended to her husband and her two children in equal parts. The bill alleges that defendants the said Edward Godfrey, R. C. Kyle, W. J. Kyle, and Jim Tyson claim some interest in the land descended to George Stone, but in what way is not stated. It is urged upon the part of these last defendants that this court, in this proceeding, has no jurisdiction to adjudicate and pass upon their rights. This depends upon the character of the title under which they claim. If they claim as heirs at law of either of the parties, or as grantees of either of them, then the court, under section 2576 of the Code of 1880, has jurisdiction to hear and determine the question of title, and any other question necessary to be determined to settle all the rights and equities between the parties in reference to the lands of which partition or sale is prayed for in the bill; but, if the title is claimed under an adverse source to the complainant's title, and the other parties derive or claim title from the same source with the complainant, then the court has not jurisdiction to determine the validity of such adverse title. But, as the character of the source of title claimed by these defendants does not appear in the bill, the demurrer will be overruled, with leave to set up the same defense in the answer, and 60 days will be allowed them in which to answer as of the present term.

MADISON COUNTY v. PRIESTLY, Treasurer, *et al.*

(Circuit Court, S. D. Mississippi. May 15, 1890.)

## CONSTITUTIONAL LAW—RAILROAD AID BONDS.

Under Const. Miss. art. 13, § 14, which declares that the legislature shall not authorize any county, city, or town to aid any corporation, unless two-thirds of the qualified voters of such municipality shall assent thereto at a special election, railroad aid bonds are not invalidated in the hands of innocent purchasers by the fact that less than such majority voted for them, where more than two-thirds of the votes cast were in favor of issuing the bonds. Following *Carroll Co. v. Smith*, 4 Sup. Ct. Rep. 539.

In Equity. On demurrer to bill.

*E. E. Baldwin*, for complainant.

*Walter Troller*, for the bank.

*E. Mayer*, for Mr. Smith.

HILL, J. This bill was filed by complainant against defendants in the chancery court of Madison county, and removed to this court by the defendants Mrs. Condet Smith and the Bank of Commerce, both non-residents of this state. The bill seeks to enjoin Priestly, the treasurer, from paying the interest and bonds, described in the bill heretofore issued by the supervisors of Madison county to the Vicksburg, Canton & Yazoo City Railroad Company, and purchased and now held by said defendants and others. The questions to be decided arise upon the demurrer of these defendants to complainant's bill.

The allegations stated in the bill as a defense to the payment of said bonds and interest are that the board of supervisors had no power to issue the same; that they purport to have been issued in payment for capital stock subscribed by said board in said corporation; and that, to have authorized said board to subscribe for said stock, and to issue said bonds, with interest coupons attached, it was necessary that the assent of two-thirds of the qualified voters of said county should have been obtained, such number being ascertained by a vote had thereon at a general or special election held for said purpose. The bill alleges that there were 6,275 registered voters in said county, and that, at the time said subscription was ordered to be made, the board of supervisors entered the order declaring that 1,067 votes were two-thirds of the votes of the qualified voters in said county, and that number of votes were cast at the election held for the purpose stated, which, the bill avers, was then known to be untrue. The bill admits the authority for holding said election, and that it was held; that there were 1,067 votes cast in favor of said subscription, and 77 votes against the subscription; that the order of the board was made, declaring that the election had been held in pursuance of the act of incorporation of said railroad company, and that more than two-thirds of the qualified voters of said county had voted in favor of said subscription, which order was made on the 27th day of April, 1872, directing the issuance and delivery of the bonds, with interest coupons attached, in payment for the stock which the president was

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directed to subscribe; that said bonds, with interest coupons attached, were before the 11th day of September, 1873, issued and delivered to S. S. Calhoun as trustee for said board of supervisors, and by him delivered to the president of said railroad company on the 11th day of September, 1873, and on other days from that date to the 24th day of September, 1874, and being the bonds and coupons the payment of which is sought to be enjoined in this suit. There are other allegations made in the bill, but they need not be stated to an understanding of the questions raised by the demurrer. The bill does not deny that these defendants are innocent holders for value, without notice.

The decision made by the supreme court of this state in the case of *Hawkins v. Carroll Co.*, 50 Miss. 735, is mainly relied upon to sustain the validity of the bonds and coupons involved in this suit. This decision was rendered at the October term, 1874, but was not delivered until March, 1875, and not until those bonds were issued, delivered, and put in circulation. The bill in the case of *Hawkins v. Carroll Co.* was to enjoin the board of supervisors or trustees from putting the bonds in circulation; and while the court construed the provision of the constitution of the state prohibiting counties, cities, and towns from subscribing for capital stock, and issuing bonds in payment in railroad corporations, unless assented to by two-thirds of the registered voters therein, the question as to whether or not this construction of the constitution would affect the validity of bonds issued before that time, and held by innocent holders for value, without notice, was not decided in that case, but was reserved. So that decision is not binding in this case. But, if it were otherwise, the decision of the supreme court of the United States of *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. Rep. 539, subsequently decided, settles that question in favor of the validity of the bonds issued before the decision of *Hawkins v. Carroll Co.*, and the same class of bonds enjoined in *Hawkins v. Carroll Co.*, and which, in my opinion, is decisive of this case. The questions now presented were before the court upon the validity of the coupons upon the same bonds in the case of *Smith v. Madison Co.*, (decided at June term, 1877,)<sup>1</sup> when the bonds and coupons were held valid, and upon which the interest has been paid up to the filing of this bill. This decision has been fully sustained by the supreme court of this state as to these bonds issued, and in the hands of innocent holders, before the decision of *Hawkins v. Carroll Co.*, in the case of *Cutler v. Board*, 56 Miss. 115. If any further authority were now wanting to maintain the validity of the bonds and coupons in this case, this decision would be conclusive; and I take it that this bill would not have been filed but for the decision of the supreme court of the United States of *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654. In that case the bonds were issued in payment of county warrants. The power to do so was limited by the constitution of the state of Colorado to a certain percentage on the assessed value of the taxable property in the county. The court held that the taxable

<sup>1</sup> Before the publication of the Federal Reporter began.

value of the taxable property in the county could only be ascertained by reference to the records of the county containing it, and that it was the duty of the purchaser to look to the records, and, if he failed to do so, the recitals in the bonds that they were issued in conformity to the statute did not estop the county from showing that the bonds were issued contrary to the inhibition contained in the constitution, of which provision in the constitution the purchaser was required to take notice. The constitution of this state does not refer to any public record to ascertain the number of voters in the county; and, indeed, there is no record showing conclusively this fact. In the case of *Hawkins v. Carroll Co.*, the court holds that the registration books are competent evidence of the number of qualified voters in the county, but not conclusive, and that it is competent to show deaths, removals, and disqualifications, etc. So that the rule laid down by the court in the *Case of Lake County*, relied upon by counsel, does not apply to this case. If other reference were necessary to support the validity of the bonds in this suit, it would be found in the opinion of the supreme court of the United States in the case of *Township of Bernards v. Morrison*, 10 Sup. Ct. Rep. 333, (decided at the present term of that court,—reported in the Supreme Court Reporter.)

The cases of *Bank of Commerce*, and that of *Mrs. Condet Smith* are submitted together on demurrer, and are governed by the same rules. The bonds in both cases were issued before the decision of *Hawkins v. Carroll Co.*, 50 Miss. 735. The holders in both cases are *bona fide* purchasers for value, without notice, and entitled to recover the amount of the interest coupons held by them, and will be entitled to recover the amount of the bonds when due. The result is that the demurrer to the bill in each case must be sustained, the injunction dissolved, and the bill dismissed, at complainant's costs.

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AMERICAN LOAN & TRUST CO. v. ST. LOUIS & CHICAGO RY. CO. *et al.*

(Circuit Court, S. D. Illinois. June 10, 1890.)

RAILROAD BONDS—BONA FIDE HOLDER.

Where overdue railroad mortgage bonds, which belong to the railroad company, are bought at 40 cents on the dollar from the vice-president of the company after suit to foreclose has been begun, and a receiver has taken possession of the mortgaged property, the purchasers of such bonds are not *bona fide* holders where inquiry on their part would have shown that the vice-president had no authority to sell the bonds.

In Equity.

W. M. Safford and C. H. Aldrich, for defendants.

GRESHAM, J., (*orally*.) The bill was filed to foreclose the first mortgage, on January 5, 1889; and a receiver was appointed two days later, who

went into possession of the property. The bill to foreclose the consolidated mortgage was filed on January 7, 1889, and the two suits were afterwards consolidated. The real controversy before the master appears to have been over the bonds numbered from 1,401 to 1,600, inclusive. The evidence in the record clearly shows that when the two suits were commenced, and later, these bonds were all in the hands of F. C. Hollins & Co., fiscal agents of the consolidated company. F. C. Hollins, of Hollins & Co., was vice-president and director of the consolidated company, and a member of the executive committee. Indeed, he and D. L. Wing, who was the president, absolutely controlled the action of the corporation. One hundred and twenty-one of the bonds, numbered above 1,400, were presented by Mrs. Celena Hollins, wife of F. C. Hollins, and 14 of them were presented by F. C. Hollins & Co. On the evidence before the master, he was justified in treating F. C. Hollins as the holder of these 135 bonds. Howard Taylor claims to have bought 5 of the remaining 65 bonds from F. C. Hollins, Zabriskie claims to have bought 10 of them from F. C. Hollins, W. B. Wadsworth claims to have bought 19 of them from F. C. Hollins, William P. Dixon claims to have bought 10 of them from F. C. Hollins, L. Jaques claims to have bought 10 of them from F. C. Hollins, and the holders of the remaining 11 claim to have bought them from others who had purchased from Hollins. Not more than 40 cents on the dollar was paid for any of the bonds, and some of them were purchased from Hollins at less than 30 cents on the dollar. As already stated, under a clause in the mortgage the bonds had all become due before suit was brought, at which time these 200 bonds belonged to the railway company; and some of the present holders purchased even after the decree foreclosing the first mortgage had been entered. It is plain that Hollins had no authority to dispose of these bonds; and, even if bonds thus secured by mortgage may be bought as commercial paper after suit to foreclose has been commenced, and after the court has taken possession of the mortgaged property by a receiver, the facts in the record were sufficient to put purchasers upon inquiry; and inquiry would have revealed the fact that Hollins had no authority to dispose of the bonds. The holders of the 200 bonds are not entitled to share in the distribution of the fund arising from the sale of the mortgaged property, and a decree will be entered upon that basis.



STEVES *et al.* v. CARSON *et al.*

(Circuit Court, D. Colorado. July 1, 1890.)

**MINES AND MINING—PATENT—ADVERSE SUITS—LIMITATIONS.**

Rev. St. U. S. § 2326, provides that a suit upon an adverse claim to a mining location must be begun within 30 days after the claim is filed. Gen. St. Colo. 1883, p. 673, § 18, provides that, in case of failure of a suit from certain causes, the plaintiff may renew his suit at any time within one year. *Held*, that the fact that an adverse suit had failed for a reason within the purview of said state statute did not authorize the plaintiff to begin another suit after the expiration of such 30 days, since said United States statute could not be affected by state legislation.

At Law. On demurrer to complaint.

*Wilson & Stimson*, for plaintiffs.

*Porter Plumb*, for defendants.

Before CALDWELL and HALLETT, JJ.

HALLETT, J. March 6, 1889, defendants applied in the land-office at Glenwood Springs to enter the Blazing Star Lode claim in Pitkin county, to a portion of which plaintiffs made adverse claim May 10, 1889, under a location called the "Jay Gould Lode." This suit was brought in support of the adverse claim, April 29, 1890, nearly one year after filing the adverse claim in the land-office. The act of congress (Rev. St. § 2326) plainly requires the adverse claimant, "within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession," and this suit was not brought within that time. Plaintiffs aver, by way of excuse for the delay, that a suit in all respects similar to this was brought by them, in due time, in the district court of Pitkin county, which was afterwards dismissed by the court "for a matter of form," in that no summons was issued within one month after filing the complaint; and plaintiffs rely on a section of the statute of limitations of the state (section 18, p. 673, Gen. St. 1883) which provides that, in case of the failure of a suit from insufficient service, unavoidable accident, and the like, plaintiffs may renew their suit "at any time within one year after the abatement or other determination of the original suit."

This proposal to ingraft a statute of the state upon an act of congress does not appear to be within any recognized principle of construction. It is true that state statutes of limitation are often enforced in federal courts, when, like other laws of the state, they enter into the contract, and become binding on the parties. But they have no application in a proceeding for disposing of public land, of which congress has exclusive jurisdiction. In respect to the manner of making locations, it is provided in the act of congress that it may be supplemented by local law, and the rules and customs of miners. But a proceeding in the land-office, and, upon a controversy in that office, suits in court to settle the title are to be begun and conducted as declared in the act of congress, which must be regarded as full and complete on that subject. There were obvious reasons for requiring that the application for title, when made in the

land-office, should be carried to a speedy determination. In the case of agricultural lands, controversies as to the ownership were settled in the land-office. But this practice was always unsatisfactory; and so, in the act now under consideration, it was provided that, in case of adverse claimants to the same tract of mineral land, the parties shall go into a court of competent jurisdiction, where, from the orderly course of established justice, better results may be expected. Promptness and diligence in such matters is of the greatest importance to all concerned; and therefore it was provided that the adverse claimant in the land-office must begin suit to settle the title within 30 days from the time of filing his adverse claim, and he must prosecute the suit with reasonable diligence. There is no exception as to the claimant who may be beyond seas, or under disability of any kind, or who may fail to act from inadvertence or other cause. The suit must be prosecuted with reasonable diligence. The act says: "And a failure so to do shall be a waiver of his adverse claim." This act admits of no addition or modification from the statute of the state; and where, as in this instance, the claimant commences suit in due time, and is cast in his suit, he is without remedy, except such as may be obtained in the same suit on appeal or writ of error. The demurrer will be sustained, and judgment of dismissal will be entered.

CALDWELL, J., concurs.

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*In re WAHL.*

(District Court, D. Minnesota. May 12, 1890.)

1. **POST-OFFICE—SENDING OBSCENE MATTER THROUGH THE MAILS—PRIVATE LETTERS.**

Rev. St. U. S. § 3893, as amended by act of September 26, 1888, making it an offense to deposit in the post-office, for mailing or delivery, any "obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, \* \* \* of an indecent character, \* \* \* whether sealed as first-class matter or not," includes a private letter, inclosed in a sealed envelope, and containing such prohibited matter.

2. **SAME—SUFFICIENCY OF COMPLAINT.**

A complaint against a person for violation of such section is sufficient if it merely charges defendant with having deposited in the mail on obscene, lewd, and lascivious letter, without setting out the language used in the letter.

3. **SAME—EXAMINATION BEFORE COMMISSIONER.**

Where the examination of a person charged with the violation of a United States statute is transferred by the commissioner before whom the warrant is returnable to another commissioner in the same district, the latter has jurisdiction to take the examination and commit defendant, if the charge is sustained.

Petition for Writ of *Habeas Corpus*.

*Halvor Steenerson*, for petitioner.

*Eugene G. Hay*, U. S. Dist. Atty., for respondent.

NELSON, J. A petition signed by Barney A. Wahl was presented to me on May 8, 1890. The petitioner represented and complained that he,

the said Wahll, is unjustly and unlawfully detained and imprisoned, and restrained of his liberty, by William M. Campbell, marshal of the United States for the district of Minnesota, in the county jail at Winona, and that the cause of the petitioner's confinement, restraint, and imprisonment is as follows: That on the 4th day of April, 1890, Eugene G. Hay, acting as United States district attorney for said district, made a complaint before Ambrose Tighe, a commissioner of the circuit court of the United States in said district, wherein and whereby he, the said Eugene G. Hay, attempted to charge the petitioner with having committed an offense against section 3893 of the Revised Statutes of the United States, and that the commissioner issued a warrant directed to the said Campbell, as marshal, commanding him to forthwith arrest the petitioner, and bring him before Frank Ives, a commissioner of the circuit court aforesaid, residing in Crookston, in said district, there to be dealt with according to law; that the petitioner was arrested and brought before Commissioner Ives on April 22, 1890, and, upon motion of petitioner's counsel and affidavit, the examination was transferred to Commissioner George, in said district, who proceeded to hear the case, after overruling a motion to discharge on the ground that no offense was charged in the complaint and warrant, and he committed the petitioner. The warrant of commitment is as follows:

"U. S. OF AMERICA, DISTRICT OF MINNESOTA—ss.:

*"The President of the United States of America to the Marshal of the District of Minnesota and to the Keeper of the Jail of Winona, in the State of Minnesota, Greeting:*

"Whereas, Barney A. Wahll has been arrested upon the oath of Eugene G. Hay, United States district attorney, for having, on or about the 19th day of April, 1889, in said district, in violation of sec. 3893 of the Revised Statutes of the United States, unlawfully, wrongfully, and knowingly deposited, and caused to be deposited, a certain letter in a post-office of the United States, to-wit, the post-office of King, in Polk county, state of Minnesota, in said district, and within the jurisdiction of this court, for mailing and delivery to one Miss Eva Johnson, of Ovetia P. O., in said Polk county, Minnesota, which said letter was written on four several sheets or pieces of paper, on each of which were illuminated comical pictures commonly known as and called 'comic valentines,' and then and there containing and consisting of indecent, obscene, lewd, and lascivious delineations, epithets, terms, words, and writing, and which said letter was then and there a lewd, obscene, and lascivious letter, and was inclosed in a sealed envelope, and containing the following superscription: 'Miss Eva Johnson, Ovetia, Polk Co., Minn.:' and the following postmark: 'King Minn Apl 19/90;' and, after an examination being this day had by me, it appearing to me that said offense had been committed, and probable cause being shown to believe said Barney A. Wahll committed said offense, as charged, I have directed that said Barney A. Wahll be held to bail, in the sum of \$500, to appear at the first day of the next term of the district court of the United States for the district of Minnesota, at Winona, and he having failed to give the required bail: Now, these are, therefore, in the name and by the authority aforesaid, to command you, the said marshal, to commit the said Barney A. Wahll to the custody of the keeper of said jail of Winona, Minn., and to leave with said jailer a certified copy of this writ, and to command you, the keeper of said jail of said county, to receive the said Barney A. Wahll, prisoner of the

U. S. of America, into your custody in said jail, and him there safely to keep until he be discharged by due course of law.

"In witness whereof, I have hereunto set my hand and seal at my office in said district this 1st day of May, A. D. 1890.

"EDWARD GEORGE. [Seal.]

"Commissioner of the Circuit Court of the U. S. for the District of Minnesota."

The petitioner alleges that his detention and imprisonment is by virtue of the complaint, warrant, and commitment only, and that the same are wholly void, for the reason that they, and each of them, fail to contain or allege facts sufficient to constitute an offense against the laws of the United States, and that said commissioner, George, had no jurisdiction to issue the warrant of commitment, and no evidence was produced in support of said pretended charge. A writ of *habeas corpus* is prayed for, and a writ of *certiorari* to bring the evidence taken by the commissioner before the court. The petition being sworn to, a writ of *habeas corpus*, returnable forthwith, was issued and delivered to Marshal Campbell, who made a return certifying that he held the petitioner, Wahll, in custody by virtue of the warrant of commitment of Commissioner George, which is attached, and made part of the return, being the same as set forth, and accompanying the petition; and the body of the petitioner is also produced in court. The order for a writ of *certiorari* is waived by petitioner's counsel, and a motion to discharge is made upon the petition and return with the warrant of commitment.

It is urged (1) that the commissioner had no jurisdiction; (2) that the facts in the complaint are too indefinite to inform Wahll of the charge against him; (3) that no offense is charged.

It is sufficient to say, in reference to the first reason urged, that Commissioner George, who heard the case, was a duly-appointed commissioner of the circuit court, and fully empowered to examine the charge made against Wahll, and commit him, if in his opinion the charge was sustained. The transfer from Commissioner Ives, under the circumstances, was proper, and is the usual mode of procedure where, for any reason, one commissioner may not be able to sit as an examining magistrate. Besides, the transfer was made at the request of Wahll's counsel, and on his behalf.

There is little force in the second reason presented. The accused was clearly and fairly informed of the charge against him; sufficiently so, at least, to enable him to make his defense, and that is all that can be required. The obscene and lascivious language used in the letter, the law does not require to be set forth *in hæc verba*.

The third reason assigned for the petitioner's discharge is the only one presented about which there might be an honest difference of opinion. The charge is that Wahll, about April 19, 1890, in violation of section 3893 of the United States Revised Statutes, unlawfully, wrongfully, and knowingly deposited, and caused to be deposited, in a post-office of the United States, to-wit, the post-office of King, Polk county, Minn., in said district, and within the jurisdiction of this court, for mailing and deliv-

ery to Miss Eva Johnson, at Ovetia P. O., Polk county, Minn., which said letter was written on several sheets or pieces of paper, on each of which were illuminated comic pictures, commonly called "valentines," containing and consisting of indecent, obscene, and lascivious delineations, epithets, terms, and words, and which said letter was then and there an obscene and lascivious letter, and was inclosed in a sealed envelope, and contained the following superscription: "Miss Eva Johnson, Ovetia, Polk Co., Minn."

On September 26, 1888, section 3893 was amended so as to read as follows:

"Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, or any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of, the same, shall for each and every offense be fined, upon conviction thereof, not more than \$5,000, or imprisoned at hard labor not more than five years, or both, at the discretion of the court. And all offenses committed under the section of which this is amendatory, prior to the approval of this act, may be prosecuted and punished under the same in the same manner, and with the same effect, as if this act had not been passed: provided, that nothing in this act shall authorize any person to open any letter or sealed matter of the first class not addressed to himself."

It is urged that knowingly depositing in a post-office, for mailing and delivery, a private letter in a sealed envelope, although containing obscene and lascivious and indecent messages and epithets, is not an offense, or in violation of section 3893, even as amended September 26, 1888; and the reason urged is that, no matter how grossly obscene may be the character of the letter, its form protects it, and, being sealed, it is mail-matter entitled to be transported, and cannot be excluded from the mail. It must be admitted that congress has the power to prescribe regulations as to what shall constitute mail matter, but it is urged that the sanctity thrown around the private correspondence of the citizen by law, and the difficulty of enforcing a regulation excluding from the mail an obscene sealed letter, has in the past deterred congress from including sealed letters within the express terms of section 3893; and the present amendment, which specifies and excludes obscene letters from the mails, must be limited to unsealed letters. The legislation on this subject is first found in the act of June 8, 1872, which provides—

"That no obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character, or any letter upon the envelope of which, or

postal card upon which, scurrilous epithets may have been written or printed.  
\* \* \* shall be carried in the mail."

The statute, amended from time to time, became section 3893, Rev. St., and in 1876 was again amended by adding the word "writing" before "print," and substituted this provision: "And every letter, upon the envelope of which, or postal-card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed," is declared to be non-mailable matter. The decisions upon this section, as it stood in 1876, were conflicting. Some courts vigorously insisted that the word "writing" was so comprehensive as to include a private, sealed letter. Others asserted that, by the amendment of the word "writing," congress intended that it should be a publication, and be so limited, and that sending an obscene sealed letter through the mail to another person, no one but the person mailing the letter, and the person to whom it was addressed, knowing anything about it, was not a "publication," within the meaning of the statute; and then, again, the statute itself, in speaking of letters, excluded only those upon the envelope of which indecent and obscene epithets, etc., were written or printed. Which view of the statute, as we find it after the amendment inserting the word "writing," is correct, is immaterial now. In my opinion, since the amendment of September 26, 1888, there can be no reasonable doubt that congress clearly expressed its intention to exclude obscene letters, whether private and sealed or unsealed. It in terms included an obscene letter, without any limitation, and struck out of section 3893 the former clause in reference to letters upon the envelopes of which obscene epithets, etc., were written or printed. It provided for guarding the sanctity and security of private correspondence by a provision that no sealed letter should be opened by any person except the one to whom addressed, but in no doubtful language declares an obscene letter non-mailable.

It is urged that the rule of *noscitur a sociis* would still limit the word "letters" to an unsealed publication. While ordinarily this rule of interpretation is recognized, still, when the intention of congress is apparent from the history of the legislation on the subject, and its clearly-expressed language, courts will not enforce the rule.

I think no one can follow the legislation from 1872 up to September 26, 1888, without being convinced that congress intended finally to purge the United States mail, and as far as possible prevent it from becoming a vehicle for the transmission of obscene, indecent, and lascivious messages. The writ of *habeas corpus* is dismissed, and the prisoner remanded to the marshal.

*In re ESMOND.*

(District Court, D. South Dakota. June, 1890.)

## 1. CRIMINAL LAW—TERRITORIAL COURTS—CUMULATIVE SENTENCES.

Rev. St. Idaho, § 7237, providing that cumulative sentences may be imposed on a person convicted of two or more crimes, applies to offenses against the United States tried in the territorial courts.

## 2. SAME.

Cumulative sentences are valid, if they are definite and certain.

Petition for Writ of *Habeas Corpus*.

*Winsor & Kittredge*, for petitioner.

*Wm. B. Sterling*, for the United States.

FOSTER, J. This is an application made by Henry Esmond, a prisoner tried and sentenced in the district court of the territory of Idaho—exercising United States jurisdiction for certain purposes, on four convictions for offenses connected with the robbery of the United States-mail. The prisoner was sentenced to four consecutive terms of imprisonment, of three years each; the judgment of the court providing in each of the sentences after the first that the additional term of three years was “to commence at the expiration of the term of three years to be served by said defendant this day adjudged against him in the case of the United States, criminal number three, against Henry Esmond, or whenever his term of imprisonment after the judgment in said case shall cease and be ended for any reason, except by the death of the said defendant.” There being no United States prison in the territory of Idaho, the said Esmond was confined by order of the attorney general in the United States penitentiary at Sioux Falls, in the territory of Dakota. The sentence was rendered on the 30th day of September, 1886, and the first term expired, after giving credits for good behavior, on the 30th day of May, 1889. The question presented for our decision is whether the said consecutive sentences are legal and valid. It is claimed by the petitioner that the said sentence beyond the first imprisonment is illegal and void because it is indefinite and uncertain, and the court had no power to impose a cumulative sentence. The statute of Idaho contained the following provision:

“When any person is convicted of two or more crimes, before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be.” Rev. St. Idaho, § 7237.

It is contended for the petitioner that this provision does not apply to offenses against the laws of the United States tried in the territorial courts. Touching this question, there are two cases decided by the supreme court to which we will refer. *Reynolds v. U. S.*, 98 U. S. 145, was a prosecution in the territorial courts of Utah for bigamy under the

act of congress. The laws of Utah made a grand jury to consist of 15 persons, and the indictment was found by such a grand jury; whereas, the laws of the United States makes the minimum number of grand jurors 16. The supreme court held that the territorial court was not a United States court, and that the statute of the territory governed its proceedings. The court says:

"They are courts of the territories invested for some purposes with the powers of the courts of the United States. \* \* \* This leaves the territorial courts free to act in obedience to the requirements of the territorial laws in force for the time being."

The territorial legislature of Montana had abolished all distinctions between proceedings at law and in equity in its courts. The only error assigned in the following case was the intermingling of legal and equitable remedies in one form of action. The court say:

"Such an objection would be available in the circuit and district courts of the United States. \* \* \* Whether the territorial courts are subject to the same regulations is the question which is now fairly presented."

After discussing the question at some length, the conclusion is expressed in these words:

"From a review of the entire past legislation of congress on the subject under consideration, our conclusion is that the practice, pleadings, and forms and modes of proceedings of the territorial courts, as well as their respective jurisdiction, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assembly, and to the regulations which might be adopted by the courts themselves." *Hornbuckle v. Toombs*, 18 Wall. 648.

Now, if there is nothing in the organic act of the territory of Idaho impliedly or expressly prohibiting that territory from passing an act concerning cumulative sentences, (and it is not claimed there is,) it may well be held that such legislation is obligatory upon the territorial courts when sitting to hear cases arising under the laws of the United States.

Passing to the general question whether cumulative sentences, in the absence of any statute, are valid, I find quite a conflict of authorities. In *Bloom's Case*, 53 Mich. 597, 19 N. W. Rep. 200, Judge COOLEY discharged the prisoner where there were cumulative sentences. The petitioner had been convicted on two charges of larceny, and sentenced to imprisonment for three months on each, the first commencing January 25th, the second to commence "from and after April 24, 1888, unless," etc. Then follow several contingencies. In this case the judge said:

"The question presented is not without difficulty. \* \* \* But, expressing no opinion upon the general question, we think a sentence to confinement, to take effect in the future, cannot be sustained unless it is certain and definite, and not subject to undefined and uncertain contingencies. The commitment in this case is not of that character."

The same rule was followed and exemplified in *Lamphere's Case*, (Mich.) 27 N. W. Rep. 882. In this case the court follow the *Bloom Case*, but concede that under the common law, in cases of misdemeanor, consecutive sentences were allowed, but deny that the rule applied in cases of



felony. Again, in *Allen's Case*, 11 Ind. 389, the prisoner was discharged where held under cumulative sentences. The court say:

"There being no statute in force providing that one term of imprisonment shall commence at the expiration of another, we are of the opinion that both terms commence and run concurrently. We have been furnished with no authorities upon the question involved."

In support of the legality of cumulative sentences are the following authorities: *Kite v. Com.*, 11 Metc. 581. We quote from the opinion:

"The court are all of opinion that it is no error in a judgment in a criminal case to make one term of imprisonment commence when another terminates. It is as certain as the nature of the case will admit, and there is no other mode in which a party may be sentenced on several convictions."

In *U. S. v. Patterson*, 29 Fed. Rep. 775, the petitioner, Baldwin, was convicted on three indictments, and sentenced to five years upon each indictment. The judgment did not state on which indictment the imprisonment began, and provided further: "Said terms not to run concurrently." Held, that the sentence was too uncertain, and was therefore illegal and void. In this case Justice BRADLEY says:

"Perhaps these terms might have been lawfully made to take effect successively if the order of their succession had been specified, although there is no United States statute authorizing it to be done; but this was not done. \* \* \* As neither of them was made to take effect after the one or the others, they all took effect alike."

*People v. Forbes*, 22 Cal. 136, holds that consecutive sentences are valid; also do *State v. Smith*, 5 Day, 175; *Brown v. Com.*, 4 Rawle, 259; *In re Jackson*, 3 MacArthur, 24; *Johnson v. People*, 83 Ill. 434; *Ex parte Kirby*, (Cal.) 18 Pac. Rep. 655. Bishop, in his work on Criminal Law, states the proposition as well settled that cumulative sentences are legal. Section 953. It would seem that the great weight of authority is in favor of the legality of consecutive sentences. Indeed, there seems to be quite a uniformity of decisions in favor of such judgments, with the exception of the two Michigan and Indiana cases before referred to. We are therefore constrained to hold that the sentence in this case is legal, and the prisoner must be remanded to the warden of the penitentiary.

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## UNITED STATES v. GARDNER.

(Circuit Court, N. D. New York. May 22, 1890.)

### 1. INDICTMENT—DESCRIPTION OF OFFENSE—CONSPIRACY TO COMMIT LARCENY.

An indictment averred that defendant, and S. and H., "together with divers other evil-disposed persons," did conspire to steal certain chattels, "the property of and in the possession of the United States," and that thereafter "the said S., together with the said divers other evil-disposed persons," in execution and furtherance of the said conspiracy, did unlawfully and feloniously steal, etc. Held, that the indictment charged defendant with the conspiracy only, and not with the larceny, and an objection to a conviction for the conspiracy, on the ground that, as it was a misdemeanor only, it was merged in the larceny, which was a felony, could not be sustained.

**2. SAME—AVERMENT OF OVERT ACT.**

In such indictment the averment of the commission of the larceny, which was the object of the conspiracy, sufficiently charges an overt act in furtherance of the conspiracy.

**3. SAME.**

An indictment for conspiracy need not charge the commission of an overt act in furtherance of the conspiracy. It is sufficient if it charges that the conspiracy was to do some criminal act.

**4. SAME—OWNERSHIP—POSSESSION BY COLLECTOR OF CUSTOMS.**

In an indictment for a conspiracy to steal, and stealing property, an allegation that it was "the property of and in the possession of the United States of America," is supported by evidence that the property was in the possession of the collector of customs of the United States, having been seized by him as smuggled merchandise.

Error to District Court.

*Richard Crowley*, for plaintiff in error.

*John E. Smith*, Asst. U. S. Atty.

WALLACE, J. This is a writ of error to the district court to review a judgment by which Gardner was convicted of the crime of conspiracy, and sentenced to imprisonment for the term of two years. The indictment avers that Gardner, Stone, and Haines, being persons of evil minds and dispositions, "together with divers other evil-disposed persons, whose names are to the jurors unknown," did conspire to steal certain chattels, "the property of and in the possession of the United States of America;" and that thereafter the said Stone, "together with the said divers other evil-disposed persons," in execution and furtherance of the said conspiracy, did unlawfully and feloniously steal, take, and carry away the chattels previously described. Upon the trial in the court below, after the evidence was all in, the court was moved to rule that Gardner should be acquitted, because (1) upon the face of the indictment it appeared that the offense of conspiracy was merged in the larceny of the chattels, the former being a misdemeanor and the latter a felony; (2) that the indictment did not aver the commission of any overt act in furtherance of the conspiracy; and (3) that the evidence did not show that the chattels described in the indictment were the property of and in the possession of the United States. Upon the exceptions taken to the denial of this motion by the court it is now insisted that the judgment should be reversed.

By the laws of congress the offense of conspiracy is a misdemeanor, and that of larceny is a felony. Supp. Rev. St. U. S. 183. According to the authorities, where the object of a conspiracy is to commit a crime of a higher grade, and the object is accomplished, a prosecution for the conspiracy cannot be maintained, because the lesser offense is merged in the greater. Mr. Wharton states the doctrine thus:

"The technical rule of the old common-law pleaders, that a misdemeanor always sinks into a felony when the two meet, has, in some instances, been recognized in this country, and perhaps may be considered in Massachusetts, New York, and Pennsylvania as the settled law, though with very little substantial reason." Whart. Crim. Law, 671.

Not only is this the rule recognized by the courts of the states mentioned by Wharton, but it is the generally declared doctrine of the adjudications in this country. *U. S. v. McDonald*, 3 Dill. 545; *U. S. v. Mar-*

*tin*, 4 Cliff. 166; *State v. Mayberry*, 48 Me. 238; *Elsey v. State*, 47 Ark. 572, 2 S. W. Rep. 337; *State v. Lewis*, 48 Iowa, 579; *People v. Richard*, 1 Mich. 222; *Wright v. State*, 5 Ind. 528. The reason why a conviction cannot be had for the conspiracy to commit a felony, or for an attempt to commit a felony, when it appears that the felony was actually committed, is that an acquittal for the minor offense would not bar a subsequent indictment for the major, and consequently the accused might be put twice in jeopardy for acts which were all constituent parts of one offense. On the other hand, a conspiracy to commit an offense of the same grade does not merge in the consummated offense; and upon an indictment for the offense which was the object of the conspiracy, the accused can plead a conviction or acquittal upon the indictment for the conspiracy, and the plea would be a good bar.

In the present case there is no occasion to look into the evidence to see whether the larceny proved upon the trial was a larceny in which Gardner was one of the principals. The question made at the trial, and reviewable here, arises exclusively upon the face of the indictment. So far as appears from the indictment, Gardner did not take any part in the larceny. The larceny was committed by Stone, together with the "divers other evil-disposed persons," among whom neither Gardner nor Haines are included by the language of the indictment; and Gardner's only offense was the conspiracy. Upon the averments of the indictment, Gardner could not be convicted of the felony. Even if he were charged as an accessory before the fact, he could not be convicted of the felony. *Math. Crim. Law*, 9; *Norton v. People*, 8 Cow. 137. If he should be indicted again for the same transaction as an accessory to the felony before the fact, a plea of a conviction or acquittal upon the present indictment would be a perfect bar. Neither the rule of merger, nor the reasons upon which it rests, have any application to the present case, and the exception to the ruling of the court below was not well taken.

There is no merit in the objection that the indictment fails to charge an overt act in furtherance of the conspiracy. An indictment for conspiracy, to be good under the statute, must charge that the conspiracy was to do some act made criminal by the laws of the United States, and must state with sufficient certainty the facts to show that such a criminal act was the object of the conspiracy. It is usual to set out the overt acts, those acts which may have been done by any one or more of the conspirators in pursuance of the conspiracy, and in order to effect the common purpose; but this is not requisite if the indictment charges what is in itself an unlawful conspiracy. The offense is complete on the consummation of the conspiracy, and the overt acts may be either regarded as matters of aggravation or disregarded as surplusage. Where an indictment for a conspiracy does not set forth the object specifically, and show that such object is a legal crime, it should particularly set forth the means to be used by the conspirators, and show that these means are criminal. *Lambert v. People*, 9 Cow. 578; *Com. v. Hunt*, 4 Metc. 125. In this indictment, however, the averment of the commission of the larceny, which was the object of the conspiracy, is an ample averment of an overt act.

It appeared in evidence upon the trial that the chattels, the larceny of which was the object of the conspiracy, were at the time in the possession of the collector of customs, at the custom-house at Ogdensburg, having been seized by the collector as smuggled merchandise preparatory to the institution of proceedings for forfeiture and condemnation. The chattels were therefore in the possession of an officer of the United States, and his possession was in law the possession of the United States; and the United States had a sufficient special property in them to warrant the averment of the indictment. Possession is sufficient evidence of title; and if goods are stolen from a thief they may be described as the property of the thief in whose possession they were when stolen, or of the true owner, at the election of the pleader. *Ward v. People*, 3 Hill, 396. There was no error in the rulings excepted to upon the trial, and the judgment is accordingly affirmed.

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UNITED STATES *v.* GARDNER.

(*Olcutt Court, N. D. New York. May 22, 1890.*)

1. SMUGGLING—INDICTMENT—DESCRIPTION OF PROPERTY.

An indictment for smuggling "smoking opium" and "prepared opium" sufficiently describes dutiable merchandise under 23 U. S. St. at Large, p. 495, § 2502, prescribing a duty on "opium prepared for smoking, and all other preparations of opium not specially enumerated or provided for in this act."

2. EVIDENCE—ADMISSIBILITY.

Defendant, being caught with smuggled opium in his possession, represented to the officer that he was acting under instructions of a government officer, and asked him to telegraph about the matter. The reply to the telegram stated that defendant was not acting under instructions, and that his false statement, coupled with his arrest while in the act of smuggling, was strong evidence of his guilt. The telegram and reply were shown defendant, and on his trial were admitted in evidence. Held that, though that part of the reply expressing an opinion of defendant's guilt might have been inadmissible if objected to on the ground that it was not responsive to the telegram, yet the court was justified in assuming at the time it was admitted that evidence would be offered as to defendant's statements or silence when the reply was shown him, which would have made it admissible.

3. SAME—WAIVER OF ERROR.

In such case, the evidence, on the assumption of the introduction of which the telegram and reply were admitted, not having in fact been introduced, defendant should have moved to have the admitted evidence withdrawn from the jury. Not having done so, he cannot complain.

Error to the District Court.

*Richard Crowley*, for plaintiff in error.

*John E. Smith*, Asst. U. S. Atty.

WALLACE, J. This is a writ of error to review a judgment of the district court whereby the defendant below was convicted of the offenses of smuggling and concealing smuggled goods, and sentenced to imprisonment for a term of four years. The indictment contains nine counts. At the close of the evidence the court instructed the jury to render a verdict of acquittal as to the seventh, eighth, and ninth counts. The

other counts charge the defendant below with having smuggled into the United States at different times merchandise subject to duty by law, described in some of them as a specified number of pounds of "smoking opium," and in others as "prepared opium," knowing that the duty due and payable thereon had not been paid or accounted for, and with concealing the opium, knowing that it had been imported contrary to law. The court was asked upon the trial to instruct the jury to acquit him as to the remaining counts of the indictment, upon the ground that the indictment did not describe any dutiable merchandise, there being no duty imposed by statute upon any such article as "smoking opium" or "prepared opium." The court refused so to instruct the jury, and the first point now urged is that this refusal was error. The act of March 3, 1883, (22 U. S. St. at Large, 495,) by section 2502, classifies and subjects opium to duty as follows:

"Opium, crude, \* \* \* one dollar per pound. \* \* \* Opium, prepared for smoking, and all other preparations of opium not specially enumerated or provided for in this act, ten dollars per pound. \* \* \* Opium, aqueous, extract of, for medicinal uses, and tincture of, as laudanum, and all other liquid preparations of opium not specially enumerated or provided for in this act, forty per centum *ad valorem*."

It cannot for a moment be doubted that under the statute opium, whether crude or prepared in a solid or liquid form, is dutiable; and it is obvious, therefore, that an indictment which describes the merchandise smuggled and concealed as "smoking opium," or "prepared opium," describes it sufficiently to denote that the merchandise was within the classification of dutiable merchandise. The rule of criminal pleading is that, where chattels are the subject of an offense, as in larceny, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods must be stated. The present indictment fully complies with the requirements of this rule. The description of the merchandise is certainly as full and specific as it would be if it had been described as so many pounds of opium "prepared for smoking," or of "a preparation of opium."

It is insisted that the court below erred in receiving in evidence upon the trial the telegraphic message sent by Mr. Winslow, a special treasury agent, and the reply in answer thereto. These were admitted against the objections of the defendant, and the exception to the ruling raises the question of the competency and materiality of the evidence. The case made upon the trial was this: The revenue officers of the United States had seized within the collection district of Cape Vincent two lots of opium in boxes. One lot, at the time of seizure, was being transported in a sleigh, accompanied by the defendant and one Ephraim Gardner, a relative of his; the other lot was concealed in a barn belonging to Ephraim Gardner. It was shown that the defendant and Ephraim Gardner, while passing under assumed names, had been concerned in removing the opium from the Canada side of the St. Lawrence river to the American side. When the defendant was arrested he represented,

in substance, that he had formerly been a government officer, and was acting, at the instigation of certain government officers, as a confederate of Canadian opium smugglers, with a view to break up the operations of the smugglers, and effect the seizure of their opium; and he asked Mr. Winslow to telegraph to one Ayres, a special agent of the treasury department, at San Francisco, and ask him if he (the defendant) was not acting under instructions. Mr. Winslow accordingly sent a telegram, and received a reply from Mr. Ayres. The day after the reply was received the message and the reply were shown to the defendant. The reply, in substance, was that the defendant was not acting under the direction or with the knowledge or approval of Mr. Ayres, and that his false statement in that regard, coupled with his arrest in the act of smuggling, was, to the mind of Mr. Ayres, strong evidence of his guilt. Inasmuch as no evidence was offered on the part of the defendant to controvert the facts which had been shown on the part of the government, and as the evidence showing that the defendant had brought the opium clandestinely from Canada into this country, and had concealed some of it, and was about removing the rest, was overwhelming, it would seem that his false statements as to the nature of his connection with the transaction were of but little importance either as tending to show that he was a participant in smuggling the opium or was actuated by a criminal intent. The message was sent by his request. He left it to the discretion of Mr. Winslow to frame the inquiry, and in effect he authorized Mr. Winslow to regard the reply to be made by Mr. Ayres as his own statement. If the part of the reply of Mr. Ayres which was not properly responsive to the inquiry, and which gave Mr. Ayres' own opinion of the guilt of the defendant, was inadmissible, the objection should have been put upon that ground. But the ruling can be vindicated upon another consideration. When the ruling was made it had been proved that the message and reply had been shown the defendant, and the court was justified in assuming that testimony would be offered by the government respecting the statements or silence of the defendant when the papers were exhibited to him. Such testimony would certainly have rendered the message and reply admissible. When such testimony was not introduced, a motion should have been made to strike out the evidence, or instruct the jury to disregard it. If such a motion had been made, the testimony which would have rendered it competent might have been supplied. Not having made such a motion, the defendant cannot justly complain of a ruling which was not necessarily erroneous when it was made. The judgment is affirmed.

## UNITED STATES v. HARTLEY.

(District Court, N. D. Mississippi, W. D. June 15, 1890.)

## 1. POST-OFFICE—LARCENY FROM MAIL—CONSTRUCTION OF STATUTE.

Rev. St. U. S. § 5467, provides: "Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter \* \* \* which shall contain any note, bond, \* \* \*,"—but provides no penalty after such clause. After a semicolon, it further provides: "Any such person who shall steal or take away of the things aforesaid out of any letter, \* \* \* shall be punished," etc. Held that, since there is no penalty attached to the first clause, the section only covers the offense described in the second clause, of stealing or taking away.

## 2. SAME—INDICTMENT.

Where an indictment under such section charges that defendant "did secrete, embezzle, and destroy" certain letters, etc., "within the intent and meaning of section 5467, Revised Statutes of the United States," the recital of such section will be considered surplusage, and the indictment, though not good under said section 5467, will be considered sufficient under section 3891, which provides that "any person employed in any department of the postal service who shall unlawfully detain, delay, or open any letter, packet, \* \* \* or who shall secrete, embezzle, or destroy any such letter, packet, \* \* \* shall be punished," etc.

## On Motion to Quash Indictment.

Rev. St. U. S. § 5467, provides: "Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter \* \* \* which shall contain any note, bond, \* \* \*; any such person who shall steal or take any of the things aforesaid out of any letter, \* \* \* shall be punished," etc. Section 3891 provides: "Any person employed in any department of the postal service who shall unlawfully detain, delay, or open any letter, packet, \* \* \* or who shall secrete, embezzle, or destroy any such letter, packet, \* \* \* shall be punished," etc.

*Henry C. Niles*, U. S. Dist. Atty.

*Edward Mayes*, for defendant.

HILL, J. The questions for decision now presented arise upon the defendant's motion to quash the indictment. The indictment charges that the defendant, on the 17th day of June, 1887, within this district, did secrete, embezzle, and destroy certain letters intrusted to him, and which then and there came into his possession, and which were then and there intended to be conveyed by the mail, which said letters then and there contained articles of value within the intent and meaning of section 5467, Rev. St. U. S., a more particular description of which said letters and contents to the grand jurors were unknown; the said George A. Hartley then and there being a clerk in the post-office of the United States at Lyon, in said district, contrary to the form of the statute of the United States, and against the peace and dignity of the United States. The grounds of the motion to quash the indictment, as stated, are: (1) The indictment does not charge that the acts set forth were done feloniously. (2) That the indictment does not charge that the articles were taken out of the letters. (3) That the indictment does not sufficiently describe the contents of the letters. (4) Because that, as to the first count in the indictment, the charge therein contained is self-

contradictory in this, that the averment is that the defendant did secrete, embezzle, and destroy the articles therein contained. The offense charged is not a felony, but a misdemeanor. Hence the ground for the motion is not well taken. This ground for the motion would be well taken if the indictment were based on the latter clause of section 5467.

There is a difference of opinion among the judges who have passed upon this question—*First*. By Judge PARDEE, of this circuit, in the case of *U. S. v. Long*, 10 Fed. Rep. 879, in which he holds that the first clause of section 5467, not having any penalty annexed to it, is inoperative. *Secondly*. By Judge BROWN, of the eastern district of Michigan, in *U. S. v. Atkinson*, 34 Fed. Rep. 316, in which he holds that the penalty which was annexed to the first clause by section 279 of the act of June 8, 1872, which section was carried into the Revised Statutes, was by oversight omitted in the Revised Statutes, and may be supplied by implication. The *third* decision on this question was by Judge SIMONSON, of the South Carolina district, in *U. S. v. Gruner*, 35 Fed. Rep. 59, in which it is held that the only offense punishable under section 5467 is the "stealing or taking" by a postal employe of the articles enumerated in this section from the mail intrusted to him, which mail has been embezzled, secreted, or destroyed by him. In a case upon which there is a difference of opinion among the judges who have passed on the question, and in which there is some doubt as to the proper construction to be given to the statute, I think it safer to follow that given by the circuit judge of this circuit, and therefore hold that, for the want of the penalty to the first clause, this indictment cannot be maintained as a violation of section 5467.

But the charge made in the indictment is that the defendant was employed as a clerk in the post-office at Lyon; that the letters were in his custody as such clerk,—which charge is substantially the same offense as is described in section 3891, and creates the offense, although the package, letter, or mail does not contain anything of value, and fixes the punishment at a fine of not more than \$500, or by imprisonment for not more than one year, or by both. The statement made in the indictment that the letters contained the articles mentioned in section 5467 may be considered as surplusage, and when so considered the indictment is sufficient under section 3891; and for this reason the motion to quash the indictment will be overruled, and the defendant held to answer the same as if it were an indictment under section 3891.



HOE *et al.* v. CRANSTON.

(Circuit Court, D. Connecticut. June 28, 1890.)

**1. PATENTS FOR INVENTIONS—PATENTABILITY—INVENTION.**

Letters patent No. 216,787, issued June 24, 1879, to George C. Gill for an improvement in apparatus for stopping and reversing machinery, consisting of two pulleys on the driving shaft, one fast and one loose, a belt, with a fork and lever for shifting it, and a vibrating frame, carrying a frictionally acting wheel, the shaft of which is geared with the loose pulley, are not invalid for want of invention.

**2. SAME—INFRINGEMENT.**

Said patent is infringed by a device which differs from the patented machine only in using a friction wheel instead of a cog-wheel in the gearing.

In Equity.

*M. H. Phelps*, for complainants.

*Frederick E. Tasker and Donald G. Perkins*, for defendant.

SHIPMAN, J. This is a bill in equity to restrain the defendant from the alleged infringement of letters patent No. 216,787, dated June 24, 1879, to George C. Gill, assignor to R. Hoe & Co., for an improvement in apparatus for stopping and reversing machinery. The apparatus is designed to be used mainly upon printing-presses, and to enable the operator to quickly stop and reverse the press if a sheet of paper has been improperly fed to it. The description of the improvement which is contained in the specification cannot be understood without constant reference to the drawings, and I therefore use, slightly abbreviated, the clear description which is contained in the testimony of the plaintiff's expert, Mr. Henry B. Renwick:

"There are many machines which require to be reversed or have their wheels turned in opposite directions or stopped, while the motor shaft is always revolving in the same direction. The Gill invention performs this duty by the aid of only two pulleys on the driving shaft, and a single belt, capable of transferring the motion of the motor shaft to the driving shaft. On the driving shaft there are two pulleys. The one nearest to the frame of the printing-press is a fast pulley, keyed upon the shaft. The outer pulley on this driving shaft is a loose pulley; that is, one free to revolve upon the shaft as a journal, or one which will permit the shaft to revolve in either direction while the pulley stands still. A belt connects the motor shaft with either pulley on the driving shaft at the will of the attendant; the belt being shifted by means of a shifting lever, which carries a fork that embraces the belt. When the fork is shifted into its position nearest the frame of the printing-press, the lower part of the belt is on the fast pulley, and when this fork is in the position furthest from the machine the belt is shifted upon the loose pulley. In order to reverse the motion of the driving shaft, as the fast and loose pulleys both revolve in the same direction under the operation of the motor shaft, it was necessary to make some connection between the loose pulley and the driving shaft, so that the revolution of the loose pulley should drive the driving shaft in a direction opposite to that of the loose pulley and of the motor shaft. Mr. Gill devised means, combined with the pulleys and shafts and belt, which will perform this duty. On the left-hand side of the fast and loose pulleys of the driving shaft there is mounted what the patent calls a 'vibrating frame.' This frame carries a shaft which has at one end a friction wheel or friction gearing, and at the other end a cog-wheel, [this fric-

tion gearing is the wheel 22 of the 3d claim.] and there is provided in the machine a lever, by means of which this vibrating frame can be vibrated by the hand of an attendant; its range of vibration being so great that at one time the friction gear carried by the vibrating frame shall be in gear with a friction surface making part of the fast pulley on the driving shaft, and that, when the vibrating frame is moved in the other direction, said friction gear in the vibrating frame will be out of contact with the friction surface on the fast pulley. Now if, when the friction surfaces are in contact, that one on the vibrating frame could be driven in the same direction as the loose pulley is driven, and by motion derived from the loose pulley, then the fast pulley would be driven in the opposite direction to the loose pulley, and the motion of the driving shaft and the machine would be reversed. In order to perform this duty, Mr. Gill secured to the loose pulley, so that it would turn with it, a cog-wheel, and this cog-wheel gears into another cog-wheel, and this second cog-wheel gears into a third cog-wheel, which latter is the wheel that is carried by the vibrating frame. In consequence of this construction, the shaft upon the vibrating frame, with its friction gear, revolves in the same direction as the loose pulley. If we now suppose the belt shifted upon the fast pulley, then the fast pulley and the driving shaft will be driven, what I call, 'ahead.' Now, if it be desired to stop the machine, the attendant shifts the belt to the loose pulley, when it will be revolved aimlessly, and the driving shaft will stand still. If he now desires to turn the driving shaft and the fast pulley in the opposite direction, he brings the vibrating frame into such position that the friction gear supported by it will engage with the friction surface on the fast pulley. Then the loose pulley will no longer revolve aimlessly, but, by means of the gearing before described, will drive the fast pulley and the driving shaft in the opposite direction from that in which the loose pulley is being driven, thus reversing the motion of the driving shaft and of the machine. If it be now desired to stop the machine, all that is necessary is to shift the position of the vibrating frame so that the friction gear thereon is out of contact with the fast pulley, and the machine and driving shaft will stop, although the loose pulley still revolves. If it be now desired to make the machine go ahead again, the belt is, by means of the shipper and fork, shifted from the loose to the fast pulley; and it will be noticed that these three operations are performed by the use of a single pulley on the motor shaft, of a single belt, and of only two pulleys, one fast and one loose, on the driving shaft."

The second and third of the five claims of the patent are alone said to be infringed, and are as follows:

"(2) The combination, with the belt, 13, the driving shaft, and its fast and loose pulleys, of the vibrating frame, carrying a frictionally-acting wheel, and gearing connecting the shaft of said wheel with the loose pulley, substantially as described. (3) The combination, with the belt, 13, and a device for shifting the same, of the driving shaft, 20, fast and loose pulleys, and a vibrating frame carrying a wheel, as 22, the shaft of which is geared with the loose pulley, all substantially as described."

The elements which are combined in the third claim are the belt, a device for shifting the belt, which is the fork and lever, the driving shaft, a fast pulley, and a loose pulley; the vibrating frame carrying a friction gear, which engages with a friction surface attached to or making part of the fast pulley, the shaft of the frame being geared with the loose pulley by means of gearing, substantially such as is described, so that the friction gear revolves in the same direction as the loose pulley. The

elements of the second claim are the same, with the exception of the fork and lever. The printing-press of the defendant has a belt, a fork and lever for shifting the belt, a driving shaft, a fast and a loose pulley, a vibrating frame carrying a shaft provided at one end with a friction gear and at the other end with a cog-wheel. The vibrating frame can be moved towards and away from the fast pulley, and when it is nearest to the pulley its friction gear is in contact with the surface of the fast pulley. The shaft on the vibrating frame is driven from the loose pulley, being so geared with it that the friction gear revolves in the same direction as the loose pulley. A cog, called in the case "the small iron cog," is driven from the loose pulley by friction gearing, viz., the friction surface of the loose pulley and a little pulley keyed upon the same shaft as the cog, and this iron cog gears into a cog-wheel on the vibrating shaft. The apparatus, which was patented to the defendant in 1883, is the same as the plaintiffs', except as to the means for driving the iron cog. In the plaintiffs' device this cog is driven by another cog keyed to the loose pulley, instead of by friction gearing.

The important question in the case is that of patentability. The defendant does not insist that the particular combination existed before the Gill invention, but that stopping and reversing mechanism was well known, and consisted of fast and loose pulleys, a shifting device, gears which transmitted motion, so that the driving shaft should be driven in a reverse direction, for which purpose a vibrating frame had been used, and therefore, whenever it was required in a particular machine to stop and reverse, the skilled mechanic knew how to adapt his machine to the necessities of the particular case. These general statements in regard to the elements of the combination are true, but it is necessary to look more closely into the history of the art, to see what had been reached, and thence to ascertain whether the character of the new combination was such as to be within the scope of mere mechanical knowledge and of expected skillful adaptation of known means to ends.

The defendant introduces the stopping and reversing mechanism in divers existing machines, books, and patents which show the state of the art in machines of this kind before the Gill invention. The C. B. Rogers & Co., the Hopkins & Allen, and the Sibley planers, the Tilton and the Soger patents, have no vibrating frame, but, as a consequence, have three pulleys, so that the belt may be easily transferred from the fast to the loose pulley. In the "Model of Lathe Head" the revolution of the lathe spindle can be made at different velocities, and can be stopped, but cannot be reversed. It has but one pulley, and cannot be altered so as to reverse the motion of the shaft, without making a new and different machine. No. 59 in "Brown's Mechanical Movements" is also for using a shaft with varying velocities, and has three pulleys and no vibrating frame. The mechanism of the "Sibley Lathe Head" both stops and reverses the motion of a shaft. It has one pulley, and of course no shipper. It has a vibrating frame which carries two sets of gears,—one for moving the shaft in one direction, and the other for moving it in another direction. The Williamson patent is the only other patent relied upon in the argu-

ment. It has no reversing apparatus. There is thus no mechanism which both stops, starts, and reverses a machine by the use of two pulleys, one fast and one loose, and a vibrating frame which throws in and out of operation a single set of gears, which, when put in motion by the loose pulley, cause the fast pulley to revolve in the opposite direction to the loose pulley. The Gill mechanism is a simple and compact method of stopping and reversing, has but one train of reversing gear, and gives the operator prompt and easily-managed control of the press. The important elements which give the combination its superiority are the vibrating frame and the friction gear, which acts upon the friction surface of the fast pulley, or, as they are called in the second claim, "the vibrating frame, carrying a frictionally acting wheel." The elements of the combination have never been thus brought together before, and the arrangement produces an important result, without unnecessary wear and tear, and without loss of power, and by a simple and economical combination of parts, which is easily managed. This combination in the use of the vibrating frame and its frictional wheel seems to me to have been the result of invention, and to have been beyond the scope of mere mechanical skill.

Upon the question of infringement, the only difference which is claimed by the defendant's expert to be of importance is that, instead of the cog-wheel, 10, in Gill's machine, the defendant uses a friction wheel, which is driven by the surface of the loose pulley, and transmits motion to the iron cog. These two kinds of gearing were, in the place and for the purpose for which they were there used, known equivalents or substitutes for each other, and, unless a most narrow construction should be given to the Gill patent, they create no difference between the two devices.

Let there be a decree against the defendant for the infringement of the second and third claims, and an accounting.

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**ASHE v. MUTUAL LASTING CO. *et al.***

(Circuit Court, D. Maine. April 25, 1890.)

**PATENTS FOR INVENTIONS—WHO ENTITLED TO—CONFLICTING CLAIMS.**

Suit was brought under Rev. St. U. S. § 4915, to determine whether A. or G. & C. were the inventors of a machine for which a patent was granted to G. & C., claiming "in a tack-strip heading-machine, the combination of a support for the tack-strip, consisting of a disk having peripheral teeth to engage between the shanks of the strip, a clamping jaw, and a header." The evidence showed that A. was the first to suggest the use of a wheel having teeth to engage between the shanks of the strip, but that the wheel was to have a positive movement, which was found to work imperfectly, while in the perfected machine of G. and C. the strip is not fed by the positive movement of the wheel, but the wheel is moved by the strip. *Held*, that A.'s claim to be the inventor of the complete machine is not sustained, and his bill will be dismissed.

**In Equity.**

*Frederick P. Fish and James H. Lange, for complainant.*

*Thomas W. Clarke, for defendants.*

COLT, J. This suit is brought under section 4915 of the Revised Statutes. The single issue raised is whether the complainant, Robert Ashe, is the first and original inventor of the following subject-matter of invention:

"In a tack-strip heading-machine, the combination of a support for the tack-strip, consisting of a disk having peripheral teeth to engage between the shanks of the strip, a clamping jaw, and a header."

On June 26, 1884, the defendants, Edward F. Grandy and George W. Copeland, filed a joint application in the patent-office for letters patent for a machine for heading tack-strips which embodied the invention now in suit; and on July 11, 1884, the complainant, Ashe, likewise made application for a patent covering the same invention. The parties were put into interference, preliminary statements were filed, proofs taken, and the cause came on to be heard before the examiner of interference, who decided that Ashe was the prior inventor. Thereupon Grandy and Copeland appealed to the board of examiners in chief, who reversed the decision of the lower tribunal. Ashe thereupon appealed to the commissioner of patents, who affirmed the decision of the examiners in chief, and awarded priority of invention to Grandy and Copeland. This suit was afterwards brought.

The sole question at issue is one of fact. It appears that Copeland had been interested for some years in perfecting a machine for heading tack-strips, and that he had taken out a number of patents in this branch of the art. In December, 1883, Grandy, Ashe, and Joseph E. Crisp were in the employ of Copeland, and, under the direction of Copeland, were engaged in designing a machine for heading tack-strips. Ashe does not deny that most of the improvements embodied in the Copeland and Grandy machine for which an application for a patent was made on June 4, 1884, and a patent granted July 10, 1888, were suggested by others, but he insists that he was the first to conceive, in a tack-heading machine, the combination of a support for the tack-strip, consisting of a wheel having peripheral teeth to engage between the shanks of the strip, a clamping jaw, and a header. In deciding upon disputed questions of fact, the court must be governed by the weight of evidence, taken in connection with surrounding circumstances and probabilities. I have carefully considered the evidence in this case, both that before the patent-office, which by stipulation is made a part of this record, and that introduced in support of the present bill, and I am satisfied in my own mind that Ashe has failed to sustain his position as the prior inventor of the invention in controversy as against the defendants. It is true that Copeland and Grandy, during the winter of 1884, had been using clamping jaws to hold the strip, and that Ashe, in March, 1884, was the first to suggest the use of a wheel having teeth to engage between the shanks of the strip, and that he drew a plan of a wheel with a jaw and a header, but the plan was wanting as to details; and further, and more important, in the Ashe invention the wheel was to have a positive movement, which was found to work imperfectly. In the perfected machine of Grandy and Copeland, the strip is not fed by any positive movement of the wheel,

but the wheel is moved by the strip. It is impossible to weigh the evidence of Copeland, Grandy, and Crisp, as against that introduced by Ashe, without reaching the conclusion that, while Ashe may have first suggested the use of a wheel, he did not complete and perfect in a practical tack-heading machine the invention which he now claims. I do not think it necessary to enter into the details of the evidence. I deem it sufficient to state the conclusion I have reached upon a full consideration of the facts. The bill should therefore be dismissed.

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DEDERICK v. SIEGMUND.

(Circuit Court, N. D. New York. July 1, 1890.)

PATENTS FOR INVENTIONS—PATENTABILITY.

The second claim of letters patent granted September 21, 1880, to Albert A. Gehrt for baling-press, which consists of "a friction plate or pressure contrivance for applying friction to the traverser, to retard its backward movement," is invalid, because not limited to any specific devices.

In Equity.

*Church & Church*, for complainant.

*L. Hill and Knight Bros.*, for defendant.

WALLACE, J. The second claim of the patent in suit, (granted to Albert A. Gehrt, assignor, dated September 21, 1880, for "baling-press," ) which is the only one alleged to be infringed, is as follows:

"In a baling-press in which the traverser is reversed in whole or in part by the reaction or back expansion of the pressed material, a friction-plate or pressure contrivance for applying friction to the traverser, to retard its backward movement and prevent shock, substantially as described."

In baling-presses in which the traverser is reversed by the reaction or back expansion of the pressed material, the rebound is sometimes so strong as to be seriously objectionable, or, as stated in the specification, "the traverser is reversed with a severe shock to the frame and power connection." The subject of the present patent, so far as the second claim is involved, is a friction plate or pressure contrivance for retarding the force of this rebound. The movement of the traverser takes place in a chamber. The patentee says in his specification:

"To remedy this defect, I apply more or less friction to the traverser during its backward movement, and thus stop its motion gradually. Various instrumentalities may be employed in carrying out this idea; but I prefer to adjust the lining or planking (of the chamber) by means of an adjusting screw or screws, S, so as to cause it to bear upon the top of the upper rear extension of the traverser, as shown in Fig. 1. By operating the screw, the lining or planking can be made to bear more or less tightly, as will be readily understood. The lining or planking may be permanently contracted, if desired, and the same result be produced."

These statements comprise the whole description of the friction plate or pressure contrivance. Succinctly stated, what the specification describes is this: The lining of the chamber in which the movement of the traverser takes place is adjusted inwardly by a set-screw, so as to impinge upon and arrest the traverser in its rebound, or the chamber is constructed in a contracted form so as to arrest and impede the movement of the traverser; or various other instrumentalities, to retard the rebound of the traverser, which are not mentioned, may be employed. The third claim of the patent is for a combination of the friction plate or pressure contrivance, which consists of the lining or planking adjusted by a set-screw, with the traverser. The second claim must therefore be construed as one for some other pressure contrivance for controlling the rebound of the traverser. In view of its broad terms, it cannot be restricted to one in which the pressure contrivance consists of a chamber of a permanently contracted form. It is contended for the complainant that any press of the rebounding traverser type, in which a friction plate or pressure contrivance is applied to the traverser to retard its backward movement and prevent shock, falls within the terms and scope of the claim, and is an infringement of it. The language of the claim is such as not only to justify, but to require, this scope to be given to it, and it must be construed as one for the application of friction or pressure to the traverser, during its backward movement, by any and every device which is capable of more or less retarding such movement; and this is the construction placed upon the claim, in considering the question of infringement, by the complainant's expert witness. There is no limitation in the claim to any specific devices, but the claim is intended to and does include any and all of the "various instrumentalities" by which "more or less friction" may be applied to the traverser. In other words, the claim is one for the application of friction to retard the movement of the traverser, unlimited to any particular form or character of mechanical means for effecting such application. Such a claim cannot be upheld. The bill is dismissed.

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STEAM GAUGE & LANTERN CO. v. WILLIAMS.

(Circuit Court, N. D. New York. June 26, 1890.)

**1. PATENTS FOR INVENTIONS—LOCOMOTIVE HEAD-LIGHTS—INFRINGEMENT.**

The first claim of letters patent issued August 1, 1883, to Edward Wilhelm, for an improvement in locomotive head-lights consisting of a reflector, provided with an opening behind the burner, whereby light is emitted backwardly into the head-light case for illuminating signal plates, is not infringed by a device wherein the light passes into the head-light case through an enlargement of the burner hole, since such claim must be restricted to head-lights in which there is a hole in the reflector distinct from the burner and chimney holes, in order to give it novelty.

**2. SAME—PATENTABLE INVENTION.**

The second claim of said patent, for the combination with such reflector of "an auxiliary reflector whereby the light emitted backwardly through such opening is directed towards the signal plates," is void for want of patentable invention.

In Equity.

*E. S. Jenney*, for complainant.

*Edmund Wetmore*, for defendant.

WALLACE, J. The two claims of the patent in suit (granted to Edward Wilhelm, August 1, 1882, for "locomotive head-lights") alleged to be infringed by the head-lights manufactured by the defendant are as follows:

"(1) In a head-light, a reflector provided with an opening arranged behind the burner, whereby light is emitted backwardly into the head-light case for illuminating signal plates or lenses applied to said case, substantially as set forth. (2) The combination, with a head-light case, provided with signal plates or lenses, of a reflector constructed with an opening arranged behind the burner, and an auxiliary reflector, whereby the light emitted backwardly through such opening is directed towards the signal plates or lenses, substantially as set forth."

The subject of the patent is an improvement in that class of head-lights which are provided with signal plates or lenses in the sides of the head-light case; and the object of the improvement is to illuminate the signal plates in a simple and efficient manner, so that the signal can readily be observed at night by train dispatchers or others whose duty it is to note the passing of trains. Locomotive head-lights in their ordinary form consist of a metal case with a glass front, inclosing a parabolic reflector which carries a lamp. The lamp is located so that when lighted the flame is in the focus of the parabola, in order that the rays of light may be thrown forward upon and somewhat along the sides of the track. The lamp is provided with a chimney, and the reflector is provided with two holes, one above the other, for securing the lamp. The body and burner of the lamp rest in the lower hole, and when the chimney is placed over the burner it extends through the upper hole, and the lamp is thus firmly secured at both ends. Each of these holes opens into the case behind the reflector, so that at the upper hole the chimney extends into and is exposed within the case back of the reflector, and at the lower hole the body of the lamp extends into and is exposed within the case at the back of the reflector. Before the date of the Wilhelm patent such head-lights, provided with signal plates or lenses in the sides of the case, and with means for illuminating the signal plates, were old. Such a head-light is described in the patent to Mills, Bell, and Carey, granted in 1876, in which the signal plates are illuminated from the interior of the case by means of side openings which consist of a hole in the reflector at each side of the lamp opposite the signal plates. Another such head-light is described in the patent to Forsyth granted in 1878, in which the signal plates are placed in openings in the case, one at each side, located about on a level with the aperture in the reflector which holds the chimney, the object being to utilize the light which escapes through the chimney aperture for illuminating the signal plates; and in order to do this more effectually the inside of the case and the back of the reflector are painted white.

The precise improvement made by Wilhelm appears from the following language of his specification:



"Heretofore these signal plates have been illuminated in various ways, with more or less success, either by direct light thrown upon the signal plate through openings in the reflector on both sides of the lamp, or by the light which is emitted through the chimney opening of the reflector, and diffuses itself in the upper portion of the head-light case, and also by light reflected backwardly from the front end of the head-light case. My invention consists in constructing the reflector with an opening at or near its apex behind the lamp, whereby light is emitted into the head-light case, where it diffuses itself, and may be utilized for illuminating the signal plates or lenses applied to the head-light case; also in providing such case and reflector with an auxiliary reflector, which deflects the light emitted backwardly through the openings in the main reflector, and directs such light upon the signals which are desired to be illuminated."

The specification describes an opening or aperture formed in the rear portion of the reflector about in a line with and behind the burner of the lamp; and a reflector arranged at the back of the case behind the main reflector, which may be composed of two plane reflectors arranged at an angle to each other, or may be made curved, convex, or conical, or of any other suitable form, to deflect a sufficient quantity of light upon the signal plate. As shown by the drawings, the opening is a distinct aperture from the burner hole, and is located above the hole. The specification states that the illumination of the signal plates may be attained, but in a less satisfactory manner, without the auxiliary reflector, by painting the interior of the head-light case white. Obviously, the patentee contemplated an improvement of the head-light of the Forsyth patent. This is apparent from the enumeration of the advantages introduced into such a head-light by making an opening in the reflector behind the burner, which are set forth in the specification as follows:

"The light emitted through this opening is more intense than that which is emitted by the chimney opening, and not liable to be obscured when the upper of the chimney becomes covered with smoke or soot, which happens occasionally, and materially interferes with the illumination of the signal plate."

The improvement, which consists in forming an opening in the reflector of the Forsyth head-light, is the subject of the first claim of the patent. In other words, the first claim is for a head-light essentially like that of the Forsyth patent, improved by making an aperture in the reflector behind the burner and between the burner hole and the chimney hole, for emitting light into the case. The second claim is for the head-light of the first claim, with an auxiliary reflector behind the main reflector to catch and deflect the light emitted from the aperture. The head-lights which are manufactured by the defendant do not contain any opening or aperture in the rear portion of the reflector which is distinct from the holes in which the chimney and the body of the lamp rest. Prior to 1880 the defendant designed a reflector differing in form from those previously in use, making it deeper, and shaping it so that the part in rear of the burner was elongated, in which the hole for the body of the lamp was considerably enlarged rearwardly. The object of this change was to facilitate access to the lamp for the purpose of trimming and lighting it without removing it from the reflector. The head-light, hav-

ing such a reflector and aperture, is described in a patent granted to the defendant December 28, 1880; and in catalogues to the trade issued by him in 1879 there are wood-cuts of this head-light which show the lower hole in the reflector to extend towards the apex until it reaches a point on a line with the lower part of the burner. It seems entirely plain that the alleged infringing head-light is the precise structure described in the defendant's patent of 1880 and in his catalogue.

If, as is now contended for the complainant, the burner hole of the defendant's head-light is the opening or aperture of the Wilhelm patent, it is impossible to escape the conclusion that the first claim of the patent is invalid for want of novelty. Certainly there could not be invention in 1882 in putting the burner hole of the defendant's patent of 1880 into the head-light of the Forsyth patent in 1878. When the parts of the two old head-lights are assembled together, they do precisely the same work in their new juxtaposition which they did previously. The burner hole emits light into the case in the same way it did in the defendant's head-light, and the other parts severally do their work in the same way they did in the Forsyth head-light. It might have involved invention if such a burner hole, instead of being employed in the reflector of a locomotive head-light, had been employed in something else to appropriate it for illuminating the signal plates, and adapting it to the new occasion; but it is not invention merely to transfer one part of a composite device to another composite device of the same general type, when the result is merely to aggregate the effects of each. Unless the first claim is limited to one for a head-light in which there is an aperture distinct from the burner hole or chimney hole in the reflector, it cannot be upheld. Upon this construction the defendant does not infringe.

The second claim is destitute of novelty. It cannot be invention to add to a head-light an auxiliary reflector, which, as the specification states, "may be of any suitable form," to intensify and direct the light which escapes into the case. The utility of such a device is suggested by the main reflector itself, and the specification implies that any person skilled in the art can, without instruction from the patent, select the requisite form to do the required work. The bill is dismissed.

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#### SACKETT v. SMITH.

(*Circuit Court, S. D. New York. May 13, 1890.*)

##### 1. PATENTS FOR INVENTIONS—COMBINATIONS—WANT OF NOVELTY—FOUNTAIN-PENS.

Letters patent No. 847,961, August 24, 1886, to George H. Sackett, for an improvement in fountain-pens, consists of a reservoir, or tubular holder, constructed with longitudinal grooves in the inner walls of its lower end, in combination with a pen, the lateral edges of which fit into the grooves, so as to hold the pen in place. *Held*, that the use of grooves for holding the pen in place, having been long known, was not patentable.

2. **SAME.**

Such patent, in so far as it consists of a slitted pen so fixed in the holder that the slit comes in contact with the ink held in the reservoir, so that the ink will be directed by capillary attraction down the split to the point of the pen, is not infringed by the use of a pen the slit of which is below the ink space in the reservoir.

3. **SAME.**

Letters patent No. 353,162, November 23, 1886, to George H. Sackett, for an improvement in fountain-pens, consists of an ink-reservoir closed air-tight at its top, and open and internally unobstructed at the bottom for the passage of air and ink, the ink being kept in the reservoir by the air pressure, a slitted pen attached to the bottom of the reservoir, and a lip or tongue, the inner surface of which is applied parallel with the pen, to form, conjointly with the surface and the slit of the pen, a channel for conducting the ink to the point of the pen. *Held*, that the patent must be confined to the precise form and arrangement of parts described in the specification and to the purpose therein indicated, since the use of the parts to accomplish similar results in analogous combinations was known before the date of the invention.

4. **SAME.**

Such patent, where it calls for a tongue or feeding-stem located within the reservoir, with its upper end extended to or near the closed upper end of the reservoir, is not infringed by the use of a pen with a feeding stem which only extends part of the way up the reservoir.

5. **SAME.**

Nor is a patent, the specifications of which call for an ink reservoir "open and unobstructed" at the lower end, infringed by the use of a pen-holder into the bottom of the reservoir of which is screwed a perforated nozzle, through which the ink is conducted to the pen, since such a nozzle forms an obstruction.

In Equity.

*James A. Whitney*, for complainant.

*Walter S. Logan*, for defendant.

COXE, J. This is an equity action for infringement of two letters patent granted to the complainant for an improvement in fountain-pens. The first of these patents, No. 347,961, is dated August 24, 1886; the second, No. 353,162, is dated November 23, 1886. The applications were filed April 23, 1883. In both patents the improvements relate to fountain-pens in which the ink is sustained in the reservoir by atmospheric pressure, and is supplied to the pen by capillary attraction as distinguished from the attraction of gravitation. No. 347,961, in so far as it has reference to the present issue, relates to an arrangement by which the pen is held in place at the lower end of the reservoir or holder. The interior surface of the reservoir is provided with grooves, into which the edges of the pen fit. The pen is thus held in position with its upper portion extending into the ink space of the reservoir, so that the ink may pass directly into the inner portion of the slit of the pen, and thus be transmitted to its point. The only claim of the patent alleged to be infringed is the second. It is as follows:

"(2) A reservoir or tubular holder constructed with longitudinal grooves in the inner walls of its lower end, in combination with a pen the lateral edges of which fit into said grooves, thereby insuring the retention of the pen in place, substantially as and for the purpose herein set forth."

In No. 353,162 the invention comprises certain novel means of insuring the downward flow of ink within the reservoir of a fountain-pen and the frequent and regular transmission of ink to the point of the pen. The ink reservoir or tubular holder is closed at its upper and open at its lower end. The pen is fixed at the lower end so that its slit is in close

proximity to the ink at the mouth of the reservoir. A lip or tongue, flexible if desired, is attached to the upper or, if preferred, to the under side of the pen, in such a manner as to provide a thin space between the pen and lip transverse to and in communication with the slit. The channel thus formed for conducting the ink to the point of the pen is T-shaped in its cross-section. By "the attraction of adhesion" the opposing surfaces of the channel insure the flow of the ink to the point of the pen when used in writing. This lip or tongue may be formed in any appropriate manner. It may consist of a slip of gold, rubber or other suitable material inserted in the same manner as the pen and parallel therewith, it may be inserted in a socket formed externally in the holder, it may be a prolongation of the holder itself, or it may be formed upon or attached to the lower end of the feeding-stem. "The feeding-stem is a device designed to insure the regular descent of the ink within the reservoir when the latter is of such diameter that under ordinary conditions the ink would be maintained in the upper part of said reservoir by atmospheric pressure from below, and thus interfere with the operation of the pen by failing to regularly supply the same with ink, the said stem being so constructed in itself or so arranged in relation to the walls of the reservoir as to provide what may be termed an 'internal capillary channel,' through which a small current of ink may flow downward, leaving the air in the surrounding space free to move upward, thereby insuring, more especially when the holder is of very small diameter, the automatic downward feeding of the ink to the upper portion of the pen, whence, by means hereinbefore explained, it is transferred to the point thereof. The said stem may therefore consist of a single flat strip of metal or other suitable material placed close to but not in actual contact with one of the sides of the interior of the reservoir, or of a single strip grooved or U-shaped in its cross-section, or its equivalent may be provided by longitudinally grooving the internal surface of the reservoir, the walls or surfaces of the said grooves serving the same purpose, because of their adhesive attraction, in substantially the same way as does the stem itself when applied as hereinbefore explained. It should be kept in mind that the feeding-stem facilitates the operation of filling the reservoir as well as the feeding of the ink to the pen."

All three of the claims are involved. They are as follows:

"(1) In a fountain-pen, the combination of the following elements, to-wit: an ink reservoir closed air-tight at its top and open and internally unobstructed at the bottom for the passage of air and ink, a slitted pen attached to the permanently open bottom of the reservoir, and a lip or tongue the inner surface of which is applied parallel with the pen to form, conjointly with the surface and the slit of the pen, a channel for conducting the ink directly from the open lower end of the reservoir to the point of the pen, all substantially as and for the purpose herein set forth.

"(2) In a fountain-pen, the combination of the following elements, to-wit: an ink-reservoir closed air-tight at its top and open and internally unobstructed at the bottom for the passage of air and ink, a slitted pen attached to the permanently open bottom of the reservoir, and a lip or tongue the inner surface of which is applied parallel with the pen to form, conjointly with the

surface and the slit of the pen, a channel for conducting the ink directly from the open lower end of the reservoir to the point of the pen, and a feeding-stem located within the reservoir and with its lower end connecting with the channel aforesaid, and with its upper end extended to or near the closed upper end of the reservoir to insure the descent of ink to said channel, all substantially as and for the purpose herein set forth.

"(3) In a fountain-pen, the combination of a holder or reservoir closed airtight at the top and open and internally unobstructed at the bottom, a slitted pen, and a feeding-stem placed within said reservoir with its upper end extended to or near said upper end of said reservoir and provided at its lower end with the lip C, placed over and adjacent to the back and slit of the pen, all substantially as and for the purpose herein set forth."

The defenses are want of novelty and invention, unlawful expansion of the claims and non-infringement.

As to the second claim of No. 347,961 it is quite clear that if a construction is placed upon it broad enough to cover any pen it is void for want of patentability, and if confined to the exact combination described by the patentee it is not infringed. The English patent to William E. Wiley, sealed April 24, 1857, describes a tubular pen-holder for an ordinary dipping pen "made with two grooves on opposite sides of its interior for the purpose of holding the pen, the object being, by such means, to cause pens to be held in tubular holders in a central position." Other references show somewhat similar constructions. It is beyond question, therefore, that no one can hold a patent for a pen-holder the only alleged novelty being that it is provided with grooves for holding the pen in place. This method was old a quarter of a century ago, and even if it had not been suggested by Wiley and others, it is, at least, doubtful whether its use in a pen-holder would require an exercise of the inventive faculty in view of the many analogous uses to which grooves are put in all the mechanical arts. The claim cannot be upheld, therefore, if construed, as the complainant insists it should be, to cover an improvement which relates merely "to holding the pen in place in the lower end of a fountain-pen reservoir;" and, if it is limited to the peculiar form of pen described in complainant's patent the defendant does not infringe. He has no *slitted pen*, as that term is used in the patent. The upper end of the slit in his pen is far below the ink space of the reservoir. On the other hand, the fundamental idea of the complainant is to carry the ink to the point of the pen by bringing the upper end of the slit in direct communication with the ink in the reservoir, so that the ink will be directed down the slit by capillary attraction. In order to accomplish this a pen is used having a long slit and about twice the thickness of an ordinary steel pen. The defendant's structure, manufactured under a patent granted to Paul E. Wirt, has a thin gold pen about half the thickness of a steel pen. It is quite true that Wirt uses grooves, but he has a right to use them. He does not employ them to hold the complainant's pen in position, or to hold any pen in position, to accomplish the purpose set forth in complainant's patent. The court does not decide that this claim is invalid, but that if upheld at all it must be for a combination which the defendant does not use.

Regarding patent No. 353,162 it will be observed that claim 1 is for a combination in a fountain-pen containing the following elements: *First.* An ink reservoir closed air-tight at its top and open and internally unobstructed at the bottom, for the passage of air and ink. *Second.* A slitted pen attached to the permanently open bottom of the reservoir. *Third.* A lip or tongue, the inner surface of which is applied parallel with the pen, to form, conjointly with the surface and the slit of the pen, a channel for conducting the ink to the point of the pen. In short, it is for a fountain-pen consisting of a slitted pen inserted in the open and unobstructed end of the holder, the pen being provided with a parallel lip. The other claims are narrower than the first, additional elements being added. They will be considered in detail later on. In view of what was known prior to complainant's invention a broad construction of these claims is out of the question. Fountain-pens in many varieties and operating upon different principles had long been known. All this, if confined to the so-called "gravity" pens, is conceded. But the idea of using atmospheric pressure and a capillary feed was not original with the complainant. In the specification filed in the patent-office by Marvin C. Stone, October 15, 1881, before the earliest date fixed for the complainant's invention, the general principle of operation above alluded to is clearly enunciated. This evidence is important as corroboratory of the oral testimony showing what was actually constructed by Stone. He says, that the invention "consists in supplying ink to the pen from the fountain by capillary action consisting of plates conforming to the figure of the pen and applied thereto approximately in contact therewith on both the concave and convex surfaces." And again: "E is the compressible elastic porous ink-feeder which is used to retain ink in and feed air to the reservoir and to feed ink to the pen. \* \* \* The operation of my invention is as follows: The pressure of the air upon the ink which saturates the feeder retains the ink in the holder. \* \* \* The pen which is inserted between the two closely fitting plates that conform to its shape has its nibs constantly supplied with ink by the capillary action of the surfaces of the pen with the surfaces of its adjacent plates. \* \* \* The two plates perform the double office of feeding the pen with ink by capillary action and serving also as a holder for the pen itself. \* \* \* The holder or pen receptacle should hug the pen very tightly at every point in order that the capillary action may be as perfect and as little affected by gravity as possible." A patent was granted to Stone June 27, 1882, No. 260,134, for a fountain pen-holder. It is not pretended that the Stone pen was a perfect writing instrument, or that it can be compared in this regard with either the complainant's or the defendant's structures, but it cannot be doubted that the principle upon which these improved pens operate was known to Stone and by him embodied, though in a somewhat crude and unsatisfactory form, before the date of complainant's invention. Wirt, too, as early as the summer of 1881, had hit upon a similar line of investigation and had constructed a rudimentary pen which operated upon the capillary principle. This pen not only had an open reservoir in which the ink was

retained by atmospheric pressure, but also a lip applied to the pen for feeding the ink from the reservoir to the point of the pen. That he made such a structure is established by the testimony of nine witnesses, all of them unimpeached and, apparently, of high standing and respectability. At least five of them are entirely disinterested. Their testimony has been criticised with great severity and painstaking elaboration and several discrepancies and inconsistencies are pointed out. But after all they agree, substantially, upon the main proposition, there is nothing improbable in their story, no motive has been shown for wholesale perjury and no view of the matter has been presented which will justify an arbitrary rejection of their testimony. The language of Judge SHIPMAN in *Hershey v. Blakesley*, 33 Fed. Rep. 922, seems peculiarly applicable. He says:

"I am fully aware of the ease with which honest witnesses can persuade themselves that they remember some by-gone circumstance which they are ingeniously induced to think that they remember; but, in this case, I do not perceive any manipulation of these witnesses, and I think that their testimony was not manufactured, and they were not mistaken. There is nothing improbable, either by reason of the state of the art or of the character of the improvement, in the history which is given."

Other evidence has been introduced, but it is unnecessary to discuss it, for it is already quite evident that the complainant did not enter an undiscovered field whose virgin soil had theretofore remained untrodden by the foot of the inventor, but that this is one of the cases referred to by the supreme court in *Bragg v. Fitch*, 7 Sup. Ct. Rep. 978, where the invention "is but one in a series of improvements all having the same general object and purpose; and that in construing the claims of the patent they must be restricted to the precise form and arrangement of parts described in the specification, and to the purpose indicated therein." In addition to what has already been said, applicable to all three of the claims, it will be noted that "a feeding-stem located within the reservoir \* \* \* with its upper end extended to or near the closed upper end of the reservoir" is an element of the combinations covered by claims 2 and 3. It seems unnecessary to spend time in discussing the meaning of the words quoted. They are too plain to admit of doubt or cavil. There is no room for misunderstanding. An architect who agrees to run a ventilator shaft or a steam main to or near the roof of a many-storied building, does not fulfill his contract if his shaft ends at the story above the basement. So one who uses a pen with a feeding-stem which extends a third of the way up the holder does not infringe a claim which provides for a stem extending the entire distance, or nearly so. The language of these claims was adopted deliberately and with full knowledge of its restrictive import. The drawings not only show a feeding-stem extending to the upper end of the reservoir, but one actually inserted in and attached to the upper end. Surely, the claims do not cover, as the complainant insists, a stem which extends "to any desired point within the reservoir." The contention that the language under discussion means "to or near the closed upper end of that part of the re-

reservoir which co-ordinates with the stem in doing the work and securing the required effect" is ingenious certainly but at variance with the plain import of the specification, claims and drawings. There is no process of reasoning by which a claim, expressly limited to a feeding-stem extending to the upper end of a pen-holder, can be construed to cover a stem which is wholly confined to the lower end of the pen-holder. It cannot be tortured into a construction so strained and unnatural. There is nothing ambiguous about the claim. The language is perfectly plain and simple. It is not a case where the court is permitted to speculate upon what might have been done or what should have been done in the patent-office. We are dealing now with what was done. Claims are construed as they are, not as they might be. The complainant accepted the patent with the claims thus limited and it is now too late to alter or extend them. He must abide by them as they stand. As was said by Mr. Justice BRADLEY in *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278:

"When a claim is so explicit, the courts cannot alter or enlarge it. \* \* \* They [the patentees] cannot expect the courts to wade through the history of the art, and spell out what they might have claimed, but have not claimed. \* \* \* There [in the patent-office] his claim is, or is supposed to be, examined, scrutinized, limited, and made to conform to what he is entitled to. If the office refuses to allow him all that he asks, he has an appeal. But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the patent-office. \* \* \* When the terms of a claim in a patent are clear and distinct, (as they always should be), the patentee, in a suit brought upon the patent, is bound by it. *Merrill v. Yeomans*, 94 U. S. 568. He can claim nothing beyond it. \* \* \* As patents are procured *ex parte*, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim."

The defendant is selling pens constructed under letters patent No. 311,554, granted to Paul E. Wirt February 3, 1885. Into the lower end of defendant's pen-holder is screwed a perforated nozzle through which the ink is conducted to the pen. The passage through the nozzle, when compared with the interior of the reservoir, is very small. The reservoir is obstructed at the bottom by the presence of this nozzle. The ink does not flow as freely with it as it would without it. "Unobstructed," means free from obstacles or impediments which check, hinder or retard passage. It is by no means synonymous with "open." The complainant clearly understood this for he uses both words—"open and unobstructed." He meant to convey the idea of a reservoir not only open but unobstructed also. His drawings show this. Had a pen-holder like Wirt's been presented as a reference by the patent-office officials the complainant would probably have argued that it was not an anticipation, because a reservoir contracted from a large opening at the bottom to a comparatively small one was not an unobstructed but an obstructed reservoir. The defendant's holder is open because it has a hole at the bottom, but to say that the insertion of the nozzle does not impede and obstruct the flow of ink from the reservoir is like saying that a river is not obstructed by a dam, or a stove-pipe by a damper. The defend-



ant does not use the feeding-stem of the second and third claims. Not only does his stem stop far short of the upper end of the reservoir, but it is not provided with the U-shaped groove, or placed close to the wall of the reservoir so as to form the "internal capillary channel" of the patent. Other differences between the two structures exist, but they are of minor importance. Sufficient dissimilarity has already been pointed out. I am constrained to hold, therefore, that the defendant does not infringe. Where the patent relates only to a progressive step in a series of improvements the tendency of modern decisions is more than ever towards a strict construction of claims and a finding of non-infringement in doubtful cases. *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. Rep. 1343; *Newton v. Manufacturing Co.*, 119 U. S. 373, 7 Sup. Ct. Rep. 369; *Paving Co. v. Schalicke*, 119 U. S. 401, 7 Sup. Ct. Rep. 391; *Hartshorn v. Barrel Co.*, 119 U. S. 664, 7 Sup. Ct. Rep. 421; *Grier v. Wilt*, 120 U. S. 412, 7 Sup. Ct. Rep. 718; *Brewing Co. v. Gottfried*, 128 U. S. 158, 170, 9 Sup. Ct. Rep. 83; *McCormick v. Graham's Adm'r*, 129 U. S. 1, 9 Sup. Ct. Rep. 213; *Sargent v. Burgess*, 129 U. S. 19, 9 Sup. Ct. Rep. 220; *Peters v. Manufacturing Co.*, 129 U. S. 530, 9 Sup. Ct. Rep. 389; *Water-Meter Co. v. Desper*, 101 U. S. 332. It would seem that the world is wide enough for both these patentees, and that each should be permitted to enjoy the fruits of whatever novel features he has supplied to the art. The bill is dismissed.

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GUERARD v. THE LOVSPRING.

(District Court, D. South Carolina. May 16, 1890.)

1. SALE—WHEN TITLE PASSES.

Libelant contracted to sell and deliver along-side of a chartered vessel, for loading, a quantity of phosphate rock. He had a copy of the charter-party in his possession, and selected the stevedore and lighterman himself to deliver the rock. After several lighters had been delivered and made fast to the vessel, one of them capsized. Libelant took bills of lading to his own order, and surrendered the receipts of the ship-master for all the rock except the load thus lost, the receipt for which he retained. *Held*, that libelant showed an intent not to pass the property in the lost rock, but to retain the *jus disponendi*, and a suit therefor against the vessel was properly brought in his own name as owner.

2. ADMIRALTY—PROCEEDING IN REM.

The charter-party provided for delivery of the rock, "the cargo to be brought along-side and taken from along-side free from expense and risk to the ship," and the charterer reserved "the option of appointing stevedore for loading at the ship's expense." There was no provision that the stevedore was to act under the master's orders. Part of the rock was towed to the ship in lighters, and made fast, and receipts therefor were given by the master. One of the lighters, after being fastened, capsized, losing her load. *Held*, that an action *in rem* for the lost rock could not be maintained against the vessel.

In Admiralty.

*Brawley & Barnwell*, for libelant.

*J. P. K. Bryan*, for claimant.

SIMONTON, J. The libel is filed for the recovery of the value of a lighter load of phosphate rock. Libelant on 26th December, 1889, by sale bill, sold to one Gesterding, of Hamburg, Germany, about 2,000 tons kiln-

dried phosphate rock of a certain quality and price, for delivery January, February, along-side vessel, cash against documents. Vessel to load as much of cargo as possible at phosphate works, near Charleston, S. C.; balance to be lightered down to city by seller. Thereupon Gesterding entered into a charter-party with the owner of the *Lovspring*, and sent her to this port for a load of rock. The special provisions of the charter-party will be noted when needed. It required the captain to apply for cargo at Charleston to the libellant. This he did. Libellant directed him to the Rose Phosphate Works, on Ashley river. The bark then took in part of her cargo, and dropped down the stream, and anchored for the remainder. Libellant engaged Thomas Young as stevedore, and hired from Young a tug and lighters. Two lighters, with phosphate rock, were towed down to the bark on the evening of 26th March, reaching her at 8 o'clock, and the lighters were made fast to the bark, each with two lines, the tug furnishing one for each lighter, the bark the others. The master gave to the tug-master a receipt for the two lighters with phosphate rock in good order. For some reason Young and the master could not agree, and with the consent of both parties Lee was substituted as stevedore, and went aboard with his gang about 1 p. m. on 27th March. One of the lighters capsized about 2 o'clock on that day, losing her load. The mates and crew of the bark say that they noticed nothing about the lighter indicating this until it went over. A witness not connected with this case, whose place of business was on shore about 200 yards opposite to the bark, says that the lighter showed a list at 7 a. m., and that this gradually increased until she went over. When the tug had made fast the lighters she went away, leaving none of her men in charge, and no one on behalf of the lightermen came back to look after the lighters.

The first question made in this case is, in whose name should the action be brought? The claimant contends that Guerard, by his contract with Gesterding, agreed to deliver the rock along-side the vessel; that he alleges and has offered proof that he did deliver this rock along-side; that the property, if this be so, passed to his vendee, who alone can sue. The contract of sale in this case was not for a specific chattel. It was for about 2,000 tons of phosphate rock. It would have been satisfied by the delivery of any rock answering the character and quality of that agreed to be delivered. In such a case the appropriation, in that sense of the term which alone would pass the property from the vendor to the vendee, is not complete so long as the vendor shows by some act his determination to retain *jus disponendi*. This act may be in the form of the bill of lading which he requires. Equally so would be his retention of the ship's receipts to the lightermen, which must be surrendered for the bill of lading. *Wait v. Baker*, 2 Exch. 1; *Van Casteel v. Booker*, Id. 691; *Turner v. Trustees*, 6 Exch. 543; *Gabarron v. Kreeft*, L. R. 10 Exch. 274. Mr. Benjamin, in his book on Sales, 328 *et seq.*, cites these cases and many others. His conclusion upon the cases, among others, is this: "(5) Although, as a general rule, the delivery of goods by the vendor on board the purchaser's own vessel is a delivery to the purchaser and passes the property,

yet the vendor may by special terms restrain the effect of such delivery, and reserve *jus disponendi*, even in cases in which the bills of lading show that the goods are free of freight because owners' property. And on a sale of goods which are not specific, although the goods have been delivered on board a ship of, or chartered by, the purchaser, yet, in the absence of any appropriation of the goods in the fulfillment of the contract previous to shipment, the fact that the vendor has taken a bill of lading to his own order, or that of a third person, will prevent the property in them from passing to the purchaser." Amer. Ed., by Kerr.

In the present case, libellant when he finished loading the bark took the bills to his own order. He did not include in these bills the lost rock, nor did he require the master to do so, as was done in *Bulkley v. Cotton Co.*, 24 How. 386. He did not demand a separate bill for this rock. He surrendered all the other receipts to his lighterman. He retained that for this lost lighter. Thus he demonstrated his intent not to pass the property and to retain *jus disponendi*. He accepts the loss as his, and it goes without saying that his vendee concurs with him. This does not in any way affect the bark, or deprive her of any advantage of position she would otherwise enjoy. If the lost rock be the property of the charterer, and he brought this action, he would be bound by and and she would be protected by all the terms, limitations, conditions, and exceptions of the charter party. But so, also, is the libellant. He was the agent in that behalf of the charterer, had in his possession a copy of the charter-party, selected the stevedore, engaged the lighterman. He delivered the rock, or attempted to deliver it, under this charter-party, and solely because of it. He knew precisely how, in what capacity, under what limitations, qualifications, and exceptions, the cargo was sent to the bark in the stream. He is as much bound as the charterer would be. He could not treat this vessel as a common carrier. He knew that she was not a general ship, up for a general cargo, carrying goods for any one offering them. *Macl. Shipp.* 115, 391. He knew that she was under special charter to one man for this voyage for one purpose, and with all her freight room engaged. This action is properly brought in his name, and, as he alleges, as owner.

Our next inquiry is, has he a cause of action *in rem* against the bark? By his own contract and that of the charter-party, a portion of the cargo was to be delivered in the stream. His responsibility for this portion depends upon the express contract, and, where this is silent, upon the general usage subject to which the contract was made. *Maude & P. Shipp.* 136. This charter-party provides:

"The cargo to be brought along-side and taken from along-side free of expense and risk to the ship, any custom of the port to the contrary notwithstanding. Ship to receive cargo at charterer's wharf if required, provided there is sufficient water, or to load as deep as possible, always afloat, as charterer or agent shall appoint, at wharf, taking balance of cargo in stream. \* \* \* Whenever ordered, the ship is to load and discharge at such safe dock, wharf, or place, always afloat, as charterer or his agent shall appoint. Charterer reserves the option of appointing stevedore for loading at ship's expense."

The place of loading must be safe. As the charterer selects it, he is responsible for its safety. If, therefore, when the cargo was being delivered at the phosphate landing, the wharf, by reason of some defect in it, had fallen in, and the rock had been lost, there can be no doubt that the loss could not fall on the ship. As the wharf must be safe, so, also, the means used in transferring cargo from the shore to the ship in the stream must be safe, "free of expense and risk to the ship." And for this also the shipper is responsible. That is to say, if he uses lighters for this purpose they must be tight, staunch, and seaworthy in all respects, and must remain so as long as they are so used. *Lyon v. Mells*, 5 East, 437; *Word v. Leathers*, 97 U. S. 379. I say they must remain so. The master had no control whatever over the stevedore. He was selected by the shipper. The provision so common in charter-parties, that the stevedore, though named by shipper, should act under the master's orders, is omitted in this charter-party. So the master could not put a pound of this rock in his ship himself, or receive it in his ship, until it suited the stevedore. For this reason the lighter must not only come along-side tight, staunch, and seaworthy, but it must remain so until the other agent of his principal is ready to discharge its contents. There was not such a delivery of this rock to the master as to put it under his control, and therefore at his risk. *Blaikie v. Stembridge*, 95 E. C. L. 908, is a leading case. It was affirmed on appeal. It is quoted in all the text-books, and MacLachlan in his work on Shipping, 415, note 4, quotes *Swainston v. Garrick*, 2 Law J. Exch. 255; Consolate 2, Perciss 220, as sustaining it. The court says: "The stevedore was to be appointed by the charterer, and therefore to act for him and represent his interests. For this purpose he had the charge and custody of the goods until they were laden and stowed on board." This same case, construing a charter-party like this in every important respect, only that it has the clause, omitted from this, "that stevedore is to be under master's orders," says: "The cargo is to be brought along-side at the risk and expense of the charterer, and it is to be shipped and stowed by his stevedore; consequently at his risk, though at the expense of the ship-owner." The case of *The Sunlight*, decided in this court and affirmed in the circuit court, (2 Hughes, U. S. 11,) is not in conflict with this case. In the case of *The Sunlight*, phosphate rock, which the agreed statement of facts says was the property of the bark, was brought along-side and put entirely under the control, both as to the rock and the lighter, of the bark and her master. It capsized in the dock, and the bark lost the property. There was no special contract, and the case went off on a supposed custom of the port. This being the result of this contract made between the owners of the *Lovspring* and the charterer, no receipt or act of the master could alter, amend, or vary any of the terms of this contract. *Burton v. Sharpe*, 2 Camp. 529; *Macl. Shipp.* 138; *Sickens v. Irving*, 7 C. B. (N. S.) 165, 29 Law J. (C. P.) 25; *Manchisa v. Card*, 39 Fed. Rep. 495.

Let us look at the case from another point of view. The lighter was sent to the bark in order to fulfill the contract of the shipper. It was loaded with rock intended to be part of her cargo, was put along-side

the bark, and attached to her by lines. It so remained until she sank, with no one to watch her but the master and the crew of the bark, certainly until the stevedore came aboard. As we have seen, it was the duty of the shipper to furnish lighters, tight, staunch, and in every way seaworthy. As these lighters carried his rock to be put aboard ship by his stevedore at such time as he selected, he was bound to keep his lighters in that condition until this was accomplished. As the lighter was loaded by him, it was his duty to see that it was properly stowed, and that it should remain so until discharged by his own stevedore. If, therefore, the lighter capsized because it took in water, not being seaworthy, or because of bad stowage of cargo, he is responsible for it. If the lighter capsized from stress of weather, it is a danger of the sea for which the bark could not be responsible. There was no delay on the part of the bark. The stevedore was not ready to begin loading at any time during which the lighter was along-side the bark. The testimony gives no reason to think that the lighter at any time came into collision with the bark. It certainly did not at the time that it capsized. As the lighter was made fast to the bark by lines furnished in part by and with the co-operation of the tug people, negligence in the mode in which it was made fast cannot be imputed to the bark, in the absence of all testimony to this effect. These are all the causes for capsizing lighters which Mr. Rhodes could give, and he has large experience in handling them. But the master received the lighters, and, notwithstanding the absence of the stevedores and the hour of the night at which they arrived, permitted them to be attached by lines to his bark, and suffered the tug-master to leave them unguarded without objection. Did the bark incur any liability for this? Did her master assume the responsibility of these lighters, seeing that they did not leak, that their cargo was kept properly stowed, that no accident befell them?

Assuming, for the sake of argument, that nothing can be deduced from the terms of the charter-party on this point, and treating it as if it were silent as to it, is there any custom of this port which makes the vessel custodian of lighters bringing cargo at the risk and expense of the shipper? No such custom has been proved. On the contrary, it appears from the testimony of Mr. Rhodes that the White Cross Line, who do a large lighterage business, employ a man specially to visit and care for their lighters. And the tug-master in this case, employed by Capt. Young, another lighterman, only knew that they kept a pump for lighters to be used when the tugs could not be employed in pumping them out. There being, therefore, nothing in the express contract nor in the custom of the port which would make it the duty of the bark to safely keep and care for this lighter, the only other way in which she can be made liable is on the implied contract of the master when he gave the receipt for the two lighters in good order. What was the consideration for this? He was not bound by his charter-party to undertake the care and custody of the lighters, nor by the custom of the port. His freight was secure under his charter-party, and the delivery of the rock on the lighter as a part of his cargo, or withholding it, were equally indifferent

to him. He thus became an unpaid agent, having in possession the property of another, undertaking to keep or perform something about it. Even the master in such a case could not be held liable, except in an action charging his negligence as the cause of the damage, and proving it. *Coggs v. Bernard*, 1 Smith, Lead. Cas. (6th Amer. Ed.) pt. 1, p. 419, notes; Story, Ag. 213, 278. 339. Neither of these has been done in this case. *A fortiori* the bark cannot be held in this court in this proceeding *in rem*. Let an order be entered dismissing the libel, with costs.

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ON REHEARING.

(June 11, 1890.)

SIMONTON, J. In deference to the earnest conviction of libelant's proctor, for whom the court entertains great respect, and in view of the importance of this case to the trade of this port, a rehearing has been granted, and the questions at issue exhaustively discussed.

Is the bark responsible for the sinking of the lighter, attached to her by lines, and loaded with rock intended to be a part of her cargo? What is the effect of her master's receipt for the lighter in good order? The charter-party made between the owners of the bark and the charterer, for whom libelant was the agent, is the law of this case. Who is responsible for the seaworthiness and safety of the lighter, from the time she came along-side the ship up to and during the process of loading from it? Under the charter-party the charterer could load her at a wharf, so long as the ship could lie there with perfect safety. When it became unsafe to remain at the wharf she could be loaded in the stream. But the cargo must be brought along-side without expense or risk to the ship, any custom of the port to the contrary notwithstanding. When the ship arrived at this port she was secure of her freight money, whether she took a cargo or not. The charterer was bound by penalty for a full cargo. The libelant, his agent, was under contract to deliver such a cargo. So the loading was solely for the interests of the charterer and of the libelant. The mode of loading was wholly for his convenience, with the one qualification that the ship should be safe. So the libelant selected the wharf, engaged and paid the lighterman, who was under his control, and selected the stevedore for the special purpose of loading in the stream from the lighter. No words qualified the selection of stevedore. It is not said that he is to be employed by the ship, or should act under the direction of the master; only he must be paid by the ship. When libelant selected a wharf for the ship at which she was to be loaded, he was responsible for a safe wharf,—safe to hold the goods until they could reasonably have been taken aboard. *Young v. Lehmann*, 27 Fed. Rep. 385. So when, for his own convenience and the safety of the ship, he began to load from lighters, he substituted the lighter in the place of the wharf. He was bound to furnish safe lighters,—safe to hold the goods until they could reasonably have been taken aboard. Were we dealing with his responsibility as lighterman only, "that responsibility

would cease then;" or, what is the same thing, "would continue until the cargo is properly placed on the slings, and hooked to the tackle," (NELSON, J., in *The Cordillera*, 5 Blatchf. 519;) and as the loading from the lighter was to be done by his stevedore, using none of the ship's appliances, he could himself control the duration of this responsibility. This, then, was the obligation assumed by the shipper,—a part of his contract. He could not devolve on another the duty of performing it to his own exoneration, without changing the terms of the charter-party. The master had no authority whatever to alter, amend, or waive any one of the terms of the charter-party. Macl. Shipp. 138; Carv. Carr. by Sea, § 44, p. 45. If, therefore, as is contended by libelant, the master accepted the delivery of the rock, and assumed the custody of or responsibility for the lighter, notwithstanding the charter-party, his act was outside of his authority as master, and libelant knew it. His act did not bind his owners nor the ship. If he undertook the less responsible duty of watching the lighter, and of reporting to the libelant at his place of business in Charleston any change in her condition or threat of disaster, so that libelant should meet it, and avert it if possible, this would seem an imperfect obligation. Assuming it to be a legal contract, it certainly is not a maritime contract, as its performance was to be on land. It could create no lien on the ship enforceable in this court. So whatever personal responsibility the master may have assumed in any aspect of the matter, it was not a thing for which the ship is responsible to this libelant. It being the duty of the libelant to furnish a safe lighter,—safe for the purposes of loading a cargo from it to the ship,—this lighter capsized. She was brought to the ship at 8 o'clock at night. At 7 the next morning she had a list. At 2 P. M. she went over. Yet the only evidence at all which we have that she was seaworthy when she arrived is the receipt of the master, given after dark, without examination. We have no evidence, whatever, that she continued seaworthy, or that libelant or his agents ever inquired about it. There was one person whose duty it was to know this, and who must have known it,—the tug-master in charge of the lighter. He was called by libelant, but was not examined in chief on this point. On the cross-examination he said that when he got to the bark he sent a man—his mate—into the hold of the lighter. He does not give his report. We do not know his report. The man was not produced. His name is John Smith. We are equally without any evidence as to her condition at the phosphate works. The only person who could tell—Mr. Alston, who loaded her—was not called. Upon this showing the libelant cannot hold the bark in this proceeding *in rem* for this rock.

It would not be proper to conclude without consideration of a part of the argument challenging the correctness of the conclusion in *Blaikie v. Stembridge*, 95 E. C. L. 894. That case determined that, under the terms of the charter-party produced in it, the charterer was in the custody of the goods until they were taken from the lighter and put into the ship. It was used by me as persuasive authority. The case is quoted as authority in all the English text writers to whom there is access, and

by very many English judges. Among these is Sir Robert PHILLIMORE, than whom there is none of higher authority. *The Catharine Chalmers*, 32 L. T. (N. S.) 847, abstracted in 1 Pritchard's Dig. 499. It is not contended that when, under charter-party, the stevedore is selected or appointed by the charterer, this at all times and under all circumstances relieves the ship and its master. On the contrary, there being no demise of the ship, her owners under charter-party with such a provision in it are responsible upon a bill of lading by the master to a shipper who is ignorant of the charter-party. *Sandeman v. Scurr*, L. R. 2 Q. B. 86; *The Boskenna Bay*, 22 Fed. Rep. 666; *The St. Cloud*, Brown & L. 4; 8 Jac. Fish. Dig. 12401. When the charter-party provides that, though appointed by the charterer, the stevedore is employed by the ship, and is under the direction of the master, he is an agent of the ship. *The T. A. Goddard*, 12 Fed. Rep. 174. And as the master is always responsible for the navigation of the ship, and the safe carriage and safe delivery of the goods in her, and as the proper stowage of cargo is equally essential to proper navigation and proper carriage, he cannot be freed from this responsibility for good stowage, unless the contract with the owner of the goods expressly declares, or the clear, unambiguous custom of the port provides, that the charterer and his stevedore are alone responsible for stowage. Macl. Shipp. 414; *Sack v. Ford*, 13 C. B. (N. S.) 90; *The Boskenna Bay*, *supra*; *The Keystone*, 31 Fed. Rep. 416. *Blaikie v. Stembridge* is commented upon by two judges who have no superiors as admiralty lawyers on the bench,—Mr. Justice CLIFFORD and Judge BROWN of New York. Judge CLIFFORD, in *Richardson v. Winsor*, 3 Cliff. 404, is deciding a case between the owner and the charterer respecting the responsibility for the act of the stevedore and clerk appointed by the latter, and employed by the former. This English case was quoted. He does not dispute it at all. He distinguishes it from his own case, because the charter-party had a provision the one he was considering did not have: "Cargoes to be brought along-side and taken from along-side at the expense and risk of charterer." The charter-party we are discussing has a similar provision in stronger terms: "Cargo to be brought along-side and taken from along-side without expense or risk to the ship." Judge BROWN, in *The T. A. Goddard*, 12 Fed. Rep. 184, does say that *Blaikie v. Stembridge* is overruled by *Sandeman v. Scurr*. But this last-named case turned wholly upon the fact that the shipper who held a bill of lading from the master of a ship, not demised, was entirely ignorant of the existence of any charter-party; so the ship was liable. The charter-party we are discussing carefully omits the words, "Under the direction of the master," and any provision for assistance by the master or crew of the appliances of the ship. It comes under cases of *The Diadem*, 4 Ben. 247; *The Miletus*, 5 Blatchf. 335; and *Blaikie v. Stembridge*. The stevedore was the agent of the charterer. The case has caused considerable trouble, and has raised frequent doubts. Under these circumstances the provision as to costs will be modified. Let each party pay his own costs, and half the other costs. In every other respect the former decree is affirmed.



## THE GULNARE, (TIMOTHY MORONEY, Intervenor.)

(Circuit Court, E. D. Louisiana. June 6, 1890.)

**1. MARINE INSURANCE—INSURABLE INTEREST—CHARTERER.**

One in possession of a vessel under a written contract with the owners which provides that he shall man and run her for a commission, and hold her as security for his disbursements, has an insurable interest.

**2. SAME—SEAWORTHINESS.**

A vessel made a voyage from New Orleans to Frenchman's Harbor, where there was no opportunity to make repairs, took on a load, started back, and almost immediately sprung a leak, and was lost, without encountering any sea peril. *Held*, that the evidence showed the vessel was not seaworthy.

**3. SAME—THE POLICY—SEA PERIL.**

Encountering heavy seas is not a sea peril, within the meaning of a policy of marine insurance.

In Admiralty.

*E. B. Kruttschnitt*, for intervenor.

*Henry Denis*, for receiver.

**BILLINGS, J.** This is a suit on a marine policy of insurance upon the steam-ship *Gulnare*. The loss of the vessel is admitted, and the binding force of the policy, with two exceptions. It is claimed that the vessel insured was not seaworthy, and that Moroney had no insurable interest.

1. Had Moroney an insurable interest? The policy is "on account of whom it may concern. Loss, if any, payable to him as his interest may appear." Therefore he must have had an insurable interest to enable him to maintain this action. The vessel belonged, so far as the registered title showed, to Boyd Bros.; but the real owners came, and were represented by a Mr. Kerwan, of New York. In 1883 the plaintiff in this suit went into possession of her under a contract in writing with the owners, which was lost with the vessel. That contract provided that the plaintiff should keep possession of and run the vessel for a commission, and for his advances he should look for security to the vessel. The plaintiff had no proprietary interest. He had no admiralty lien, since his allowances were made under a contract with and for the owners. But he had a written contract, under which he was, for a commission, to possess and man and run the vessel, and was to hold her as security for his disbursements. I think his interest, with reference to capability to be insured, was that of a charterer under a charter-party. Has the charterer an insurable interest in the vessel? Prof. Parsons answers this question in the affirmative. 1 Pars. Mar. Ins. 165, and note. See, also, *Bell v. Insurance Co.*, 5 Rob. (La.) 423, 444, where the court say: "If the property is held as security, it gives an insurable interest." See, also, cases cited by Prof. Parsons in the note.

2. Was the vessel seaworthy? Applying the settled principles of law to the evidence, she was not. She started from New Orleans, made the voyage to Frenchman's Harbor, took on a load of fruit, started on a return voyage, and almost immediately sprung a leak, and was lost. The presumption is in favor of seaworthiness; "but if the vessel spring

a leak after sailing, without having met with any peril, this raises the presumption that she was unseaworthy when she sailed. This presumption may be rebutted by proof of actual seaworthiness at the time of sailing. When a vessel is shown to have met with a sea peril, if the insurer claims that the danger was owing to her being unseaworthy, and not to a sea peril, the burden is on him to show this." 1 Pars. Mar. Law, 267-271. I think, since there was no opportunity to make any repairs at Frenchman's Harbor, the voyage out and back, to and from Frenchman's Harbor, must be regarded as a continuous voyage without having been in port, which is the view the petitioner's counsel thinks should be taken. Thus the burden was upon the insurer or insured, as to seaworthiness, according to whether or not the *Gulnare* encountered a sea peril on her voyage out. The protest states that she "encountered heavy seas, and rolled heavily." This is not a peril which is insured against, but is only an ordinary peril which any strong vessel encounters everywhere. Therefore the presumption of unseaworthiness is raised, which is not overcome by any evidence. The exceptions to the master's report are overruled, the report is confirmed, and there will be judgment rejecting the claim of petitioner.

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WHEELWRIGHT v. WALSH.<sup>1</sup>

(District Court, S. D. New York. May 22, 1890.)

SHIPPING—CHARTER-PARTY—SUBSTITUTION—EVIDENCE.

Libelant chartered a vessel to bring a cargo of lumber from Fernandina. When the vessel arrived at Fernandina, it was agreed between the parties by a further arrangement, not in writing, that she should take a different cargo to Philadelphia, which she accordingly did. Respondent contended that the Philadelphia voyage was a substitute for the voyage named in the charter; libelant claimed that it was an agreement for an independent voyage, to be made before executing the written charter. *Held*, that the burden of proof rests on the party that alleges the substitution; and, where the evidence on that point is evenly balanced, the written charter must prevail.

In Admiralty.

*Owen, Gray & Sturges*, for libelant.

*Carpenter & Mosher*, for respondent.

BROWN, J. The charter, for the breach of which the above libel is filed, provided that the *Caroline Miller* should bring a cargo of lumber from Fernandina at a fixed rate. The libelants, who are the charterers, had employed the vessel on her two previous trips. When the vessel arrived at Fernandina, it was agreed between the parties by a further arrangement, not in writing, that she should take a cargo of railroad ties to Philadelphia, which she accordingly did. The respondent contends that this was a substitute for the agreement to take a cargo of lumber. The libelants contend that it was an agreement for an independent trip,

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

to be made before executing the written charter for carrying the lumber. Their witnesses testify that in the negotiation for the cargo of railroad ties it was explicitly provided that that trip should not affect the charter for the cargo of lumber. The witness for the respondent denies that there was any such condition, and asserts that it was understood to be a substitute for the charter.

In the details of the testimony there are doubtless to be found some circumstances tending to corroborate each. On the one hand, all the prior charters of the ship between the same parties had been in writing. On the other hand, as the agreement for the transportation of the ties was not made until about the time of the arrival of the vessel at Fernandina, and as she was to enter immediately upon the performance of that contract by loading at Fernandina, and was so ordered, there was not the same need of a written contract as in the other cases providing for a future voyage. The libelants, moreover, were under a definite contract with other parties to transport the lumber by a given date; so that it is scarcely probable that they would intend to abandon the existing charter of the vessel for carrying the lumber by substituting ties, and leave the transportation of lumber in fulfillment of their contract wholly unprovided for. The particular time when the lumber was to be transported was not stated in the charter; so that the transportation of the ties first, did not require any modification of the written charter as to the lumber. The written charter was an agreement to carry a particular cargo. Confessedly, that specific cargo has not been carried. The burden of proof to show that something different from what was agreed on in writing has been done and accepted as a substitute for it rests on the party that alleges the substitute. Upon evidence so evenly balanced, and looking also at the various circumstances, I do not think the respondent has made out the substitution by any preponderance of proof; and the written charter, as it stands, must therefore prevail. The respondent, having refused to send a vessel to take the lumber as required by the libellant under the written charter, must therefore be held bound to pay the difference in freight, for which amount, with interest, the libelants are entitled to a decree.

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THE TRINACRIA.<sup>1</sup>

MARX *et al.* v. THE TRINACRIA.

(District Court, S. D. New York. May 28, 1890.)

SHIPPING—CARRIAGE OF GOODS—BILL OF LADING—NEGLIGENCE—FOREIGN LAW.

Glycerine was stowed on a British ship at Genoa, Italy, and brought to this country under a bill of lading, which, besides the ordinary exception of perils of the sea, contained an exception against liability for loss occasioned by leakage or stowage, or by negligence of any person in the service of the ship. This latter exception is

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

valid both by English and by Italian law. The vessel had a very long and boisterous passage, and out of 116 drums 5 were delivered damaged by cuts, with some consequent loss of glycerine by leakage. *Held*, the foreign law governed as to any negligence within the foreign jurisdiction, and whether the damage was occasioned by perils of the sea, or by negligent stowage at Genoa, the libellant could not recover; there being no negligence shown or presumed, in this country, or from acts committed on the high seas.

In Admiralty.

*George A. Black*, for libellant.

*Hill, Wing & Shoudy*, for claimant.

Brown, J. The libel was filed to recover damages for the loss of glycerine in transportation from Genoa to New York. One hundred and sixteen drums were shipped, five of which were found on delivery to show cuts in the drums, through which more or less of the glycerine had escaped. The vessel was a British vessel, and the bills of lading excepted loss through negligence by any person in the service of the ship, loss from leakage, stowage, or peril of the seas. Both the English and the Italian laws sustain these exceptions as valid. As the contract was made in Italy by an English master of an English ship, and by an English bill of lading, the contract and the exceptions above referred to are valid as respects all acts done thereunder within Italian territory. It is no part of the law or policy of this country to invalidate the contracts of parties lawfully made abroad, so far as respects performance there, or to apply our law to the consequences of such performance there, the acts being neither criminal, by our law, nor *mala in se*. It is a wholly different question whether the courts of this country should sustain contracts or stipulations, as regards acts performed and designed to be performed, either on the high seas or within the exclusive jurisdiction of this country, when such stipulations are by our law void on grounds of public policy. See *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 459, 9 Sup. Ct. Rep. 469; *The Brantford City*, 29 Fed. Rep. 373, 391.

Upon the evidence in this case, I am satisfied that the cuts through which this leakage arose were not made within this country, but arose upon the voyage, in consequence of the long-continued very heavy weather that the ship experienced; that is, by sea perils. Other parts of the cargo showed damage from the same cause. For such damage the ship is not liable unless the stowage was negligent. The evidence here shows all possible care in the stowage. If, however, there was any fault in the stowage, inasmuch as that was done at Genoa, where the contract was made, and where the exception as to stowage was valid, and there was no negligence except at Genoa, no recovery on that ground could be had. The libel must therefore be dismissed, with costs.

## STATE OF CALIFORNIA v. CHUE FAN.

(Circuit Court, N. D. California. June 28, 1890.)

## REMOVAL OF CAUSES—LOCAL PREJUDICE.

Under Rev. St. U. S. § 641, providing for removal of a cause before final hearing, "when any civil suit or prosecution is commenced in any state court, for any cause whatever, against any person who is denied, or cannot enforce in the judicial tribunals of the state, \* \* \* any right secured to him by any law providing for the equal civil rights of a citizen," a prosecution against a Chinaman for having in his possession a lottery ticket, under a law applying to "any person," cannot be removed on the ground of local prejudice or maladministration of the law.

On Motion to Remand to State Court.

John Lord Love, for motion.

Alfred Clarke, for defendant.

SAWYER, J. The defendant, a Chinese subject, was arrested upon a complaint filed in the police court of San Francisco, charging him with having in his possession a lottery ticket, in violation of section 70 of Ordinance No. 2187, making the act a misdemeanor. The section provides that "it shall be unlawful for *any person* to have in his possession \* \* \* a lottery ticket," etc., and that "any person violating any of the provisions of this section shall be guilty of a misdemeanor," etc. The prisoner, upon being arrested, filed an elaborate petition setting up numerous grounds intended to show why he could not obtain an equal protection of the laws in the state court, and asked that the case be removed to the United States circuit court for trial, in pursuance of the provisions of section 641 of the Revised Statutes of the United States; and the police judge having refused to allow the cause to be removed, he obtained a writ of *habeas corpus cum causa*, as provided in section 642, Rev. St., and the cause and the custody of the prisoner were transferred to the United States circuit court. The state district attorney now moves, that the cause be remanded to the state court, and the custody of the prisoner restored to the sheriff of the city and county of San Francisco, on the ground, among others that, no sufficient case is made by the record and petition, under said provisions of the statute, for the removal.

That the statute is valid, and, that a case properly coming within the provisions of the statute, may be so, legally removed, is settled by the decision of the supreme court, in the case of *Strauder v. West Virginia*, 100 U. S. 303, and other cases. The only question, then, is, whether the record and petition present a case within the purview of that statute. Upon careful examination, I am satisfied, that the supreme court, in *Virginia v. Rives*, has settled the point, that it is not. This was a case of two negroes charged with murder, who alleged, very fully, the facts, and, that, on account of the action of the judges, and of popular prejudices, they were unable to obtain an equal protection of the laws. The case was removed to the circuit court under the provisions of section 641, Rev. St. In discussing the question, arising on the petition, the supreme court makes the following observations, equally applicable to this case.

"If the petition filed in the state court before trial, and duly verified by the oath of the defendants exhibited a sufficient ground for a removal of the prosecutions into the circuit court of the United States, they were in legal effect thus removed, and the writ of *habeas corpus* was properly issued. All proceedings in the state court subsequent to the removals were *coram non judice* and absolutely void. This by virtue of the express declaration of section 641 of the Revised Statutes, which enacts that, 'upon the filing of such petition, all further proceedings in the state court shall cease, and shall not be resumed except as thereafter provided.' In *Gordon v. Longest*, 16 Pet. 97, it was ruled by this court that when an application to remove a cause (removable) is made in proper form, and no objection is made to the facts upon which it is founded, 'it is the duty of the state court to "proceed no further in the cause," and every step subsequently taken in the exercise of jurisdiction in the case, whether in the same court or in the court of appeals, is *coram non judice*.' To the same effect is *Insurance Co. v. Dunn*, 19 Wall. 214. It is, therefore, a material inquiry whether the petition of the defendants set forth such facts as made a case for removal, and consequently arrested the jurisdiction of the state court and transferred it to the federal court. Section 641 of the Revised Statutes provides for a removal 'when any civil suit or prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States,' etc. It declares that such a case may be removed before trial or final hearing. Was the case of Lee and Burwell Reynolds such a one? Before examining their petition for removal, it is necessary to understand clearly the scope and meaning of this act of congress. It rests upon the fourteenth amendment of the constitution and the legislation to enforce its provisions. That amendment declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws. It was in pursuance of these constitutional provisions that the civil rights statutes were enacted. Sections 1977, 1978, Rev. St. They enact that all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. Section 1978, enacts that all citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. The plain object of these statutes, as of the constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same. The provisions of the fourteenth amendment of the constitution we have quoted all have reference to *state action exclusively, and not to any action of private individuals*. It is the state which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against *state infringement* of those rights. Section 641 was also intended for their protection against *state action, and against that alone*. It is doubtless true, that a state may act through different agencies,—either by its legislative, its executive, or its judicial authorities;

and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the fourteenth amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the state. The mode of enforcement is left to its discretion. *It may secure the right, that is, enforce its recognition, by removing the case from a state court in which it is denied into a federal court where it will be acknowledged.* Of this there can be no reasonable doubt. Removal of cases from state courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted. *But it is still a question whether the remedy of removal of cases from state courts into the courts of the United States, given by section 641, applies to all cases in which equal protection of the laws may be denied to a defendant. And clearly it does not.* The constitutional amendment is broader than the provisions of that section. The statute authorizes a removal of the case only before trial, not after a trial has commenced. It does not, therefore, embrace many cases in which a colored man's right may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by a discrimination against him in the sentence. \* \* \* But the violation of the constitutional provisions, when made by the judicial tribunals of a state, may be, and generally will be, after the trial has commenced. It is then, during or after the trial, that denials of a defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied, or that he cannot enforce it, in the judicial tribunals. It is obvious, therefore, that to such a case,—that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced—section 641, has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the state, and ultimately to the review of this court. We do not say that congress could not have authorized the removal of such a case into the federal courts at any stage of its proceeding, whenever a ruling should be made in it denying the equal protection of the laws to the defendant. Upon that subject it is unnecessary to affirm anything. It is sufficient to say now that section 641 does not. It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a state, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the state, rather than a denial first made manifest at the trial of the case. In other words, the statute has *reference to a legislative denial or an inability resulting from it.* Many such cases of denial might have been, \* \* \* as they had been, denied a trial by jury. They might have been excluded by law, from any jury summoned to try persons of their race, or the law might have denied to them the testimony of colored men in their favor, or process for summoning witnesses. Numerous other illustrations might be given. *In all such cases a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But, in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him.* When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. *Yet such an affirmation is essential to his right to remove his case.* By the express requirement of the statute, his petition must set forth

the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial." *Virginia v. Rices*, 100 U. S. 816 *et seq.*

Thus the court held the case not to be within the statute and issued a *mandamus* to the district judge directing him to remand it to the state court. That decision, in my judgment, completely covers this case. The Chinese stand exactly in the condition of those negroes with respect to a right to enjoy equal rights. Regarding the ordinance in question as a law of the state, or standing upon the same footing as a law of the state, it is perfectly fair and equal upon its face. It applies to "any person," and "every person." It is upon a proper subject for such municipal legislation. If there is a failure to execute it, or if it is unequally executed—if there is a discrimination against Chinese in its administration—that is not the fault of the ordinance. The ordinance gives no countenance to such action. The state does not thereby command or authorize this discrimination, but if it exists, as alleged,—and a strong case of discrimination in practice is, certainly, alleged,—this results from the wrongful unauthorized action, or non-action, of the courts, executive officers of the government, or other persons, precisely as in the case cited, and not from the commands, or authority of the state,—or the provisions of the law itself. And for such wrongs, in the language of the supreme court, "section 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the state, and ultimately to the review of this court." *Id.* 319. In *Strauder v. West Virginia*, the discrimination was made by the statute of the state itself, and not in its execution. The statute authorized the wrong. In other words the wrong was committed by the state, and the statute was void upon its face. On that ground the case was held to fall within the provisions of section 641, and it was properly removed, and the statute set aside. That is the difference between the two cases, bringing the one within the statute, while the other is not. The wrong in the one case, is the direct necessary result of the provisions of the statute;—of its necessary operation *proprio vigore*—while in the other, it results from the maladministration of the law. The former is removable, and the latter is not, under the provisions of section 641, Rev. St. The *Case of Yick Wo*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, does not reach this question. Congress had a choice of remedies for depriving persons of the equal rights to which they are entitled under the national constitution and laws. It might perhaps, have extended the remedy provided in section 641, to the class of cases to which this belongs, as well as to that embracing *Strauder v. West Virginia*, but, in the opinion of the supreme court, it has not done so; but has left it to the ordinary remedy of review by the higher courts, and its judgment, and the decision cited, are controlling. The case must therefore, be remanded, and the prisoner recommitted to the custody of the sheriff, from which he was taken, and it is so ordered.



MORGAN *et al.* v. HUGGINS *et al.*

(Circuit Court, N. D. Georgia. February 27, 1890.)

## 1. WILLS—CONSTRUCTION—UNCERTAINTY—EVIDENCE.

Construing a will in the following language: "In the name of God, amen. I, Riley Garrett, of the county of Randolph, and state of Georgia, being of perfect mind and memory, thanks be given unto God, calling into mind the mortality of body, and knowing that it is appointed for all men once to die, I do make and ordain this my last will and testament. That is to say, principally, and first of all, I give and recommend to the earth to be buried in a decent, Christian manner, at the discretion of the executors, who shall be Isham Wheelus, and so much of my worldly estate I give and bequeath unto William Augustus Wheelus; and I do hereby revoke and disannul all other wills, legacies, and bequests, confirming this to be my last will and testament. In testimony whereof I have hereunto signed my signature this 18th day of January, 1844,"—*held*, that the decision of the supreme court of the state, (*Garrett v. Wheelus*, 69 Ga. 466,) holding that the intention of the testator by this will, read in the light of surrounding circumstances, was, after paying burial expenses, to give the remainder of the estate to William Augustus Wheelus, is the correct construction of this will, and is followed and adopted in this case.

## 2. SAME—AFTER-ACQUIRED PROPERTY.

The Code of Georgia, enacted in 1863, contained the following provision, (section 2461:) "All property acquired subsequent to making of the will shall pass under it if its provisions be sufficiently broad to embrace such property." This provision is prospective only, and after-acquired real estate does not pass under a will made before this provision went into operation, even though the testator did not die until afterwards.

(Syllabus by the Court.)

In Equity.

Bill by Morgan and others, as assignees of certain heirs at law of Riley Garrett, to restrain Huggins, his administrator, from selling or otherwise disposing of the property of the estate, and praying an accounting.<sup>1</sup>

H. H. Perry, P. L. Mynatt, and G. A. Howell, for complainants.

John L. Hopkins and Alexander S. Erwin, for respondents.

NEWMAN, J. This is a case in equity, and the question before the court at the present stage of the case is the construction of the will of Riley Garrett, deceased, late of this district, which is as follows:

"In the name of God, amen. I, Riley Garrett, of the county of Randolph, and state of Georgia, being of perfect mind and memory, thanks be given unto God, calling into mind the mortality of body, and knowing that it is appointed for all men once to die, I do make and ordain this my last will and testament. That is to say, principally, and first of all, I give and recommend to the earth to be buried in a decent, Christian manner, at the discretion of the executors, who shall be Isham Wheelus, and so much of my worldly estate I give and bequeath unto William Augustus Wheelus; and I do hereby revoke and disannul all other wills, legacies, and bequests, confirming this to be my last will and testament. In testimony whereof I have hereunto signed my signature this 18th day of January, 1844. RILEY GARRETT. [L. s.]

"ROBERT C. CONNER.

"HEZEKIAH BROKE.

"W. C. PERKINS."

<sup>1</sup>The extrinsic evidence may be found substantially in the case of *Garrett v. Wheelus*, 69 Ga. 466.

After the death of Riley Garrett, in May, 1880, Isham Wheelus, the named executor, having died, the will was offered for probate in the court of ordinary in Hall county, Ga., by William Augustus Wheelus. In this proceeding a *caveat* was filed by the next of kin and heirs at law of Riley Garrett. The *caveat* was on the following grounds:

"(1) Because said alleged will is not a lawful will, because it was not signed, executed, and published as the last will of the said Riley Garrett according to the provisions of the law in such cases made and provided. (2) Because said alleged will is null and void in law for uncertainty as to what was intended to be conveyed by it, as to whom it was intended to convey anything, and for uncertainty as to what was meant by the language used. (3) Because said paper offered for probate is not testamentary in its character, and the court of probate has no jurisdiction to admit the same to probate."

The case thus made up in the court of ordinary was taken by appeal to the superior court of Hall county, Ga., and by writ of error to the supreme court of the state. The final decision in the supreme court, the court of last resort in the state, affirming the judgment of the superior court of Hall county, was in favor of the will, and determined that by the will William Augustus Wheelus took all the property of Riley Garrett, less the expenses of burial. It appears from an examination of the evidence submitted here on this question, and from the report of the case in the supreme court, that substantially the same evidence, so far as material and admissible, has been submitted here as was submitted in the state court. It may be that the evidence offered in this court is somewhat fuller than that offered in the state court, but the leading facts which can properly be considered in construing this will, and that throw light on the question, seem to be substantially the same. The decision by the supreme court of Georgia is reported in the case of *Garrett v. Wheelus*, 69 Ga. 466. It may be proper to observe that the complainants in the bill in this court are the assignees of the heirs at law of Riley Garrett, who were the caveators in the proceeding in the state court, and who are therefore in privity with the complainants, and stand in their place as to the effect to be given the former adjudications. It will be perceived that one of the grounds of the *caveat* in the state court was that "said alleged will is null and void in law for uncertainty as to what was intended to be conveyed by it, as to whom it was intended to convey anything, and for uncertainty as to what was meant by the language used." This ground seems to have been urged through the various stages of the case, and was passed on by the supreme court, as appears from the decision. After copying the instrument as above, the supreme court hold "that such a will was not so uncertain as to be void. A will should not be refused to be admitted to probate on account of uncertainty unless it be so uncertain that it cannot be construed by the aid of parol testimony," and then proceeds:

"It appears that the testator in this will was a bastard; that the executor was his first cousin, and the legatee named was the executor's child, six years of age; that he kept his will and a photograph of the boy in his trunk together; and that a year before his death he stated that this legatee was the only relation he recognized, [the father of the legatee having died,] though there

were others nearer of kin in fact. *Held* that, in the light of these facts, the intention of the testator was to provide for his burial expenses, and leave the remainder of his property to the legatee named."

The decision thus stated, which is copied from the syllabi of the case, is elaborated in the opinion of JACKSON, C. J. Subsequently, in a case growing out of the administration of the Garrett estate, the supreme court of Georgia, in affirming a judgment awarding the administration to Huggins, the representative of the Wheelless estate, uses this language in commencing the opinion by HALL, J.:

"Riley Garrett, of Randolph county, in this state, on the 18th day of January, 1844, executed his last will and testament, whereby he appointed Isham Wheelless his executor, and gave all his worldly estate to William Augustus Wheelless." *Long v. Huggins*, 72 Ga. 776.

So it will be seen that the supreme court of Georgia has held that by this will Riley Garrett provided for his burial expenses, and left the remainder of his property to William Augustus Wheelus; and that in a subsequent case arising from the same estate that court has treated this question as settled. It is said, however, by complainants here that the court of ordinary in the first case named, and the higher courts on appeal, had no jurisdiction to do more than admit the will to probate; and that all expressions by the supreme court in the opinion cited as to the construction of the last clause were *obiter dicta*. In brief, the question is that the jurisdiction of the court of ordinary is confined to the question of the probate of the will, and does not extend to the construction of the will. It will be perceived in the grounds of the *caveat* that the strong point made by the caveators on the right of the propounders to have the will admitted to record was the same urged with so much force here, viz., that it was void for uncertainty; that the language used had no meaning; and that, without extrinsic evidence, it was (except as to the appointment of an executor, and providing for the burial expenses) an insensible thing. It would seem difficult for the court to determine that the instrument was not meaningless without finding some meaning. It might have found one of several different meanings; but where it is held upon an issue of this sort that the paper has a definite, specific meaning, it is not so clear that this determination is without the jurisdiction of the court reviewing the judgment of the probate court on the question of the probate of the will. Attention has also been called in argument to the last paragraph in the opinion of the supreme court of the state as follows:

"A man has a right to give enough of his property to his executor to have his body buried, and the probate would be necessary for that purpose; and, the *factum* being proved, it should stand. But if there had been nothing but the subsequent bequest, and it being objected to for uncertainty, unless so absolutely void as not to be aided by the rule of construing it by surrounding circumstances, the *factum* being proved, the probate should stand, in order that it may have the light of those circumstances thrown on it if, on the issue of *devisavit vel non*, that light could not be used; for it would not do to defeat a will as void for uncertainty when it is not so uncertain that parol evidence

could make the writing certain in meaning,—not to make a different will, but to construe the writing, and thus carry into effect testator's intention as expressed in it."

It is said that the expressions used in this clause indicate that the supreme court intended to leave the construction of the will for future determination. An examination of the case does not sustain this argument. After three pages of the opinion are devoted to reasoning in favor of the sufficiency of the language in the will, which has been quoted, to convey the remainder of the estate, after paying burial expenses, to William Augustus Wheelus, the language which has just been given from the last paragraph of the opinion is used. There is much more reason for treating this last paragraph as *dicta* of the court than the main portion of the opinion as contended by the complainants. The head-notes of the case, which are supposed to embody a succinct statement of the points decided are devoted entirely, as will be seen, to the question of William A. Wheelus' rights under the will. It seems clear that the supreme court understood that the construction of this will was properly before it, and that it intended to determine it. It is not deemed necessary, however, to determine whether or not this issue as presented here is strictly *res adjudicata*. As persuasive authority the opinion of the supreme court of the state must necessarily have very strong and weighty effect. With the same will before it, with substantially the same surrounding circumstances, and with the same parties thereto, so far as legal status is concerned, with a will made, and a testator dying in Georgia, and all of the property of the estate, both real and personal, in the state, and with the same issues made, the decision of that court, even if not controlling, must be, as stated, very influential here.

But, construing this will independently of the decisions of the supreme court of the state, is it void for uncertainty? The argument for complainants in this case is to this effect: That the intention of the testator is not to be derived from extrinsic evidence unless that intention is expressed; that the question is not what the testator intended, but what he expressed; that the intention is to be obtained from the will, and not the will from the intention; and that, even if we are absolutely certain from extrinsic evidence as to what the testator intended, still, unless he has expressed it, the will is a nullity. A very elaborate and well-prepared brief and argument has been submitted with quite an array of authorities on this line, all ably presented. The oral argument to the same effect has been thorough and complete. The position that the intention of the testator must be gathered from the will itself is undoubtedly correct. It is equally true, however, that the court must place itself in the position of the testator, and to that end may gather the circumstances surrounding the testator at the time the will was made for the purpose of arriving at this intention. *Allen v. Allen*, 18 How. 385. Sections 2456, 2457, Code Ga., relating to this subject are as follows:

"(2456) In the construction of all legacies the court will seek diligently for the intention of the testator, and give effect to the same as far as it may be consistent with the rules of law; and to this end the court may transpose sen-

tences or clauses, and change connecting conjunctions, or even supply omitted words in cases where the clause as it stands is unintelligible or inoperative, and the proof of intention is clear and unquestionable; but if the clause as it stands may have effect, it shall be so construed, however well satisfied the court may be of a different testamentary intention. (2457) When called upon to construe a will, the court may hear parol evidence of the circumstances surrounding the testator at the time of its execution. So the court may hear parol evidence to explain all ambiguities, both latent and patent."

Taking this will and the evidence submitted here, and reading it, in the language of the supreme court of Georgia, "in the light of surrounding circumstances," is it not clear what the testator intended? It is not denied that the effect of the decision of the state court was to determine the right of the propounders to have the will admitted to probate, the contention being that its construction was left open. On the face of the paper it is perfectly clear that he intended to make a will, and by it it must be supposed to dispose of all his property. He appoints Isham Wheelus, the father of William Augustus, his executor, and it is conceded, although the language is imperfect, that he provided for the burial of his body, and then is the remaining clause, which has caused such extended discussion in the state court and here, "and so much of my worldly estate I give and bequeath to William Augustus Wheelus." It must be clear, as stated, that he intended by this paper to dispose of all his property, and except the provision for burial expenses there is no other disposition of property than that contained in the words last quoted. Now, can there be any reasonable doubt, from an examination of this paper alone, that the testator intended to leave the remainder of his property to William Augustus Wheelus? No other meaning can be given it consistently with the view that by this paper he intended to dispose of all his property. It is clear that he did so intend, and equally clear that the only construction which can effectuate that intention is the one just stated. Assume that nothing can be inserted, as is so strongly contended, is the will as it stands intelligible, viewed from the position in which the testator stood when it was made, and gathering by extrinsic evidence the circumstances then surrounding him for that purpose? A case coming as close to this in its facts as any other cited in the argument is that of *In re Bassett's Estate*, (*Perkins v. Fladgate*,) L. R. 14 Eq. 54. The testatrix there made a will which she declared to be her last will and testament, by which she appointed an executor, and, after giving several legacies, proceeded as follows:

"After these legacies and my doctor's bills and funeral expenses are paid, I leave to my sister Mary Perkins, \* \* \* without any power of control whatsoever of her husband, John Perkins. In case of her death to be equally divided amongst the children or grandchildren."

This was held to be a good gift of the residue of the estate. Sir JAMES BACON, V. C., in his opinion, says:

"I should feel the greatest objection to supplying any words in a will, but I do not think this will unintelligible as it stands, and accordingly I do not see the necessity of supplying any words. I read the will as intended to dispose of the whole of testatrix's estate and effects. That must have been her

intention, as is generally the case, when she set about making her 'last will and testament,' that would vest the whole of her estate in the executor. Then she gives certain legacies which it was the duty of the executor to pay. Then she says: 'After these legacies \* \* \* are paid, I leave to my sister Mary Perkins, \* \* \* without any power or control whatsoever of her husband John Perkins. In case of her death to be equally divided amongst her children or grandchildren.' The intention of the testatrix is express. If I could find any indication of an intention to give anything else, as, for instance a legacy of £500, it would be different; but what other meaning can be attributed to these words except that which I have suggested? What answer can be given to the question, 'What did she mean to leave?' except this: the entirety of the residue of her estate. Where, then, is the difficulty? No doubt the word 'residue,' if supplied, would satisfy the meaning; but that only shows that the meaning of the testatrix may be expressed by other words than those which she has used. The cases which have been cited furnish no rule whatever for the interpretation of the present case. If the whole of the property had been realized and placed on a table, the executor must have first paid out the legacies, and then handed over all the rest to the testatrix's sister."

The same argument presented in this was presented in that case, as shown by brief of counsel in the report of that case, and yet the conclusion of the vice-chancellor was as above quoted. There was no language whatever in that will to show how much was left to Mary Perkins, and yet, as it was clear that the testatrix set about making her last will and testament, and there was no other disposition of her property after certain legacies except the one before the court for construction, it was held that the intention was to give the residue. All that is said in favor of giving effect to that may with equal force be said of the will now before the court. The case of *Mohun v. Mohun*, 1 Swanst. 201, cited by complainants, and favorable to them, was decided three-quarters of a century ago, and is not authority even in England now, as is evident from the decision in the case *In re Bassett's Estate*, *supra*.

While the case of *Hawman v. Thomas*, 44 Md. 30, strongly relied on by complainants' counsel, is very much like the case at bar, still it does not appear from the report of the case that the facts were as here. The part of the will there construed is stated in the report to be the second clause. How many other clauses in the will there were is not shown in the report of the case. It does not furnish simply and clearly the question presented in this case, or in the case *In re Bassett's Estate*, *supra*. It is probably true, however, that the decision of the supreme court of Georgia, in construing this will, and the views of this court, are not in harmony with *Hawman v. Thomas*. The case cited of *Allen's Ex'rs v. Allen*, 18 How. 385, is unlike this in its facts, although supporting the general position of complainants as to the strict rule governing the admission of extrinsic evidence in the interpretation of wills; which position it is not considered necessary to controvert. Nor is it necessary to go further into the many authorities cited to discuss the question of the extent *alunde* testimony will be heard for the purpose of explaining ambiguities, latent and patent, and the nice distinctions and differences in the several lines of authorities. The law in Georgia on this subject is now embodied in the Code, § 2457. The view taken

by this court of this will and the law controlling its interpretation seems to render consideration of this phase of the law superfluous.

There is no sufficient reason to justify this court in departing from the decision of the supreme court of the state. On the contrary, there is much reason to adhere to it as a correct rule to be adopted in the construction of this will.

The other question submitted in this case, and which may now be disposed of, is, what class of property passes by this will? The Code of Georgia (section 2461) declares:

"All property acquired subsequent to the making of the will shall pass under it if its provisions be sufficiently broad to embrace such property."

The Code containing this provision went into effect January 3, 1863. The supreme court of the state, in *Gibbon v. Gibbon*, 40 Ga. 562, held that this section of the Code "is prospective only, and after-acquired real estate does not pass under a will made before the Code went into operation, even though the testator did not die until afterwards." The facts here are like the facts there, so far as the question presented is concerned. The will here as there was made before the Code, and here as there the testator died after the Code went into effect. That decision must be controlling here, and the conclusion is that the after-acquired real estate of the testator does not pass by this will. This disposes of the questions that can now be settled, and an order may be taken for a reference to a master in order that the condition, extent, and character of the estate may be ascertained, and the proper accounting had, that final decree may be rendered in the case.

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HAYDEN v. OFFICIAL HOTEL RED-BOOK & DIRECTORY Co. *et al.*

(Circuit Court, S. D. New York. July 11, 1890.)

**STOCKHOLDERS—SALE OF CORPORATE PROPERTY—PURCHASE BY MAJORITY.**

The stockholders of a corporation financially embarrassed, resolved to wind up the business, and authorized the trustees to sell the property to pay debts. At a sale duly advertised, of which the stockholders had notice, and at which many were present, the property was struck off to the secretary, who was also one of the trustees, and bought in the interest of a combination of stockholders formed in good faith, for their own protection, after it seemed probable that the property would not sell except at a great sacrifice. It appears to have been sold for all that it was worth, and the purchase by the secretary was approved by a majority of the stockholders,—by all except the complainant. *Held*, that it is not shown that the action of the majority was oppressive or in bad faith, that the sale would not be set aside on these facts, and a preliminary injunction will be refused.

**In Equity.**

Bill by a stockholder to set aside a sale of the corporate property to a combination formed by the majority. On motion for a preliminary injunction.

*Louis F. Post*, for complainant.

*William J. Fanning*, for defendants.

WALLACE, J. It appears upon this motion that the Travelers' Publishing Company, a commercial corporation, became financially embarrassed, and its stockholders, at a meeting called to consider its affairs, concluded to wind up the business, and sell its property to pay its debts, and at this meeting authorized the board of trustees to make sale of the whole or any part of the property at public or private sale, as in their judgment should seem best; that the trustees concluded to sell the property at public auction, and after reasonably advertising the sale, and giving notice thereof to all the stockholders, they sold that part of it involved in this action; that many of the stockholders, as well as the trustees, were present at the sale, and after several bids were made the property was struck off to one Jacques, the secretary, and one of the trustees of the corporation, he being the highest bidder; that he bought the property in the interest of a combination of stockholders, who had united to protect themselves when, and not until, it appeared that the property could not probably be sold except at a great sacrifice; and that, immediately after the purchase by Jacques, he transferred the property to a new corporation, the stockholders of which consisted principally of those stockholders in the other corporation who had united together.

So far as now appears, the price at which the property was sold to Jacques was all that it was worth, and everything that was done had the approval of all the stockholders except the complainant. Under these circumstances the sale cannot be annulled at the suit of the complainant, or of the corporation, assuming that the complainant represents it for the purposes of this action, merely because the property was bought by one of the trustees of the corporation. He was acting with the assent of those who, being the majority of stockholders, were entitled to represent the whole body of beneficiaries; and the rule which forbids a trustee from purchasing for himself or for another the property of which he is the fiduciary does not extend to a case where he does so with the consent of all interested. The real question in the case is whether the majority stockholders were acting in good faith towards the complainant, as a minority stockholder, in authorizing the sale of the property, and its purchase by the new corporation. The right of the majority stockholders of a corporation established for manufacturing or trading purposes to wind up its affairs, and dispose of its assets, even against the objections of the minority stockholders, whenever it appears that the business can be no longer advantageously carried on, is well recognized. *Treadwell v. Manufacturing Co.*, 7 Gray, 398; *Wilson v. Proprietors*, 9 R. I. 590; *Lauman v. Railroad Co.*, 30 Pa. St. 42. But they cannot be permitted to exercise this right in a manner inconsistent with good faith towards the minority stockholders; and if it is exercised oppressively, and they purchase the property of the corporation for themselves at an inadequate price, the transaction will not be permitted to stand. *Ervin v. Navigation Co.*, 23 Blatchf. 517, 27 Fed. Rep. 625. There are circumstances in this case which suggest unfavorable inferences; but there is quite convincing evidence that the only purpose of the stockholders who combined together, and purchased the property, was to prevent a sacri-



fice of the property, and enable enough to be realized from it to pay off the debts of the corporation, and that they had no design to disregard the interests of the complainant.

It may be that at the final hearing the facts will present a different aspect, but on the case as it now appears a preliminary injunction should not be granted. The motion is denied.

# NATIONAL BANK OF VIRGINIA v. CITY OF RICHMOND *et al.*

## MERCHANTS' NAT. BANK v. SAME.

(Circuit Court, E. D. Virginia. July 1, 1890.)

### 1. TAXATION—ASSESSMENTS—NATIONAL BANKS.

Under Rev. St. U. S. § 5219, which declares that nothing in the national banking act shall prevent all the shares of stock of a national bank from being included in the assessment of the personal property of the owners of such shares, an assessment of the entire stock of a national bank *en solido* against the bank itself is invalid.

### 2. SAME—CONSTITUTIONAL LAW.

Act Va. Jan. 27, 1890, which attempts to legalize taxes levied upon such invalid assessment, is void.

In Equity.

*James Alfred Jones*, for National Bank of Virginia.

*Pegram & Stringfellow*, for Merchants' National Bank.

*C. V. Meredith*, City Atty., for defendants.

Before BOND and HUGHES, JJ.

BOND, J. On July 17, 1889, the defendant Cunningham, who was the collector of taxes for the city of Richmond, presented to the Merchants' National Bank of Virginia, located at Richmond, a bill of taxes assessed upon the shares of stock of that association, of which the following is a copy:

1889.

(Ward 3.)

The Merchants' National Bank, to City of Richmond, Dr.

Tax on shares of stock,	-	-	-	-	\$255,000
Less value of real estate,	-	-	-	-	53,942

\$201,058, at 1.40, \$2,814 81

—With a request that the same be promptly paid, to avoid a penalty of 5 per cent. imposed by the ordinances of that city. A similar bill for taxes, to the amount of \$2,324, was presented to the National Bank of Virginia, as a tax on its shares of stock, which were valued at \$216,000, with a deduction of \$50,000 for real estate held by the bank. After the presentation of these bills by the collector, the corporations whose shares had been assessed for the payment of the tax filed separate bills of complaint in this court to enjoin the collector from proceeding to col-

lect the same from the bank. A temporary injunction was issued, and now, the matter having been finally heard upon their answers and exhibits and arguments of counsel, it is to be determined whether the temporary injunction shall be dissolved or made permanent.

The power to tax national bank shares is given by section 5219 of Revised Statutes, which declares that nothing in the law of the United States respecting banks shall prevent all the shares in any such association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located. The tax in these cases is assessed upon all the shares issued by the association *in solido* against the association, and the cashier is required by the collector to pay it or be subject to a penalty. In the *Case of First Nat. Bank of Richmond*, 39 Fed. Rep. 309, (tried in this court a short time ago,) the record in which case has gone to the supreme court, it was held by the district judge that such an assessment of a tax on the whole of the shares of a bank, at their market value, was nothing else than an assessment of the capital stock of the bank, and was not authorized by the act of congress, and that to tax the shares of the bank at all they must be listed in the name of the shareholder. Any other view of the law than this would work a grievous wrong to the shareholders of national banks. By the law of Virginia, every person assessed for a tax upon his personal property has a right to deduct from the valuation the amount of his indebtedness, so that he may be charged only with taxes on what he owns, when a balance is struck between him and his creditors. To assess the bank on all its shares *in solido* is to prevent entirely a shareholder therein from this benevolent and just provision of law.

Since the decision in the *Case of the First Nat. Bank of Richmond*, prompted by a desire to remedy this difficulty, the general assembly of Virginia, by act approved January 27, 1890, provided:

"An act to legalize and confirm certain taxes imposed by the city of Richmond for the year 1889, upon all the shares of stock issued by state and national banks located in said city. (1) Be it enacted by the general assembly of Virginia that the assessments for taxes imposed by the city of Richmond for the year eighteen hundred and eighty-nine, upon all shares of stock issued by state and national banks located in said city, and required by said city to be paid by the cashier of each bank, respectively, are hereby legalized and confirmed, subject to the right of the shareholders, or their personal representatives, of stock issued by the national or state banks which were located in said city during the year eighteen hundred and eighty-nine, to claim a deduction from or cancellation of such assessments as provided for in the next section. (2) Within five days from the passage of this act the collector of city taxes of said city shall notify the cashier of each of said banks that at the office of such collector the said collector will be in attendance at his office for three weeks subsequent to the service of said notice, and will hear any applications that may be made to him for the purpose of deducting from the assessment aforesaid any amount which any shareholder of any one or more of said banks, or any personal representative of such shareholder, by reason of the indebtedness of said shareholder, would have been entitled to deduct from the aggregate value of his shares of stock, had such amount been invested in other moneyed capital. (3) During the time above named the cashiers of any of said banks,

or any holder of any shares of stock issued by any of such banks assessed as above stated, or any one representing such shareholder, may appear before such collector, and make application to have a deduction made as above stated. The collector shall have power to administer an oath to the applicant, and, after an examination of him upon the material facts of such application, shall grant such deduction: provided, the shareholder has made no deduction on account of his indebtedness from his other personal property. Or, if the said collector shall be satisfied from the evidence before him or otherwise that any such shareholder paid a municipal or county tax for the year eighteen hundred and eighty-nine upon his shares of stock in any other county, city, or town of this state, he shall deduct from said assessment an amount equal to the tax charged in said assessment upon the shares of stock so held by such person. (4) After the expiration of the time allowed for hearing the application above mentioned, the said collector shall amend the tax-bill now held against each cashier as above mentioned, by deducting therefrom the aggregate of such deductions as may be allowed to the stockholders of the bank of which he is cashier. After each of said tax-bills has been so amended so far as required by reason of any such deductions, the collector shall present the same for payment to the cashier against whom it is assessed, and, if the same be not paid within ten days from said presentation, the same shall then become a delinquent tax due said city, and liable to the imposition of such penalties, and to be enforced as other delinquent taxes due said city. (5) This act shall be in force from its passage."

It seems from this statute that the state, still adhering to the right to assess the tax on all the shares of a banking association to the association, has directed the collector to notify the cashier of each bank that he will be ready at a certain time and place to make any deduction from the assessment which any shareholder may show he is entitled to, and that he will amend any bill against any cashier as he may be advised after such showing. But this does not avoid the difficulty, for, even if it were the duty of the cashier, which it is not, to notify the stockholders that the bank had been assessed for a tax upon its whole shares at a certain valuation, it would be impossible for him, without great difficulty, to apportion the amount among the shareholders. The taxes of the city of Richmond are higher than they are in the lesser towns of the state, and a shareholder in Danville is not liable for as much tax as a shareholder in Richmond, nor is his tax payable to the same municipality. While the cashier can be required to collect and pay the tax, he cannot be required to ascertain its amount. This is the duty of those appointed to assess and levy the tax in accordance with the law of Virginia. It was in view of this that congress provided (Rev. St. § 5210) that every national bank should keep at all times a full and correct list of the names and residences of all the shareholders of the association, and the number of shares held by each, to be open to the inspection of all the shareholders and the officers authorized to assess taxes under state authority. The last clause would be useless if the state officers were permitted to discover the number of shares the bank had issued, and then assess the tax on them *in solido* against the bank at market value. The method of assessment of this tax was illegal in the first instance and void, and no act of the general assembly of Virginia can validate it. The case of *Supervisors v. Stanley*, 105 U. S. 305, which has been urged in argument in support

of the validating act above quoted, is not in point. There it appears the assessment was against the stockholders. We think the injunction heretofore granted should be made perpetual, and it is so ordered.

HUGHES, J., concurs.

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COMMERCIAL NAT. BANK OF CINCINNATI v. HAMILTON NAT. BANK OF  
FT. WAYNE.

(Circuit Court, D. Indiana. July 15, 1890.)

**BANKS AND BANKING—COLLECTIONS—PAYMENT.**

An indorsee for collection for account of a prior indorsee for collection is liable to the owner of the draft for the amount collected, and not remitted to the owner or the prior indorsee, though credit for the amount was given the latter, and he charged the collector, and credited the owner, and was charged for the same by the owner, and though the collector, by virtue of an agreement with its indorser, whereby the amount due from one to the other for collections was to be placed to the latter's credit with a certain bank, wrote to that bank to place the amount to the credit of the prior indorsee, which order it could have countermanded after notice of the latter's failure.

At Law.

*Lawrence Maxwell and Morris & Barrett*, for plaintiff.

*Bell & Morris*, for defendant.

GRESHAM, J. In April, 1884, the plaintiff sent to Fletcher & Sharp, bankers at Indianapolis, a draft indorsed: "Pay to the order of Fenton, for collection, on account of Commercial Bank." Fenton was Fletcher & Sharp's cashier, and the draft was sent to them in pursuance of an arrangement entered into in 1883, whereby Fletcher & Sharp were to make collections for the plaintiff, and remit balances on the 1st and 15th of each month. Fletcher & Sharp indorsed the draft: "Pay to the order of John Mohr, Jr., cashier, or order, for collection, for account of Fletcher & Sharp,"—and sent it to the defendant, whose cashier John Mohr was, at Ft. Wayne. The defendant collected the draft on July 10, 1884, and the same day credited Fletcher & Sharp with the proceeds, \$3,497.49, and advised them of the fact. On receipt of this advice, July 11th, Fletcher & Sharp charged the defendant, and credited the plaintiff, with the amount, and notified the latter. This notice was received by the plaintiff July 12th, when it charged Fletcher & Sharp. On July 15th the defendant posted a letter at Ft. Wayne, addressed to Winslow, Lanier & Co., bankers at New York, directing them to credit Fletcher & Sharp with the amount collected. At this time, and for several years previous, the defendant and Fletcher & Sharp had made collections for each other under an arrangement whereby any amount due from one to the other was placed to the latter's credit with Winslow, Lanier & Co., with which banking firm both kept accounts; but the plaintiff had no knowledge of

this arrangement. The defendant in good faith directed that the credit be given to Fletcher & Sharp in New York, not knowing that they were indebted to Winslow, Lanier & Co. Fletcher & Sharp failed, and ceased to do business, on July 14th, which failure was announced in the evening papers of Ft. Wayne the next day, after banking hours, not, however, until after the defendant had posted the letter of instruction to Winslow, Lanier & Co. This letter was received in New York on July 17th. The defendant knew of the failure of Fletcher & Sharp on July 16th; and, although it had ample time to have done so, it failed to countermand the order sent by mail to the New York banking firm. On July 25th the plaintiff addressed a letter to the defendant, claiming the collection, and demanding that it be remitted. The demand was refused, and this suit was brought to recover the amount.

The indorsement to Fletcher & Sharp "for collection" authorized them and their indorsee to collect the draft for the owner, the plaintiff. Fletcher & Sharp received the draft for collection, and for no other purpose, and the restrictive character of the indorsement informed the defendant that the title remained in the plaintiff, and that it would own the proceeds when collected. The defendant became a mere subagent of the plaintiff for collection, with no more right to pay the proceeds to Winslow, Lanier & Co. than Fletcher & Sharp would have had if they had made the collection. Fletcher & Sharp acquired no property in the draft, and they passed none to the defendant. The defendant, as subagent or trustee of the plaintiff, was bound to send the proceeds to it directly, or through Fletcher & Sharp. It did neither. The defendant claims that the placing of the amount of the collection to the credit of Fletcher & Sharp on the books of Winslow, Lanier & Co., the charging of the same amount against the defendant by Fletcher & Sharp, the crediting by them of the plaintiff with a like amount, and the charging of Fletcher & Sharp by the plaintiff, amounted to a payment by the defendant to the plaintiff, through Fletcher & Sharp; that the defendant should not be required to pay the money again; and that the draft and its proceeds were, in all respects, treated in accordance with long and well established custom and usage among banks and bankers. The plaintiff's indorsement upon the draft was plain, and its legal force cannot be defeated by resort to usage or custom, or by any method of book-keeping. *Sweeney v. Easter*, 1 Wall. 173; *Bank of the Metropolis v. First Nat. Bank of Jersey City*, 19 Fed. Rep. 303; *Bank v. Armstrong*, 39 Fed. Rep. 684; *First Nat. Bank v. Reno Co. Bank*, 3 Fed. Rep. 257; *Blaine v. Bourne*, 11 R. I. 119; *Bank v. Hubbell*, 22 N. E. Rep. 1031; Pars. Notes & B. § 143. In discussing the effect of indorsements of this character, the supreme court, in *White v. Bank*, 102 U. S. 658, said:

"The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof, or by resort to usage. The plain meaning of it is that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper, or the ownership of the money when received. Both these remain, by the reasonable and almost nec

essary meaning of the language, in the indorser. \* \* \* If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to contradict it."

Instead of sending the money directly to the plaintiff, or through Fletcher & Sharp, the defendant sent it to Winslow, Lanier & Co., in New York, not for the plaintiff, but to the credit of Fletcher & Sharp. It was a violation of the plain terms of the plaintiff's indorsement to thus treat the draft and its proceeds as the property of Fletcher & Sharp. The defendant sent no money to New York to be credited to Fletcher & Sharp. It simply instructed Winslow, Lanier & Co., by letter, to charge it, and credit Fletcher & Sharp with an amount equal to the collection; and, if the letter of instruction left Ft. Wayne before the defendant knew of the failure of Fletcher & Sharp, the defendant knew of the failure in ample time to have sent a dispatch countermanding the instruction. Finding and judgment for the plaintiff for the amount collected, with interest.

### UNITED STATES *v.* KELSEY *et al.*

(District Court, W. D. Texas, Brownsville Division. June 16, 1890.)

#### 1. OFFENSES AGAINST ELECTION LAWS—INDICTMENT.

Rev. St. U. S. § 5515, provides that every officer of an election for congressman who neglects or refuses to perform any duty in regard to such election required of him by law, or who violates any duty so imposed, or who knowingly does any acts thereby unauthorized, with intent to affect any such election, shall be punished. *Held*, that an indictment charging that the defendants, members of the county commissioners' court, "unlawfully, fraudulently, corruptly, and feloniously," suppressed the return of certain ballots, without charging that the offense was committed "knowingly," and without setting out the acts which constituted such suppression, is fatally defective.

#### 2. SAME.

Under Rev. St. Tex. art. 1705, which requires the county commissioners' court to "open the election returns, and estimate the result, recording the state of the polls in each precinct," an indictment against the members of such court which charges that the defendants did "unlawfully, fraudulently, corruptly, and feloniously neglect and refuse to receive, estimate, and count all the ballots voted and returned to them," does not charge any offense; their duty being confined to the returns, and having no connection with the ballots.

#### 3. SAME.

The omission in such an indictment to allege affirmatively that the election returns were delivered to the commissioners' court is a fatal defect.

At Law. On demurrer to the indictment.

A. J. Evans, Dist. Atty., for plaintiff.

J. B. Wells, for defendants.

MAXEY, J. The questions for determination in this case arise upon demurrer to the indictment. It is alleged therein that on the 6th day of November, 1888, there was held at Roma, precinct No. 2, Starr county, Tex., a general election for a member of congress from the seventh congressional district, at which more than 200 votes were cast, and that

the votes and ballots so cast "for a representative in congress were then and there duly estimated and counted and returned by the judges and clerks of said election at said precinct No. 2, at Roma, Starr county, to the county judge of Starr county, Tex., in all respects according to the election laws of the state of Texas in such cases made and provided; and, further, that it then and there became the duty, under the laws of the state of Texas, of the county court of Starr county, Tex., the said court being then and there, to-wit, on said 6th day of November, A. D. 1888, and on the 12th day of November, A. D. 1888, composed of one J. P. Kelsey, county judge, and one James Barbour, and one Antonio Ramirez, and one Juan Gonzales Vela and one William Muquerza, and one R. Alderette, county commissioners, to receive, estimate, and count all the ballots voted and returned to them from all the precincts in Starr county, Tex., and particularly from precinct No. 2, at Roma, Tex., for a representative in congress, which duty said county court was bound to do and perform in the county of Starr, and in the state of Texas, and on the 12th day of November, 1888, the same being five days, exclusive of Sunday, after the said 6th day of November, A. D. 1888, under the constitution and laws of the state of Texas." The indictment further charges that on said 12th day of November, 1888, "the said J. P. Kelsey, and the said Antonio Ramirez, and the said Juan Gonzales Vela and William Muquerza and James Barbour, each and all being then and there officers of said general election for a representative in congress, so held, as aforesaid, on said 6th day of November, 1888, within and for the county of Starr, did, on said 12th day of November, 1888, unlawfully, fraudulently, corruptly, and feloniously, neglect and refuse to receive, estimate, and count all the ballots voted and returned to them from all the election precincts in Starr county, Tex., and particularly from precinct No. 2, at Roma, Tex., for a representative in congress at said general election, \* \* \* and then and there did unlawfully, fraudulently, and corruptly and feloniously suppress the return of ballots cast at said precinct No. 2, at Roma, Tex." Four grounds of demurrer to the indictment are assigned by the defendants, which may, for convenience, be condensed into the three following: (1) The acts charged against the defendants do not constitute an offense against the laws of the United States; (2) the indictment does not charge the "defendants with any act or acts which would constitute a crime or offense, or a failure to perform any act or duty imposed upon them by the laws of the state of Texas;" (3) the "indictment is so contradictory, inconsistent, and repugnant in its averments as to be wholly void because thereof."

The offense charged against the defendants is for neglect to perform a duty imposed by the statutes of the state. That congress has the "constitutional power to enact a law for punishing a state officer of election for the violation of his duty under a state statute in reference to an election of a representative to congress" is settled by the supreme court in the following cases: *Ex parte Siebold*, 100 U. S. 371 *et seq.*; *Ex parte Clarke*, Id. 403, 404; *In re Coy*, 127 U. S. 752, 753, 8 Sup. Ct. Rep. 1263. To determine, therefore, whether the defendants are charged

with the commission of an offense, it will be necessary to consider the laws of the state in connection with section 5515 of the United States Revised Statutes, upon which the indictment is founded. That section is in the following language:

"Sec. 5515. Every officer of an election at which any representative or delegate in congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate; or who withholds, conceals, or destroys any certificate of record so required by law respecting the election of any such representative or delegate; or who neglects or refuses to make and return such certificate as required by law, \* \* \* shall be punished as prescribed in section fifty-five hundred and (ten) (eleven.)"

The section embraces several distinct offenses, for the commission of which the same punishment is denounced. Its purpose is to punish "every officer of an election" who may commit any of the offenses properly included within its provisions. In the present case the indictment is framed upon the following clauses of the section:

"(1) Every officer of an election \* \* \* who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof;" or (2) "who knowingly does any acts thereby unauthorized, with intent to affect such election, or the result thereof."

It is insisted by defendants, in support of their demurrer, that they were not officers of election, within the meaning of the federal statutes, and therefore they are not amenable to the penalty thereby denounced. Construing section 5515 in *U. S. v. Fisher*, Judge BAXTER held that "none but officers of an election are within either the letter or spirit of the law." 8 Fed. Rep. 414-417. To the same effect are the cases of *U. S. v. Clayton*, 2 Dill. 223; *U. S. v. Baldrige*, 11 Fed. Rep. 553; and *U. S. v. Wright*, 16 Fed. Rep. 114. If none but officers of election are liable to indictment and punishment under the statute, are the defendants such officers? Are the members of a county commissioners' court, whose general official duties pertain solely to county affairs, such as managing county finances, building bridges and roads, levying county taxes, etc., (Rev. St. Tex. arts. 1514-1524,) and having no duty to perform in connection with the election except the incidental ones hereafter indicated, officers of election, within the purview of the act of congress? There are numerous adjudged cases—among them may be noted the following—which regard and treat judges of election, clerks, inspectors, commissioners of elections, and supervisors as officers of election, within the meaning of section 5515. In *re Coy*, 127 U. S. 731, 8 Sup. Ct. Rep. 1263; *Ex parte Siebold* and *Ex parte Clarke*, *supra*; *In re Coy*, 31 Fed. Rep. 794; *U. S. v. Jackson*, 25 Fed. Rep. 548; *U. S. v. Baldrige*, *supra*; *U. S. v. Wright*, *supra*; *U. S. v. Morrissey*, 32 Fed. Rep. 147; *Ex parte Perkins*, 29 Fed. Rep. 900; *U. S.*



*v. Green*, 33 Fed. Rep. 619; and *U. S. v. Davis*, Id. 621; *U. S. v. Fisher*, 8 Fed. Rep. 414. In none of the cases cited, except the last, did the court discuss the question of who are election officers, and evidently for the reason that the defendants charged were too plainly within the provisions of the statute to require argument. In *U. S. v. Fisher* the defendant was a supervisor of elections, deriving his authority to act from federal appointment; and the court, in holding him to be an officer of election, uses this language:

"An officer whose only official duties relate to the registration of voters as preliminary to the exercise by them of their right to vote, to be present at the polls during the time the votes are being cast, to engage in the work of canvassing the ballots, to personally scrutinize, count, and canvass each ballot cast, and to remain with the inspectors and other officers of such election until the votes are canvassed and counted, and certificates and returns are wholly completed, is an officer of the election so supervised by him, within the meaning and intention of the section under and pursuant to which the counts under consideration were framed." 8 Fed. Rep. 416.

The duties of federal supervisors are prescribed by the statutes of the United States. Under the laws of Texas, the persons termed "officers of election" evidently embrace and include only the presiding officer of election, the two judges, and two clerks of election, (title 34, Rev. St., and Acts 1883, pp. 50-52;) and it is thereby made the duty of such officers at each election precinct to hold the election, receive the ballots, and count the votes. Rev. St. arts. 1694-1696. And, when the ballots have all been counted, the managers of the election, consisting of said presiding officer, judges, and clerks, (Rev. St. art. 1673,) shall make out the returns in the manner prescribed, and deliver one of such returns to the county judge. Acts 1883, p. 51, art. 1698. The election returns are required to be delivered to the county commissioners' court by the county judge or clerk, as the case may be, on the day appointed by law to open and compare the polls, (Acts 1883, p. 51, art. 1699,) which day is declared to be the Monday next following the day of election. Id. art. 1700. In respect to such return the duty of the court is defined in the following words of the statute:

"On the Monday next following the day of election, and not before, the county commissioners' court shall open the election returns, and estimate the result, recording the state of the polls in each precinct in a book to be kept for that purpose." Id. art. 1705.

It is thus apparent that there is no duty devolving upon the commissioners' court, under the state laws, requiring it to conduct the election, count the ballots, make the returns, or do any act which has connection, either direct or remote, with holding the election. Its duty begins on the Monday next following, and is limited to opening the returns, estimating the result, and recording the state of the polls in a proper book. In the case of *U. S. v. Clayton*, the defendant, who was the governor of Arkansas, was indicted for the delivery of a false certificate of election to one Edwards. It was objected to the indictment that under the act of congress the defendant was not an officer of election. In sustaining the demurrer, Judge DILLON observes:

"In view of these acknowledged rules of law, the question occurs: Did congress mean by the use of the words 'officer of election' or 'election officer,' in the section of the statute on which the indictment is framed, to include the governor of a state? Is the governor an election officer? It seems to us not. These words are apt and usual words to describe the clerks and judges of election, but not to describe the governor of a state. Such is not their ordinary and usual meaning." 2 Dill. 226.

The reasoning of Judge DILLON may be appropriately applied to the indictment in this case; and it is by no means clear that congress intended to embrace within the designation "officers of election" a county commissioners' court. It was intimated by the district attorney, upon the argument, that Mr. Justice BRADLEY, in the case of *U. S. v. Davis, Governor, etc.*, tried some years ago at Austin, had construed the words of the act to include the governor of a state. If there was a written opinion in that case, it does not appear to have been reported; and, upon examination of the records, I find the papers of the case missing from the files. In my investigation, therefore, of the questions here presented, I am deprived of the views of the learned justice. For the present a definite expression of opinion upon the point discussed will be withheld; and, assuming defendants to be included within the intent of the statute, other objections to the indictment will be considered.

Counsel for defendants further earnestly insisted in argument that the indictment does not charge against the defendants "a failure to perform any act or duty imposed upon them by the laws of the state of Texas." The essential averments of the indictment, important in this connection to be noticed, are the following: (1) The ballots cast at Roma precinct "were then and there duly estimated and counted, and returned by the judges and clerks of said election \* \* \* to the county judge of Starr county, Tex., in all respects according to the election laws of the state." (2) That it then and there became the duty of the county court (evidently intended by the pleader for county commissioners' court) "to receive, estimate, and count all the ballots voted and returned to them from all the precincts, \* \* \* and particularly from precinct No. 2 at Roma," which duty said court was bound to perform on the 12th day of November, 1888. (3) It is charged that the defendants did, on said 12th day of November, 1888, "unlawfully, fraudulently, corruptly, and feloniously, neglect and refuse to receive, estimate, and count all the ballots voted and returned to them from all the election precincts, \* \* \* and particularly from precinct No. 2 at Roma." The indictment against defendants is for a neglect and refusal to perform a statutory duty. In such a case the pleader should use the statutory words, or employ equivalent words clearly showing that the offense charged is embraced within the intent of the statute. "It is, as a general rule," says Mr. Bishop, "sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter." 1 Bish. Crim. Proc. § 611. The same author announces the result reached by him after an examination of adjudicated cases in the following language:

"The indictment must employ so many of the essential words of the statute as shall enable the court to see on what statute it is framed; and, beyond this, it must use all the other words which are essential to a complete description of the offense; or, if the pleader chooses, words which are their equivalents in meaning; or, if again the pleader chooses, words which are more than their equivalents, but which include within themselves the full significations of the words not used." *Id.* § 612.

Referring to the general rule stated by Mr. Bishop, as to the manner of pleading statutory offenses, the supreme court says:

"But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute." *U. S. v. Simmons*, 96 U. S. 362.

Upon the same subject the court, in *U. S. v. Carll*, says:

"And the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." 105 U. S. 612, 613; *U. S. v. Mills*, 7 Pet. 142; *U. S. v. Britton*, 107 U. S. 661, 662, 2 Sup. Ct. Rep. 512; *U. S. v. Staats*, 8 How. 44.

"Every ingredient of which the offense is composed must be accurately and clearly alleged." *U. S. v. Cook*, 17 Wall. 174. And says the court:

"It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars." *U. S. v. Cruikshank*, 92 U. S. 558.

See, also, *Francis v. State*, 21 Tex. 286; *Henderson v. State*, 14 Tex. 510. And it is said by Judge DILLON in *U. S. v. Whittier* that—

"Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If this rule is lost sight of, the courts may hold an act to be a crime when the legislature never so intended. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused." 5 Dill. 39, citing authorities.

Applying the foregoing rules to the present indictment, can it be said that its averments are sufficient to charge a crime against the defendants? The specific duty of the commissioners' court is averred to be "to receive, estimate, and count all the ballots voted and returned to them \* \* \* from Roma precinct;" and the direct charge is that the defendants neglected and refused to perform that duty; that is, "to receive, estimate, and count all the ballots voted and returned to them" from Roma precinct. The duty enjoined by the statute upon the commissioners' court is that it "shall open the election returns and estimate the result, recording the state of the polls in each precinct in a book to be kept for that purpose." With the ballots, either as to receiving, estimating, or count-

ing, the court has nothing to do. The ballots are required by law to be placed by the managers of election in a box, which must be securely fastened, and delivered to the clerk of the county court, to be kept by him for the period of a year, and then destroyed, unless a contest should grow out of the election, in which event the clerk is required to deliver the ballot-box to a competent officer having process therefor. Rev. St. Tex. arts. 1702, 1703. And the failure on the part of the clerk to securely keep the ballot-box containing tickets, and his failure, after the expiration of one year, to destroy the ballots, are declared to be offenses punishable by fine and imprisonment. Pen. Code, arts. 174-176. It will thus be seen that the duty of the commissioners' court is confined to the returns. It acts upon the returns, not the ballots. Articles 1698-1700 of the Revised Statutes of Texas, as amended by the act of 1883, (Gen. Laws 1883, p. 51,) prescribe the duties of the managers in making and disposing of the election returns, and are as follows:

"Art. 1698. When the ballots have all been counted the managers of the election, in person, shall make out triplicate returns of the same, certified to be correct, and signed by them officially, showing—*First*, the total number of votes polled at such box; *second*, the number polled for each candidate. One of which returns, together with poll-lists and tally-lists, shall be sealed up in an envelope, and delivered by one of the managers of election to the county judge of the county. Another of said returns, together with poll-lists and tally-lists, shall be delivered by one of the managers of election to the clerk of the county court, to be kept by him in his office, open to inspection by the public, for twelve months from the day of the election; and the other of said returns, poll and tally lists, shall be kept by the presiding officer of the election for twelve months from the day of election. Art. 1699. In case of a vacancy in the office of county judge, or the absence, failure, or inability of that officer to act, the election returns shall be delivered to the clerk of the county court of the county, who shall safely keep the same in his office, and he or the county judge, as the case may be, shall deliver the same to the county commissioners' court on the day appointed by law to open and compare the polls. Art. 1700. The election returns shall be delivered, as provided in the two preceding articles, on or before the Monday next following the day of election."

After the election returns are delivered to the court, it then becomes its duty, at the time designated, to proceed with its prescribed work, to open the same, and to estimate therefrom the result. In setting forth the statutory duty of defendants, and their failure to perform it, the pleader has not used the words of the statute; nor are apt and appropriate words employed to charge the breach or omission of any duty enjoined by law.

If the averments of the indictment were otherwise sufficient, it may be further said that it is defective in failing to allege affirmatively that the election returns were delivered to, or ever were in the possession of, the commissioners' court. The averment is that the delivery was made by the judges and clerks of the election to the county judge, while the law requires the returns to be delivered by the managers to the judge, or, in case of his absence, etc., to the clerk; and the county judge or clerk, as the case may be, "shall deliver the same to the county commis-

sioners' court." The county judge does not constitute the commissioners' court. He is simply a member thereof; and three members, including the judge, are required to form a business quorum. Rev. St. art. 1511. Delivery of the returns, therefore, to the county judge, is in no proper sense a delivery to the commissioners' court; and an indictment charging the defendants with refusing and neglecting to open the returns, and estimate the result, should contain some positive and direct averment showing that such returns had been delivered to them, or were in their possession or under their control. Otherwise, the bare charge of non-performance of a statutory duty would be sufficient, in the absence of averments showing that the party charged was in a position, or had the ability, to act or do the thing required. And, in this connection, it is worthy of note that the statute expressly provides:

"No election returns shall be opened or estimated unless the same shall have been returned in accordance with the provisions of this chapter." Rev. St. Tex. art. 1706.

The remaining and concluding clause of the indictment will be briefly noticed. It immediately follows the clause above considered, and is in the following words: "And then and there did unlawfully, fraudulently, and corruptly and feloniously suppress the return of ballots cast at said precinct No. 2 at Roma, Tex." The first clause is referable to that part of section 5515 of the Revised Statutes of the United States which makes it an offense for an officer of election to neglect or refuse "to perform any duty in regard to such election required of him by any law of the United States or of any state." The clause now considered charges affirmatively the doing of an unlawful thing, an act unauthorized by the law of the state, to-wit, the suppression of the return of ballots, and is more appropriately referred to that part of section 5515 which denounces a penalty against an officer of election "who knowingly does any acts thereby [by the laws of the United States or of the state] unauthorized, with intent to affect any such election, or the result thereof." The indictment purports to charge two distinct offenses, which should be set out in separate counts. Rev. St. § 1024; 1 Bish. Crim. Proc. §§ 421, 426, 429. And see *U. S. v. Pirates*, 5 Wheat. 201, 202; *State v. Randle*, 41 Tex. 299. And it, therefore, may be obnoxious to the objection of duplicity, which is defined to be "the joinder of two or more distinct offenses in one count." The criminal law never permits this." 1 Bish. Crim. Proc. § 432. But if, according to the prescribed rules of criminal pleading, it be permissible to reject as surplusage the clause held to be defective, (*Id.* § 440; *State v. Dorsett*, 21 Tex. 657; *Henderson v. State*, 2 Tex. App. 89,) it is nevertheless true that the other or concluding clause should sufficiently charge an offense; and, failing to do so, the indictment must fall. Recurring, then, to the concluding clause, does the charge that the defendants "did unlawfully, fraudulently, and corruptly and feloniously suppress the return of ballots cast" sufficiently set out an offense against the statute? Under the federal statute, if any person shall "knowingly" do any unauthorized act, he subjects himself to the penalty denounced. The statute of the state makes the "willful" suppression of any "election return" a criminal offense, in these words:

"If any person shall \* \* \* willfully secrete, suppress, or destroy any ballots, election return, or certificate of election, he shall be punished by a fine not exceeding three thousand dollars." Pen. Code, art. 170.

Assuming that the expression, "return of ballots," as alleged in the indictment, and "election returns," may be treated as synonymous, it is still not charged that the suppression was knowingly and willfully committed. Construing the two statutes, federal and state, in conjunction, the words, "knowingly and willfully," in my opinion, are necessary to be alleged in order to make out the offense; and these are not supplied by the words of the pleader, "unlawfully, fraudulently, and corruptly and feloniously" suppressed the return of ballots cast. In the case of *State v. Webb*, defendant was indicted for perjury. A motion to quash the indictment was sustained, and the judgment was affirmed by the supreme court. Discussing the question, the court says:

"The indictment, when compared with the statute, is found wanting in a material charge set forth in the Criminal Code, in its definition of perjury, which is declared to be 'a false statement, either written or verbal, deliberately and willfully made,' etc. Pasch. Dig. art. 1909. The indictment omitted to charge the defendant with having deliberately and willfully sworn falsely. It is true the district attorney, in framing the indictment, uses an abundance of expletives, such as 'willfully, unlawfully, knowingly, corruptly, and feloniously did commit willful and corrupt perjury,' and that the accused did 'willfully, knowingly, corruptly, and falsely state under oath,' and that the accused 'did then and there, upon the trial of said case, unlawfully, willfully, knowingly, and feloniously commit willful and corrupt perjury.' But in all the charges quoted the short and simple statement required by the Code is omitted. There is no charge that the false statement was 'deliberately and willfully made.' We are left to inference in ascertaining from the indictment that the accused is charged with the crime of perjury as defined in the Code. If the definition, and material facts comprised in the definition, as set forth in the statute, be omitted in any one material circumstance, the jurisdiction will be bad. 1 Archb. Crim. Pr. & Pl. 282, and American notes. An indictment which describes the offense as having been done feloniously, unlawfully, and maliciously will not be good where the statute uses the words 'willfully and maliciously.' *State v. Delue*, 1 Chand. 166." *State v. Webb*, 41 Tex. 70. See *State v. Powell*, 28 Tex. 629, 630; *Juaraqui v. State*, Id. 626.

But the indictment is obnoxious to other objections. The charge here considered is, in general terms, that the defendants suppressed the return of ballots. Does such an allegation meet the requirements of correct pleading? In *U. S. v. Staats* it was held by the court that the charge should distinctly allege all the essential requisites that constitute the offense. "Nothing is to be left to implication or intendment." *U. S. v. Staats*, 8 How. 44; *U. S. v. Hess*, 124 U. S. 486, 8 Sup. Ct. Rep. 571; *Alexander v. State*, 29 Tex. 496. The charge of suppression is a mere conclusion deducible from facts and circumstances which should be appropriately averred. The generic term is employed. The pleader does not descend to particulars. The acts constituting the suppression are not set out. Nor, indeed, is it averred that the "return of ballots" was ever in the custody, or under the control, of the commissioners' court. The essential facts and particulars of the offense charged are left, in the absence of appropriate averments, to mere implication and inference;

and, under the rules of criminal pleading, the clause must be held defective. It may be further said that, under the particular subdivision of the federal statute which applies to this clause of the indictment, it would seem to be requisite for the indictment to further aver that the unauthorized act of suppression was committed with the intent to affect the election, or the result thereof. 31 Fed. Rep. 797, and the cases of *Wright* and *Baldrige*, before cited. For the reasons given the indictment is insufficient, and the demurrer of defendants must be sustained; and it is so ordered.

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WALSTER v. UNITED STATES.

(Circuit Court, N. D. New York. July 11, 1890.)

1. LARCENY FROM MAILS—INDICTMENT—ALLEGATIONS AND PROOF.

On an indictment in several counts against an employe of a post-office for embezzling letters, if the proof conforms to the averments in one of the counts in respect of the description of the letters and of the capacity in which defendant was intrusted with them, a motion to acquit on all the counts is properly overruled, though the proof varies from the allegations in the other counts as to those particulars.

2. SAME—CONSTRUCTION OF STATUTES.

Letters stamped and postmarked as coming from other offices, but which in fact are placed upon the distributing table by the postmaster and an inspector, addressed to a company in the same town, which gets its mail from the office in a pouch of its own, are, if the postmaster and inspector do not intend to intercept them before delivered to the proper address, letters "intended to be conveyed by mail," within the meaning of Rev. St. U. S. § 5467, making it an offense for any postal employe to embezzle any letter coming into his possession which was intended to be conveyed by mail, or to be forwarded through or delivered from any post-office.

3. SAME—DECOY LETTERS.

The fact that they were decoy letters is immaterial on a prosecution for their embezzlement.

Error to District Court.

*James Bacon*, for plaintiff in error.

*D. B. Alexander*, U. S. Atty.

WALLACE, J. This is a writ of error to the district court to review a conviction of the plaintiff in error for embezzling letters intended to be conveyed by mail, and containing articles of value, he being at the time a person employed in the postal service. The indictment contains eight counts, and is based upon section 5467, Rev. St. U. S. Of the eight counts, all but the first, third, fifth, and seventh were withdrawn from the consideration of the jury by the court upon the trial. There was a general verdict of guilty of the offenses charged in the indictment, and a sentence to imprisonment for the term of two years.

There was sufficient evidence upon the trial to justify the jury in finding that on the morning of January 19, 1890, the accused, while engaged in assorting and distributing mail-matter, abstracted four letters from the distributing table of the mail-room in the post-office at Elmira,

retired to a water-closet adjoining the room, and then broke open the letters, and appropriated the government notes, bank-bills, and postage-stamps which they contained. He was a letter-carrier, and on the occasion in question had assisted several other carriers and clerks in assorting the mail and distributing the letters to the different receptacles, whence they were to be taken away by carriers, or delivered at the office to those to whom they were addressed. While thus engaged he was watched by the postmaster and a post-office inspector from a place of concealment, and when the mail was fully distributed he was seen to retire to a water-closet adjoining the mail-room. He remained there a few minutes, came out, and attended to other duties about the office for a few moments, and was then called into the postmaster's room and searched, and the contents of the letters were found upon his person. The letters thus abstracted were decoy letters, which had been prepared by Mr. Camp, a post-office inspector, acting in concert with Mr. Flood, the postmaster, with a view to ascertain who, if any, of the employees of the office was tampering with the mails. The inspector and postmaster had caused several such letters to be prepared, among them nine addressed to the Telegram Company, a publishing concern at Elmira, and to be stamped and postmarked as if mailed from other post-offices. They had inclosed government notes, bank-bills, and postage stamps in these letters, and had caused the letters to be placed with the incoming morning mail, which had been dumped upon the distributing table. When put with the rest of the mail, they were apparently letters which had arrived that morning from other post-offices for distribution and delivery at Elmira, according to the usual course of business. The customary way of delivering matter addressed to the Telegram Company was to put the letters by themselves in a rack, whence they were taken away in a pouch belonging to the company when called for. When the accused went to the water-closet it was found that but five of the nine decoy letters addressed to the Telegram Company were in the rack. Upon being informed of this circumstance the postmaster and inspector took possession of these letters, and kept them. The evidence presented a question of fact whether it was the purpose of the inspector and postmaster to permit the decoy letters to be delivered to the Telegram Company in the ordinary way, in case they were not abstracted, or whether it was their purpose, when they put them with the mail-matter on the distributing table, to resume control of them after distribution, but before delivery to the company, provided they were not abstracted.

The rulings of the judge upon the trial which were excepted to by the accused, and as to which error is now assigned, present the questions whether there was a variance between the evidence and the averments of the indictment which required the acquittal of the accused, and whether the letters, inasmuch as they were not mailed in the usual way, but were placed by the postmaster on a distributing table in the office with mail-matter that had already arrived, were letters intended to be conveyed by mail, within the meaning of the statute. Each of the five counts upon which the conviction proceeds avers that the embezzled



letter was one "intended to be conveyed by mail," and none of them avers that it was a letter intended to be carried by an employe, or intended to be delivered from a post-office. The first and fifth counts aver that the letter described had been intrusted to the accused as a letter-carrier, and had come into his possession as such letter-carrier. The third count avers that the letter described had been intrusted to the accused as a clerk in the post-office, and had come into his possession as such clerk. The seventh count avers that the letter described had been intrusted with the accused as a clerk and mail-carrier, and had come into his possession as such clerk and mail-carrier. The first and seventh counts describe the letter as one containing certain specified articles of value, which were then and there the goods and chattels of the Telegram Company; the third count describes the letter as one containing specified articles of value, which were then and there the goods and chattels of Bushrod H. Camp; and the fifth describes the contents of the letter as the goods and chattels of Martin F. Butcher.

The court was moved to direct an acquittal of the accused because the evidence was that the contents of the letters were the goods and chattels of Mr. Camp, and it did not appear that the letters were intrusted or came to the possession of the accused as a letter-carrier, and there was therefore a variance from the averments of the indictment. This motion was denied, and an exception allowed. The evidence indicated that the contents of the letters belonged to Mr. Camp, and there was none tending to show that the contents of any of the letters were the property of the Telegram Company, as averred in the first or seventh counts, or of Mr. Butcher, as averred in the fifth count. The evidence also indicated that carriers at the Elmira post-office were sometimes required to assist in the distribution of the mail. Inasmuch as the accused was not indicted for stealing the contents of the letters, but for embezzling the letters themselves, it was unnecessary to aver in the indictment that the contents were the property of any particular person. It would have sufficed to describe the letters and their contents sufficiently for identification, and state the value of the several articles of the contents. Nor was it necessary to aver that the letters were intrusted to the accused, or came to his possession as a clerk or as a carrier. It would have sufficed to aver that he was a letter-carrier at the time the letters came into his possession. It is a familiar rule that every allegation of an indictment, whether it be necessary or unnecessary, which is descriptive of the identity of the subject of an offense like larceny or embezzlement, must be proved as laid, and the unnecessary descriptive matter cannot be rejected as surplusage. Thus in *U. S. v. Foye*, 1 Curt. 364, the indictment described the embezzled letter as one intended to be conveyed by post "from Georgetown to Ipswich," and the court held that, although it was only necessary to allege that the letter was intended to be conveyed by post, the additional descriptive matter could not be rejected as surplusage, and, not having been proved, there was a variance. It is unnecessary to decide whether there was a variance in the present case or not. The third count of the indictment conformed to the proof in respect to the description of the letter

embezzled, and the evidence was such as to authorize the jury to find that the accused was acting in a clerical capacity, and was intrusted with the letter in that capacity, as is charged in that count. If the objection of variance had been presented by a motion to direct the acquittal of the accused upon all the counts except the third, it would have been sufficiently raised, and perhaps would have been well taken. But the district judge was not requested to rule on the sufficiency of the evidence to sustain any particular count or counts, and it would have been erroneous to direct an acquittal when the evidence authorized a conviction upon the third count.

The more difficult question in the case is whether the letters abstracted were, under the peculiar circumstances, letters intended to be conveyed by mail within the meaning of the statute. If the indictment had charged that the several letters were intended to be delivered from the post-office at Elmira, the averment, assuming that the postmaster or inspector did not intend to intercept the letters before delivery, would have conformed to the facts. But as it is averred in each count that the letter embezzled was one intended to be conveyed by mail, it was necessary to prove upon the trial that it belonged to that category of mail-matter; and, if the jury were not correctly instructed as to the meaning of the term "intended to be conveyed by mail," the exceptions of the accused were well taken. Upon this question the judge instructed the jury, in substance, that the accused was not guilty of the offense charged in the indictment, if they found that the postmaster or inspector intended to immediately resume control of the letters before they were delivered to the Telegram Company in the usual way, provided they were not abstracted; but if it was the intention of these officers to permit them to be delivered to the pouch of the Telegram Company, by any of the employes of the office, they were letters intended to be conveyed by mail, and the fact that they were decoy letters was of no consequence. He refused to instruct the jury that the letters were not intended to be conveyed by mail because they were not mailed in the way letters are usually mailed, or were not ordinary mail-matter. Section 5467 makes it an offense on the part of any employe of the postal service to secrete, embezzle, or destroy any letter coming into his possession which was (1) intended to be conveyed by mail; (2) to be carried or delivered by any employe in the postal service; or (3) to be forwarded through or delivered from any post-office. The statute is not to be enlarged by construction beyond the necessary meaning of its terms, nor interpreted to embrace a case which may or may not be within the legislative contemplation; but it is not to be construed so strictly as to cripple the reasonable meaning of the phraseology, and exclude offenses fairly within its language. As is said by Mr. Sedgwick, (St. & Const. Law, 2d Ed., 282:)

"The rule that statutes of this class are to be construed strictly is far from being a rigid, unbending one; or, rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the

punishment to cases which are not clearly embraced in them, and, on the other, equally refusing, by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope,"

Letters like those in the present case, assuming that they were not to be intercepted by the postmaster before delivery to the Telegram Company, fall distinctly within the category of letters intended to be "delivered from any post-office," and satisfy that descriptive term in the section. The question is whether such letters are also within the other category of the section, and are described by the term "intended to be conveyed by mail." If the latter descriptive term were the only one employed in the section to describe the letters which are the subject of embezzlement, the question would be less doubtful. As it is, there is certainly fair room for argument that both descriptive terms are not used to define the same thing. Although the term "to be conveyed by mail" is hardly appropriate to describe a letter which is to be carried by hand from one receptacle to another in the same post-office, yet its meaning is amplified by section 5468, which declares that the fact that a letter has been deposited in any authorized depository for mail-matter, or in charge of any postmaster, or of any clerk, carrier, agent, or messenger of the postal service, shall be evidence that it was intended to be conveyed by mail. This section makes the depositing of the letter, irrespective of any other incident of transmission, the criterion whether it is intended to be conveyed by mail, and implies that a letter handed to a clerk in a post-office, for delivery at the same office to the person to whom it is addressed, may be intended to be conveyed by mail. Unless the word "deposited" has some limited meaning, a letter handed by one clerk to another at any stage of transmission, for the purpose of forwarding its delivery, is intended to be conveyed by mail, within the meaning of section 5467. Section 5468 includes a letter deposited with any agent or messenger employed in any department of the postal service, and, in many cases which are supposable, letters thus deposited would not be intrusted to such employe in the way mail-matter is commonly deposited. I conclude, therefore, that the word "deposited" is used in the sense of "intrusted," and refers to mail-matter left in any way for official transmission with an employe in the course of his employment; and that the letters intended to be conveyed by mail of section 5467 embrace all the other described classes of that section, and that the further enumeration is only another instance of the tautology which is not uncommon in legislative acts. The manifest purpose of the statute is to protect all letters confided to the care of the postal department for official transmission from embezzlement or improper appropriation by employes during the course of their transmission, and throughout the time they are in any manner in the custody of the officers or agents of the department. It would seem to be a very unreasonable construction of the statute to hold that a letter handed to the postmaster outside the office, and placed by him in a bag of outgoing mail-matter for transmission, would not be within its protection. If such a letter would be the subject of the offense, clearly letters mailed as these were would be also.

Certainly the circumstance that the letter is a decoy letter is quite immaterial. If a letter is put in course of transmission, with a view of having it conveyed by mail, it matters not what the motive of the sender may be. This has been repeatedly decided. *U. S. v. Cottingham*, 2 Blatchf. 470; *U. S. v. Foye, supra*; *U. S. v. Matthews*, 35 Fed. Rep. 890; *U. S. v. Wight*, 38 Fed. Rep. 106. The conclusion reached is sanctioned by the case of *U. S. v. Matthews*, 35 Fed. Rep. 891. In that case the letter was a decoy letter, not mailed in the ordinary way, but placed among the letters of a mail upon a dumping table for backing and distribution; and it was held that the facts were undoubtedly competent evidence to show that the letter was intended to be conveyed by mail, and were sufficient to bring the case within the statute, if it had not appeared that there was a question whether it was not the intention of the inspector who caused the letter to be deposited to intercept it before it would be carried and delivered to its proper address.

The instructions given to the jury were correct, and the instructions refused were correctly refused. It follows that none of the exceptions taken on the trial were well founded, and the judgment of the district court should be affirmed.

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### KEEP v. FULLER *et al.*

(Circuit Court, N. D. New York. July 14, 1890.)

#### 1. PATENTS FOR INVENTIONS—INFRINGEMENT—PROFITS.

A finding as to the profit realized in certain months from sales of an infringing article cannot be based solely on a comparison of sales during the corresponding months for the previous and following years.

#### 2. SAME—EXTENT OF CLAIMS.

Claims in letters patent for a stove grate "as a whole, when \* \* \* constructed and combined to operate in the manner and for the purpose shown and described," are for the entire grate, and not for an improvement on the grate; and it being sold separately, and designed for use in many different patterns of stoves, the patentee, in case of infringement, is entitled to all the profits realized.

In Equity. On exceptions to master's report.

*N. Davenport*, for complainant.

*Esek Cowen*, for defendants.

COXE, J. On the 20th of March, 1883, a decree was entered in this action in favor of the complainant sustaining, among others, letters patent No. 139,583, granted to him June 3, 1873, for an improvement in stove grates. The defendants were held to be infringers, and it was referred to a master to ascertain and report the amount of profits and damages. On the 17th of June, 1889, the master filed a report in which he found that complainant's damages amounted to 6 cents, and that the defendants' profits resulting from the sale of the infringing grates from January 1, 1876, to January 1, 1882, the dates fixed by the decree, ag-

gregated \$11,363.54, and for this sum, with the 6 cents added, judgment was awarded. The defendants thereupon filed 16 exceptions to the report, insisting that the master erred for the following reasons: *First*, there was no definite evidence of the number of infringing grates sold by defendants; and, *second*, there was nothing to show how much of the profits received by the defendants was due to their use of the invention.

It is wise to remember at the outset that the court is not now to decide *de novo* the various questions presented on the accounting. The present investigation is confined simply to the question,—did the master make any mistake which requires the setting aside of his report? He stands as the representative of the court, and is better able, by far, than one who only reads the testimony from a printed book to tell what witnesses are entitled to credit, and where the truth lies in the controversy before him. His findings are *prima facie* correct, and the burden of showing error is upon the party who excepts. If the proof is sufficient to sustain the master's findings it is enough. The investigation terminates at this point, even though the court, sitting in the master's place, might, upon similar evidence, reach a different result. "The conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part." *Tilghman v. Proctor*, 125 U. S. 136, 149, 8 Sup. Ct. Rep. 894; *Callaghan v. Myers*, 128 U. S. 617, 666, 9 Sup. Ct. Rep. 177; *Kimberly v. Arms*, 129 U. S. 512, 525, 9 Sup. Ct. Rep. 355; *Central T. Co. v. Texas R. Co.*, 32 Fed. Rep. 448; *Welling v. La Bau*, 34 Fed. Rep. 41, and cases cited. Tested by the rule of these cases, it cannot be said that the master's findings of fact are erroneous, except, perhaps, in a few particulars which will be referred to hereafter. Certainly there were two sides to the controversy before him, and he was justified in his conclusions if he accepted as correct the evidence of the complainant. The latter is criticised for testifying regarding matters of which, it is said, he could have no personal knowledge, but it would seem from his long connection with the defendants, and his knowledge of the stove business generally, that he was, at least, as competent a witness as any produced on the part of the defendants. In many important particulars his evidence is corroborated. The data from which the master made up the report came from the defendants' books. The defendants did nothing to lighten his labors in this regard. Perhaps they were not called upon to do so, but, when a party is compelled to go into his adversary's camp for proof, the rules are relaxed somewhat in his favor, and presumptions are permitted which would not be permissible in other cases; especially is this true where the adverse party has it in his power to explain and fails to do so. After an examination of the testimony, the exhibits, and the carefully prepared schedule of sales, the court is not prepared to say that the report is against the weight of evidence. When considered in its entirety, it is not an extravagant but a conservative report.

The master finds that between January 1 and July 1, 1879, the defendants made and sold 400 infringing grates, realizing a profit therefrom of \$348. This amount is arrived at not from statements in the books, or from direct evidence of any kind, but is the result of a guess based upon a comparison of sales during the corresponding months for the year before and the year after. The testimony is insufficient to support the finding. The finding as to the number of grates sent to the branch houses at New York, Chicago, and Cleveland is founded upon statements too problematical and speculative to be accepted as proof. The exceptions which challenge these two findings are the twelfth and the fourteenth. They are sustained. The finding as to the number of grates sold at defendants' retail store was not excepted to.

The remaining question is whether the facts bring the case within the rule requiring complainant to point out what portion of the profits is due to the patented feature, or, in other words, whether the patent is for an entire device, or only for an improvement upon an existing device. Two of the claims are as follows:

"A stove grate provided with transverse bars, which are capable of a vibratory motion in a horizontal plane, and of a semi-rotation in a vertical plane, upon or around the center of vibration, substantially as and for the purpose specified.

"The hereinbefore described fire grate as a whole, when its several parts are constructed and combined to operate in the manner and for the purpose shown and described."

The master's report contains the following statement upon this subject:

"Letters patent No. 139,583 is for a stove grate. This grate is a complete combination in itself. The parts and combinations described and claimed in the several claims in the patent constitute the entire device."

The master has carefully eliminated from the account all grates which were sold in or with a stove, and has confined it entirely to such grates as were sold as separate and independent articles. The defendants question the novelty and utility of the invention, and seek to limit the construction to be placed upon the claims by references not now before the court. Such questions cannot be considered. They are merged in the decree. The court, apparently without much opposition from the defendants, decided the patent valid in its entirety, as to each and all its claims, and that the defendants were infringers, having sold the identical thing covered by the patent. This decree cannot be questioned here. That the claims cover the fire grate as a whole there can be no doubt, and there is a clear distinction between an improved grate and an improvement on a grate. The complainant's grate was made and sold separately from stoves. Unquestionably it was intended for use in stoves, but so are many devices which may be the subject of distinct inventions. It was not sold for use in one pattern of stove alone; it could be used in many different stoves. Although in general appearance like other grates, it is so constructed that no part can be used upon any other grate, and no part of other grates can be used upon it. Remove

the patented features and nothing remains. Although it is an improvement upon stoves the complainant is not seeking to recover the profits upon the stove, but upon the improvement only. The rule requiring that the profits arising from the patented features must be separated from those arising from the unpatented features has little application in a case where every feature is patented. This distinction is clearly pointed out in *Maier v. Brown*, 17 Fed. Rep. 736, cited with approval upon defendants' brief. The court says:

"Thus, if one discovers a new composition of matter, such as gun-cotton, nitro-glycerine, or vulcanized rubber, or invents some new machine, such as the telephone, or some new article of manufacture, such as barbed wire, or a new pavement, he would obviously be entitled to damages, arising from the manufacture and sale of the entire article. Upon the other hand, if his invention were limited to some particular part of a large machine, such as the cut-off of an engine, the axle of a wagon, or the seat upon a mowing-machine, it is equally clear that his recovery must be limited to such profits as arise from the manufacture and sale of the patented feature."

Even when an invention belongs to the second class named in the quotation is it not true that the patentee is entitled to recover the profits made by an infringer, where the article is complete in itself, and is sold separately from the machine, the operation of which it is intended to improve? Take for illustration "the seat upon a mowing-machine." Suppose a person invents such a seat, operating upon an entirely new principle and designed to fit all mowing-machines, and has it patented; can it be that one who sells this seat alone can escape liability because it is an improvement on a mowing-machine, or because seats for the drivers of such machines had been known before? It is thought, therefore, that the facts do not bring this case within the rule of *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. Rep. 291, but rather within the rule of the following authorities: *Elizabeth v. Parement Co.*, 97 U. S. 126; *Manufacturing Co. v. Cowing*, 105 U. S. 253; *Hurlbut v. Schilling*, 130 U. S. 456, 472, 9 Sup. Ct. Rep. 584; *Zane v. Peck*, 13 Fed. Rep. 475; *Reed v. Lawrence*, 29 Fed. Rep. 915, 918.

The twelfth and fourteenth exceptions are allowed and the others are overruled.

The amount found due by the master is reduced from \$11,363.60 to \$10,510.86, and, as so reduced, his report is confirmed, with interest from the date of its submission to the court, (*Tilghman v. Proctor*, 125 U. S. 136, 161, 8 Sup. Ct. Rep. 894; *Railroad Co. v. Turritt*, 110 U. S. 301, 4 Sup. Ct. Rep. 5,) and costs, as provided by equity rule 84.

## CELLULOID MANUF'G CO. v. CELLONITE MANUF'G CO.

(Circuit Court, S. D. New York. June 26, 1890.)

## PATENTS FOR INVENTIONS—EXTENT OF CLAIM.

Letters patent No. 156,352, issued October 27, 1874, to John W. and Smith Hyatt for an improvement in manufacturing solidified collodion "by mixing pyroxyline with a latent liquid solvent, which becomes active only upon the application of heat," do not cover liquid solvents which are active as respects the pyroxyline with which they are brought into actual contact, but are used with such a relatively large mass of pyroxyline that the mass will not be converted into solidified collodion at ordinary temperatures.

In Equity.

*J. E. Hindon Hyde*, for complainant.

*John R. Bennett*, for defendant.

LACOMBE, J. This is a suit for infringement of the first claim of letters patent No. 156,352, dated October 27, 1874, and issued to Smith Hyatt and John W. Hyatt for an "improvement in manufacturing solidified collodion." The claim referred to is as follows: "(1) The process herein described of manufacturing solidified collodion by mixing pyroxyline with a latent liquid solvent, which becomes active only upon the application of heat, as and for the purposes set forth." Upon the construction of this claim rests the determination of the case. The complainant insists that it covers liquid solvents which are active as respects the pyroxyline with which they are brought into actual contact, but are used with such a relatively large mass of pyroxyline that the mass will not be converted into solidified collodion at ordinary temperatures. The defendants contend that the claim must be restricted to such liquid solvents only as possess no solvent powers at ordinary temperatures, and which, when brought in contact with pyroxyline, remain perfectly inactive till the application of heat; heat alone being necessary to bring into activity their latent solvent powers.

The first question, then, to be decided is whether, under this patent, the activity or latency of a solvent is to be determined with reference solely to the power of the solvent itself, or with reference to the quantity of pyroxyline to which it is applied. Another patent for an improvement in the manufacture of celluloid (No. 156,353) was taken out by the Hyatts on the same day as the one in suit. That patent was before Judge SHIPMAN, in *Celluloid Manuf'g Co. v. American Zylonite Co.*, 26 Fed. Rep. 692. In his decision will be found a very full description of the state of the art prior to October 27, 1874, and to restate it here would be mere useless repetition. The following brief narrative of events, however, bears more particularly upon the point raised in this suit: In June, 1869, (No. 91,341,) the Hyatts patented an "improved method of making solid collodion," the distinguishing feature of which was the use of great pressure applied to a mixture of pyroxyline and solvent, and applied so quickly that the solvent was forced into contact with every particle of the pyroxyline before the dissolving process had time



to commence. By that method a relatively small quantity of the solvent was required, the proportions of solvent to pyroxyline being given as 5 to 10, 7 to 10, or equal parts by weight. Theretofore the solvent was used in proportions greatly exceeding the pyroxyline, and the Hyatts correctly describe the process of this patent of June, 1869, as one which consists in "using the smallest practicable proportion of a liquid solvent." The only solvents contemplated in that patent were manifestly active ones, which, even in the proportions stated, dissolved those parts of the pyroxyline with which they came in contact, but were inoperative to transform the mass, unless a prompt dispersion of their activity by means of the plunger secured uniformity of action. Presumably the action of the plunger generated heat, but as to that the patent (91,341) is silent. Shortly afterwards, having ascertained the new and important fact that camphor gum, which is not a solvent of pyroxyline when cold, becomes such when heated, the Hyatts took out patent No. 105,338, July 12, 1870. In that document they described their invention to be the mixing with pyroxyline, prepared with powdered pigments, "any substance in a powdered state which may be vaporized or liquified and converted into a solvent of pyroxyline by the application of heat, and subjecting the compound so made to heavy pressure while heated, so that the least practicable proportion of solvent may be used in the production of solid collodion and its compounds." The process described is as follows: Pyroxyline is reduced to a pulp, and any desired pigments added. While the ground pulp is still wet, there is mixed therewith finely pulverized gum-camphor, in about the proportions of one part, by weight, of the camphor to two parts of the pyroxyline when in a dry state. These proportions may be somewhat varied with good results. After a thorough mixing, the water is expelled as far as possible by straining the mixture, and subjecting it to immense pressure in a perforated vessel. The mixture is then subjected to heavy pressure in a mould, and heated from 150 deg. to 300 deg. F., to suit the proportion of camphor and the size of the mass. The heat, according to the degree used, vaporizes or liquifies the camphor, and thus converts it into a solvent of the pyroxyline. By introducing the solvent in the manner described, and using heat to make the solvent active, and pressure to force it into intimate contact with every particle of the pyroxyline, there may be used a less proportion of this, or any solvent which depends upon heat for its activity, than had ever been known before. This patent of July, 1870, contained the following disclaimer: "We are aware that camphor made into a solution with alcohol or other solvents has been used in a liquid state as a solvent of xyloidine, [pyroxyline.] Such use of camphor as a solvent of pyroxyline we disclaim." Under this patent they claimed the grinding of pyroxyline into a pulp, the use of pressure, as described, and "(2) the use of finely comminuted camphor-gum, mixed with pyroxyline pulp, and rendered a solvent by the application of heat, substantially as described." In June, 1874, the Hyatts secured a reissue of their 1870 patent, known as "Reissue No. 5,928." A more specific account of their discovery as to the action of dry camphor is

contained therein. "Our invention," says the specification, "is based upon our discovery of the fact that gum-camphor in a powdered or finely comminuted state remains, under ordinary temperatures, inert when mechanically mixed with pyroxyline, of which, in solution or in a liquid state, it is, under ordinary temperatures, an active solvent; and of the further fact that, when such a mixture is subjected to heat above the ordinary temperatures, the camphor becomes an active converting agent, and transforms the pyroxyline into collodion as effectively as had been done with solutions. And these discoveries enable us to substitute a mechanical mixture for the solutions heretofore employed to keep the converting power latent, or hold it in abeyance until its action can be developed, under the best conditions and with the best effect, instead of having to contend with the difficulties incident to the premature and partial action of solutions, immediately upon coming in contact with the pyroxyline, and, while ultimately utilizing all the converting power of the camphor, to avoid the expense and loss of solvents, such as ether and alcohol, which were driven off or volatilized in the process of transformation. Other latent converting agents may be used in a similar way to effect a similar result." The invention, they add, consists in the preparation and mechanical mixture of pyroxyline and "a latent converting agent, \* \* \* which remains inert until the compound is subjected to a treatment which develops its converting power, \* \* \* thereby transforming the pyroxyline into solidified collodion without the intervention of solutions or volatile solvents."

In this reissue they omitted the words "in a powdered state," struck out their disclaimer of camphor made into a solution with alcohol, and added a new claim, viz.:

"(3) The method, substantially as herein described, of making solid collodion by subjecting a mixture of pyroxyline and a latent solvent to heat and pressure."

They also amended the claim to the use of gum-camphor as follows:

"(1) The combination of pyroxyline with camphor-gum, or any equivalent converting agent, in such manner that the transforming action of the converting agent is kept latent, substantially as and for the purposes set forth. (2) The method, substantially as herein described, of developing the latent power of the converting agent by the application of heat to a mixture of pyroxyline and gum-camphor, or its equivalent, for the purposes set forth."

In this reissue the word "latent" is for the first time introduced into the art, although a deferred action of the solvent was quite clearly indicated in the patent of 1870, as originally issued.

Among the numerous exhibits which have been presented, covering so many different varieties of compound, there is none showing the mixture of this reissue, viz., one part by weight of powdered camphor, and two parts by weight of pyroxyline. No doubt, in view of the evidence, such an exhibit was deemed unnecessary. The powdered camphor in that mixture is truly and strictly a latent solvent. One of the complainant's experts (Prof. Chandler) suggested that delicate experiments might show that there was some occult action between the components; but he ad-

mits that practically and apparently the camphor is entirely without action upon the pyroxyline until the temperature is raised in some way, or some third substance is introduced. Until that time it remains perfectly inactive and inert. It does not even commence the transformation of pyroxyline by exerting its inherent activity over those portions with which it is brought into immediate contact. Thorough mixture no doubt spoils the pyroxyline pulp commercially as pyroxyline, and spoils the camphor commercially as camphor. Thereafter it may be impossible to separate the components; but apparently and substantially the solvent action which breaks down the fibrous constitution of the pyroxyline, and produces the yellowish, semi-transparent, glutinous compound which presents itself in so many of the exhibits introduced by both sides, does not take place till heat in some form is applied.

In September, 1874, the Hyatts made application for the patent here sued upon, for "improvement in manufacturing solidified collodion," No. 156,352, dated October 27, 1874. In the specification they stated that the object of their invention was to overcome certain objections involved in the use of liquid solvents. The objections and remedies are thus pointed out:

"Heretofore liquid solvents have been used in dissolving pyroxyline by first preparing the solvent, [for instance, ether and alcohol, nitro-benzol, etc.,] and then saturating the pyroxyline with the solvents. When the pyroxyline and such solvents are brought into contact, the transforming action of the solvent upon the pyroxyline commences at once, so that the portions of the pyroxyline first exposed to the action of the solvent become first dissolved, and absorb an excess of the solvent during the mixing processes, and before the conversion of the entire mass of pyroxyline has taken place, thereby involving a waste of the solvent, and an increased expense of time and labor in the manufacture of large masses of the solidified product. This excess of solvent renders the compound soft, and the excess must be separated from the mass by evaporation, or otherwise, before a solid and useful product can be obtained. We have overcome these objections by certain processes, for which we have obtained two several letters patent. The first method is that described in letters patent No. 91,341, issued to us June 15, 1869, and consists in using the smallest practicable proportion of a liquid solvent, and bringing it into contact with every part of the pyroxyline by heavy pressure, securing thereby cheaper and better results than had been heretofore described. The second method is that described in our reissued letters patent No. 5,928, dated June 23, 1874, in which a solid solvent is used, which is latent at ordinary temperatures, but which becomes active by the application of heat. This method permitting a mechanical mixture, with the pyroxyline of the solvent in the precise proportions required to produce a solid result, the solvent remaining latent or inactive, to suit the convenience of the operator, but becoming active when required by the application of heat and pressure."

Having thus pointed out the objections to the old process, where solvents were used whose transforming action commenced at once; and which were used in such excess that subsequent evaporation was necessary to secure a solid product, and having indicated the improvements they had already patented, by one of which this excessive use of solvents was avoided and by the other of which a solvent (solid) was indicated whose transforming action did not commence at once upon mixture, but re-

mained suspended until an additional step in the process called it forth, the Hyatts next proceeded to specify the further improvement they were seeking to patent:

"Our present improvement consists in transforming pyroxyline into solidified collodion or 'celluloid,' by using a liquid instead of a solid solvent, which liquid solvent, like the solid, is latent at ordinary temperatures, but becomes active and dissolves the pyroxyline upon the application of heat. The following is a description of our improved process: 'We make a weak solution of camphor in alcohol, the proportions being, by weight, one part of camphor to eight parts of alcohol. This solution of camphor is not a solvent of pyroxyline at ordinary temperatures, and we therefore term it a latent liquid solvent; but it becomes an active solvent at an elevated temperature. There being differences, however, in the solubility of different grades of pyroxyline, a corresponding change in the strength of the solution of camphor becomes necessary, which may readily be determined by experiment. [After the pyroxyline is reduced to a pulp, mixed with coloring matter, and the aqueous moisture expelled,] we then add to the dried pyroxyline, or pyroxyline compound, the above-described latent liquid solvent in about the proportion, by weight, of 50 parts of the solvent to 100 parts of the pyroxyline. The solvent is stirred into the pulp, and the whole kept in a closed vessel until the solvent becomes evenly diffused throughout the mass; no solvent action taking place to retard or prevent this even diffusion, as would be the case in the use of solvents that are active at ordinary temperatures. The compound is then subjected to heat and pressure in a similar manner to that employed when using the solid solvents, described in our reissued letters patent No. 5,928. Any liquid solvent of pyroxyline that is latent at an ordinary temperature, and that becomes active at a higher temperature, can be used as a substitute for camphor and alcohol in our improved process. The latent solvent may be combined with the pyroxyline without first reducing the pyroxyline to a pulp. In doing so we add the latent solvent to the pyroxyline, and, after allowing it to become diffused, preferably in a closed vessel, we develop the latent solvent, and complete the transformation of the pyroxyline either in heated moulds, under pressure, or by passing the compound through heated rollers; in the latter case the heat developing the activity of the solvent, and the rollers compacting the compound. The coloring or other matter may also be added while the material is being masticated between the rollers, care being had to continue this masticating process until the component parts of the compound are thoroughly and evenly diffused throughout the mass.' The solvent and pyroxyline may also be mixed, and the compound subjected to heat, in any other suitable manner than those above described. Furthermore, the subjecting of the compound to pressure during the transforming or converting process is not essential to the working of our process, although the manufacture of the completed product is facilitated, and the cost thereof lessened, by the combined action of heat and pressure, as hereinbefore described."

The claims made under this specification were:

"*First.* In the manufacture of solidified collodion, a liquid solvent that is latent at an ordinary temperature, but which becomes active as a solvent when the temperature is increased, substantially as hereinbefore set forth. *Second.* In the manufacture of solidified collodion, a solution of camphor and alcohol combined essentially in the proportions described, whereby the solution is latent as a solvent at ordinary temperatures, but becomes active and transforms the pyroxyline on the application of heat, as hereinbefore set forth."

This application was at first rejected, on the ground that the claims were bad in form, and also that the solvent described is mentioned and disclaimed in the Hyatt patent of 1870, (the original of reissue 5,928,) as being then old. This disclaimer referred to "camphor made into a solution with alcohol," without any restriction as to the proportions of its components. Thereupon the Hyatts amended both claims as to form. They altered the second claim so as to specify the proportions of the camphor, (alcohol compound,) making it read as follows:

"*Second.* In the manufacture of solidified collodion the process of making a homogeneous mass by mixing pyroxyline with 1 part of camphor and 8 parts of alcohol, which forms a solvent that will remain latent at ordinary temperatures, and becomes active upon the application of heat, substantially as described."

They also amended the first claim by inserting the word "only," so as to read, as it does in the patent issued:

"*First.* The process herein described of manufacturing solidified collodion by mixing pyroxyline with a latent liquid solvent, which becomes active only upon the application of heat, as and for the purposes set forth."

They also addressed an argument to the commissioner of patents, October, 1874, pointing out that their invention consisted "in the employment of a liquid solvent of such composition and proportions that it is perfectly latent until the mass it is intended to solve is subjected to a certain degree of heat. The solvents described in the references are not liquid latent solvents, either by nature or in use, but are active, and perform their office immediately when brought in contact with the pyroxyline." They refer to the specification as setting forth the difference in action and result between active and latent liquid solvents, and add that the camphor-alcohol solvent, disclaimed, is, "like all others then known, 'an active agent,' and will not effect the transformation in the manner sought to be covered by our present process. All other liquid solvents are active; that is, they perform their transforming function as soon as they are brought in contact with the pyroxyline. Our present latent liquid solvent does not effect the transformation of the pyroxyline by simple contact, but remains combined therewith, and perfectly inactive, until its power is commanded by the application of heat."

Thereupon the patent was issued.

In view of the state of the art as set forth in Judge SHIPMAN's opinion, *supra*, and in this brief narrative of the circumstances under which the patent in suit was issued, what construction is to be placed upon the word "latent," as used in the claim? The complainant, it will be remembered, insists that it should cover any liquid solvent which, though active as respects the pyroxyline with which it is brought in contact, is used with such a relatively large mass of pyroxyline that the mass will not be converted into solidified collodion at ordinary temperatures. So broad a construction does not seem to be warranted by the facts of this case.

*First.* The various improvements or modifications in the process of manufacturing solidified collodion which are disclosed in the earlier

patents to the Hyatts are outstanding against this patent, just as much as if they were issued to strangers. The patent is to be construed in view of the state of the art when it was issued, although the art had been advanced to that state largely by inventions of their own. Moreover, the patent secures to the patentees only what they asked for and accepted. What their invention was is to be ascertained from the patent itself, not from subsequent statements of the inventors, with which its phraseology does not harmonize. *Vulcanite Co. v. Davis*, 102 U. S. 222; *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. Rep. 493; *White v. Dunbar*, 119 U. S. 52, 7 Sup. Ct. Rep. 72.

*Second.* The ordinary meaning of the word "latent," when used in the description of any substance possessing inherent power, would import that such power was not manifested,—was hidden, concealed, not visible or apparent. It would not fairly describe a condition where the power was in part displayed or manifested.

*Third.* The phraseology of the specifications imports some peculiarity in the liquid solvent itself. After describing the weak solution of camphor and alcohol, there appears this clause: "*This solution of camphor is not a solvent of pyroxyline at ordinary temperatures, and we therefore term it a latent liquid solvent.*" If the present contention, as to the meaning of the word "latent" is to be accepted, it would be difficult to conceive of any possible solution of camphor, or of anything else, which could not, with equal propriety, be called "latent." If the discovery sought to be availed of was the possibility of arresting the action of any solvent by reducing the quantity of the solvent applied to the mass, it is very strange that language should have been used which imported the use of some peculiar solvent.

*Fourth.* The word "latent" had a meaning in the art. It was first introduced in the reissue No. 5,928 as descriptive of the dry powdered camphor therein used. As pointed out, *supra*, the camphor, as used in that patent, remained inert, inactive, exerting no action upon the pyroxyline with which it was mixed, not even commencing operations by dissolving small portions of it. To define such action, or, rather, such non-action, of the solid camphor-gum, the word "latent" was selected. Surely, an apt selection. Thereafter, when the word "latent" is used in the celluloid art without some qualification, it would naturally be understood to have the meaning given by the text of the patent in which it was first used, as illustrated by the process which that patent pointed out.

*Fifth.* The patent itself indicates that the word is used with that meaning. It refers to the reissue "in which a solid solvent is used, which is latent at ordinary temperatures," and then prescribes the use of a liquid instead of a solid solvent, "which liquid solvent, like the solid, is latent at ordinary temperatures." The language of the specifications and of the argument addressed to the commissioner of patents, which refers to their new solvent as one "perfectly latent" or "perfectly inactive," seems to indicate quite clearly that the construction now contended for was not thought of when the patent was issued.

*Sixth.* The process described in the patent is not inconsistent with this construction of the word "latent." It is no doubt true that when a ball of pyroxyline about the size of a walnut is dropped into a bottle containing two ounces of the weak solution of camphor and alcohol described in the patent it is entirely absorbed. But the patent states that the components are to be combined in "about the proportions, by weight, of fifty parts of the solvent to one hundred parts of the pyroxyline." When so combined, the compound apparently presents the same practical result as would follow the use of dry camphor alone.

*Seventh.* It is urged by the complainants that the patent is not limited either as to the strength of the solvent to be used or as to the proportions in which it is to be combined with the pyroxyline; that two separate processes are provided for,—the one contemplating pressure in heated moulds, the other mastication under heated rollers; that the specific statement of ingredients and proportions refers only to the first method; and that for the second method the patent covers practically any ingredients in any proportions. The language of the specification warrants no such construction. It describes "a weak solution of camphor in alcohol, the proportion being, by weight, one part of camphor to eight parts of alcohol. This is the solution which the patentees say they make in their improved process, which they state is not a solvent at ordinary temperatures; which they therefore term a latent "liquid solvent." The specification proceeds: "There being differences, however, in the solubility of different grades of pyroxyline, a corresponding change in the strength of the solution of camphor becomes necessary, which may readily be determined by experiment." This provides for but a limited change. When abnormal pyroxyline is used, the solution of the patent is to be modified so far only as to give it the same strength, relatively, to the abnormal pyroxyline as the one to eight solution possesses relatively to normal pyroxyline.

The specification next provides for a reduction of the pyroxyline to a pulp, and its mixture "with the *above-described latent liquid solvent* in about the proportions by weight of 50 parts of the solvent to 100 parts of the pyroxyline;" the compound to be then subjected to the process of pressure in heated moulds. The specification proceeds: "Any liquid solvent of pyroxyline that is latent at an ordinary temperature, and that becomes active at a higher temperature, can be used as a substitute for camphor and alcohol in our improved process." This surely is not, as complainants insist, a direction to those skilled in the art to use different proportions of camphor and alcohol, when completing the process under masticating rollers, as provided for in the next succeeding sentences of the patent. It is a general provision, applicable equally to the die and to the roller process, contemplating the discovery of some other liquid solvent than camphor and alcohol, which, like the special solution of the patent, might conduct itself "like the solid" when mechanically mixed with pyroxyline. Whenever "any latent liquid solvent" other than the solution of their improved process should come to light, the patentees in-

tended that it should be covered by this patent; they being the first to point out the use of latent solvents, both solid and liquid.

The specification then proceeds as follows:

"The latent solvent [*i. e.*, the one herein specifically described as one to eight camphor and alcohol, or as modified to meet modifications in the pyroxyline, or any liquid solvent which is latent in the sense of the patent, and which can be used as a substitute for camphor and alcohol] may be combined with the pyroxyline without first reducing the pyroxyline to a pulp. In doing so we add the latent solvent to the pyroxyline, and, after allowing it to become diffused, preferably in a closed vessel, we develop the latent solvent, and complete the transformation of the pyroxyline either in heated moulds, under pressure, as in the previously described process, [*i. e.*, the one where pyroxyline was first reduced to a pulp,] or by passing the compound through heated rollers; in the latter case the heat developing the activity of the solvent, and the rollers compacting the compound."

While this indicates that when the pyroxyline is not reduced to a pulp a process of mastication under heated rollers may be substituted for the pressure in heated moulds, it does not call for any change in the composition of the solvent when so used. The word "latent," as used in the claim, therefore, cannot be held to cover liquid solvents which are not, "like the solid, latent" at ordinary temperatures.

It only remains to determine whether the defendants infringe the first claim of the patent as thus construed. They do not use the 1 to 8 solution of camphor and alcohol, but one composed of 35 to 40 parts of camphor and 50 parts of wood alcohol. This, as complainants' witnesses concede, is by no means a weak solution. This solution they mix with pyroxyline in the proportions of about 85 to 90 parts of solvent to 100 parts of pyroxyline. That such a solution is an active solvent of so much of the pyroxyline as it comes in contact with is practically not disputed; in fact it is one of the most active known. That it has acted upon such parts of the pyroxyline so as to break down their fibrous constitution, and produce, in combination with them, a yellowish, semi-transparent, glutinous compound, which is neither pyroxyline nor camphor and alcohol, is the universal testimony of the exhibits. Nor does the witness McLaughlin substantially contradict this, for he says that "usually on the top of the batch that was soaked it looked something like the sample, [Monroe experiment, No. 1.]" As the defendants, therefore, use neither a weak solution of camphor and alcohol, nor mix it with pyroxyline in the proportions specified, nor use any liquid solvent "which, like the solid, is latent at ordinary temperatures," they cannot be held to infringe. Bill dismissed.



CAVANAGH v. PIKE *et al.*

(Circuit Court, D. Massachusetts. July 22, 1890.)

**PATENTS FOR INVENTIONS—INFRINGEMENT—PILE-DRIVERS.**

Patent No. 205,244, granted June 25, 1878, to George H. Cavanagh, for an improvement in pile-drivers, was for an extensible guide-way adapted to be projected or extended below the platform or frame, to permit the hammer to follow and operate upon the head of the pile, to drive it below the level of the base of the pile-driver. *Held*, that this is not infringed by patent No. 284,232, granted September 4, 1883, to Roys J. Cram, for a steam pile-driver having a combined cylinder and hammer, the whole within a frame having on each side continuous vertical grooves adapted to work in guides formed on, or rigidly fixed to, the uprights.

*James H. Lange and Fred. P. Fish*, for complainant.

*William B. H. Dowse*, for defendants.

CARPENTER, J. This is a bill in equity brought to enjoin the respondents from infringing letters patent No. 205,244, granted June 25, 1878, to the complainant, for improvement in pile-drivers. The claims of the patent are as follows:

"(1) In a pile-driver, an extensible guide-way adapted to be projected or extended below the platform or frame, substantially as and for the purpose described. (2) The uprights, *b, b*, combined with a vertically adjustable guide-way adapted to be lowered below the base of the driver, to permit the hammer to follow and operate upon the head of the pile, to drive it below the level of the base, as may be desired."

In the construction of a pile-driver, it is found to be a practical necessity that the uprights within which the hammer works, and such immovable guide-way as may be attached thereto, shall not extend to any considerable distance below the framework or platform of the pile-driver. The purpose of this invention is to provide means whereby piles may be driven to any desired point, within certain limits, below the level of that platform. The means employed for this purpose before the invention of the complainant appear to have been as follows: (1) To apply to the upper end of the pile being driven a follower against which the hammer might strike; (2) to bolt supplemental guide-ways to the uprights in line with the stationary guide-ways; (3) to cause the hammer, in falling, to project for some portion of its length below the ends of the uprights and stationary guide-ways. In the case of steam pile-drivers, wherein a cylinder and piston-rod are carried on the hammer, and included with it in one rigid frame-work, the length of the frame-work is such as to allow the fall of the hammer to a point considerably below the ends of the guide-ways. Examples of such pile-drivers are seen in patents No. 160,781, issued March 16, 1875, to Thomas T. Loomis; reissue No. 7,586, issued April 3, 1877, to Thomas T. Loomis; and No. 185,458, issued December 19, 1876, to Thomas M. Skinner. In addition to these methods which appear to have been in use, there was published the patent No. 134,412, issued December 31, 1872, to Charles H. Williamson and another, which shows a rod and a weight with a hole in the center,

for the purpose of sliding the weight up and down on the rod, and which is evidently so constructed that the guiding rod may be extended below the platform. The English patent No. 2,562, granted September 18, 1862, to John Nymen Woodford for driving and drawing piles, contains this statement:

"Between the upright bars or plates, there is a space in which there are other uprights consisting of two parallel plates or bars, which are capable of being slid up and down between the two first-mentioned upright bars or plates, so that when desired the uprights may be lengthened, whether when using it for a jib, or otherwise. Chains and pulleys are applied for winding up the monkey, drawing piles, and raising soil."

The device used by the respondents is represented in patent No. 284,-282, issued September 4, 1883, to Roys J. Cram. It is a steam pile-driver having a combined cylinder and hammer, called in the patent a "cylinder ram," the whole within a frame having on each side continuous vertical grooves adapted to work in guides formed on, or rigidly attached to, the uprights. The respondents argue that the Woodford patent is a complete anticipation of the patent on which the complainant here sues. In the English patent the construction of the uprights, which are one element in the combination, is such that the weight cannot extend below their lower ends; and therefore the apparatus, as there shown, is not capable of the functions of the apparatus patented by the complainant. On the other hand, it is now evident that a slight modification of the uprights will allow the guide-ways to project below the lower ends of the uprights. Whether to make this modification involves invention, I shall not, in this case, undertake to decide; because I am satisfied that, assuming the patent of the complainant to be valid, it must still be so construed that the apparatus used by the respondents will not be held to be an infringement.

If the complainant had for the first time produced a guide-way extensible below the ends of the uprights, then it might, perhaps, be said that to substitute guide-ways attached to the weight, and moving with it below the ends of the uprights, is only to provide an equivalent for the guide-ways movable and adjustable within a groove in the uprights so as to extend downward beyond the end of the uprights. But it appears that a guide-way extending below the uprights is shown in the patent to Williamson; and it also appears that a guide-way attached to, or, more properly speaking, forming a part of, the weight mechanism, is shown in the patents of Loomis and Skinner. In the patent No. 160,-781, issued in 1875, the patentee says:

"With my invention the pile can be driven below the lower extremity of the leaders, for the arrangement of the frame guiding the hammer and the grooved cylinder is such as to allow the frame to extend below the leaders when found necessary, and still retain its original vertical position, which cannot be done with the pile-drivers now in use."

The complainant points out that the guiding groove or guide-way in the drawings of the Loomis and Skinner patents is not continuous for the whole length of the frame, and that therefore the frame cannot ef-

fectively and safely extend so far as to disengage the grooves or guide-ways from the uprights. Assuming this to be true, there still does not appear to be any reason why the hammer on the Loomis device may not descend to a point where its upper surface is very slightly higher than the lower end of the uprights, and thus provide for driving the pile to a point substantially lower than the lower end of those uprights; and, if it be urged that even thus the hammer mechanism cannot, as in the respondents' device, descend to a distance below the end of the uprights nearly equal to its whole length, still it appears from a comparison of these patents that the method of carrying the weight below the uprights by means of guide-ways forming part of the weight mechanism is fully described in the Loomis patent, and shown in that patent, and also in the Skinner patent. The same method was, indeed, suggested by the practice, in the use of the old form of pile-driver, to allow the weight to descend by part of its length below the ends of the uprights, although it is, perhaps, true that the construction and operation of the flanges or guide-ways was not such as to make them a practically operative device for this purpose. The claim in the patent of the complainant cannot therefore be construed to cover such a device; and the bill must, therefore, be dismissed, with costs.

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CLEAVELAND FENCE CO. v. INDIANAPOLIS FENCE CO. *et al.*

(Circuit Court, D. Indiana. July 21, 1890.)

PATENTS FOR INVENTIONS—PATENTABILITY—FENCES.

Patent No. 397,110, granted February 5, 1889, to John B. Cleaveland, claims "in a fence the combination of a corner or end post, or intermediate, and a distance rod screwed to said posts at or near their summits, with a guy secured to said intermediate posts at or near distance rod, at its top end, and anchored to the ground at its bottom end." *Held*, that the claim embodies no patentable novelty.

In Equity.

C. P. Jacobs, for complainant.

C. & E. W. Bradford, for defendants.

WOODS, J. Suit for injunction against infringement of the sixth claim of patent No. 397,110, issued on the 5th day of February, 1889, to John B. Cleaveland, which claim reads as follows:

"In a fence the combination of a corner or end post, an intermediate post, and a distance rod secured to said posts at or near their summits, with a guy secured to said intermediate post at or near distance rod, at its top end, and anchored to the ground at its bottom end, substantially as and for the purpose described."

The scope of this claim is well stated by complainant's expert, Mr. Hood, in answer to question fifth of his examination in chief:

"*Question 5.* Mechanically speaking, what substantial elements are involved in a fence which would embody the invention described in the sixth claim of that patent? *Answer.* A pair of posts connected near their tops by a rod, which holds them at a fixed distance apart, an anchor imbedded in the ground, and a brace rod or cable extending from one of the posts to the anchor; the arrangement being such that a strain exerted in the direction to pull one of the posts from a vertical position would be transmitted to the other post by means of a connecting rod, on which there would then be exerted a crushing strain, and the strain being then transmitted by means of the brace rod or cable to the anchor, in such a direction as to exert a tensile strain on the brace rod or cable."

In view of the prior art, as shown in the record, and of other structures in common and familiar use from time immemorial, it is impossible, I think, to find patentable novelty in this combination. The same relation of parts, serving the same use, is shown in the drawings of the Kelly patent No. 344,660. The sill there shown is an addition, which needs only to be removed or cut off between the foot of the posts, each, and the guy rod, to show the exact mechanical construction claimed by Cleaveland; but, as it is, the sill only strengthens the anchorage in the ground of the posts and guy, and the same result would be accomplished by the use of a bed of grouting or a foundation in solid stone.

It is claimed, however, that Cleaveland completed his discovery before Kelly applied for his patent; and, on the other hand, that if this be so, that Cleaveland lost and abandoned his right to a patent by failure to make his application therefor within two years after public use. These questions I do not find it necessary to determine. The Heikes patent of August 3, 1858, (No. 21,073,) unquestionably antedates Cleaveland's first attempts, and, little less clearly than the Kelly, is a substantial anticipation. The only suggestion to the contrary is that in the Heikes design the guy rods, *b*, are represented in the drawing as descending from their points of attachment to the posts to the ground at points not in the line of the fence. If this be so, it is certainly not invention to change the point of an anchorage from a place outside to a point in the line of the fence. If such a difference can be material, then complainant's patent, if conceded to be good, could be evaded by using a guy anchored a little to the side of the fence line, or two guys, one on either side of that line. But, aside from the proof of the prior art, this combination is to be found in numerous well-known structures which have been in common use as long as men have lived in houses, or longer. For example, the battened door or swinging gate, if fastened firmly to both posts, instead of one, affords a complete illustration. The frame alone of the ordinary farm gate, if sunk into the ground a few inches, will constitute a fence corner of the same construction as that in question, save the use of wood instead of iron, which of course does not affect the question of invention. Examples and illustrations are also to be found in the construction of frame houses, or mills or other like structures, with corner posts tied together at the top and bottom with plates and sills, and with braces or guys in the corners, and all anchored (or not) by rods into the foundation in the ground. And simpler yet,

but equally complete, is the illustration found in the scaffolding which builders use, consisting of upright posts, with horizontal bars and diagonal braces, all bound together and resting upon or anchored in the ground according to the emergencies of the case. The court finds that the claim in question embodies no patentable novelty, and that for this reason the bill should be dismissed. So ordered.

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THE CITY OF WORCESTER.

SCOTT v. THE CITY OF WORCESTER.

SAME v. NORWICH & N. Y. TRANSP. CO.

(District Court, D. Connecticut. July 17, 1890.)

**SALVAGE.**

A steamer valued at \$237,500 was stranded on a dangerous reef on a foggy night. Her cargo, worth \$100,000, and on which the freight was \$601, was removed during the next day without danger; the day being pleasant and the water smooth. The next day was rough, and holes were worn in the steamer in addition to the cracks previously made. The prospect of getting her off depended on the weather, but the weather for the following week was fine, and temporary repairs were made; and at the end of seven days she was taken into a port for further repairs, and afterwards to a dry-dock. Two wrecking companies, with a large outfit, consisting of several steamers, barges, divers, etc., were in use about two weeks. *Held*, that the sum of \$1,218 should be allowed for saving the cargo, and \$31,753.52 for saving the steamer.

In Admiralty. Libels for salvage.

*Samuel Park* and *Walter C. Noyes*, for libelants.

*Allen Tenney* and *W. L. Putnam*, for respondents.

SHIPMAN, J. These are two libels for salvage. The first named is *in rem*, against the steam-boat City of Worcester, for salvage for saving the vessel, and the second is *in personam*, against the owner of the vessel, for salvage for saving the cargo, the service having been rendered at the request and for the benefit of the respondent.

The facts in the cases are as follows: The City of Worcester, a Long Island Sound iron passenger and freight steamer, of the value of \$237,500, having 50 passengers on board, and a cargo worth \$100,000, upon which the freight money was \$601, struck upon the south and west parts of Bartlett's reef, near the entrance to New London harbor, about 1 o'clock on Sunday morning, January 12, 1890. The night was very foggy. No lights could be seen. The vessel was going very slowly under one bell. The tide was flood. She was a fine steamer, was built in 1881 at a cost of \$420,000, and is owned by the Norwich & New York Transportation Company, and was regularly running between Norwich, New London, and New York. She lay upon the reef from her bow to her after gangway. She was drawing about 13 feet forward, and

about 10½ feet aft, and at low tide the water was about 5 or 6 feet deep on part of the reef. From her after gangway to her stern the depth gradually increased till the water was 16 feet deep under her rudder. Two of her five compartments filled with water on Sunday. On Monday another compartment filled. On Sunday the injury consisted in a crack about 35 feet long upon the port side forward, terminating in a hole 3 feet long nearly under one of the port boilers. The bottom of the reef is sprinkled with large boulders and rocks. On Sunday the vessel lay without a list. Information of the accident was promptly sent to New London, and the libellant, Scott, whose business is that of a wrecker, and who is the owner of a plant which is constantly ready for service, was notified by the local agent of the claimant at New London that his services were wanted. The president of the company soon after reached New London, knew of the employment of Scott, and ratified it. No contract was made with him either for a given sum or for any sum, or for a *quantum meruit*, or to pay him at all events. He entered upon the services as a salvor at the request of the claimant, and for its benefit. He started at about 4 o'clock with his steam-tug T. A. Scott, Jr., reached the vessel about 7 o'clock, took off all the passengers, and carried them to New London. He then returned with his tug-boats T. A. Scott, Jr., and the Cassie, and two barges of his own, with the steam-tug Briggs and barge Donald, belonging to the Thames Tow-Boat Company. The bill for the day's services of these vessels, amounting to \$218, he paid. The day was exceptionally fine. The water was smooth. The barges were placed along-side of the hatchways of the Worcester. All the cargo was trucked into them by the steamer's men, and at half past 7 o'clock was safely out of the steamer, and was delivered by the libellant at New London, whence it was sent to its destination. This work was done without injury, accident, or danger. On Sunday morning the president of the company was justly afraid that Scott's equipment was insufficient for the work of pulling the Worcester from the reef. At his request, Scott telegraphed to the Merritt Wrecking Organization to send at once six pontoons and four steam pumps and boilers to work on the Worcester. In response to this telegram a barge and powerful wrecking steamer, the I. J. Merritt, was sent under the charge of Mr. Sharp, and arrived on Monday morning. Mr. Sharp wanted to know why the telegram had been signed by Scott instead of by the company. He was satisfied upon this point, and went to the reef on that afternoon. There was the same absence of contract with the Merritt Wrecking Organization that there was with Scott. Scott was wreck-master, and in charge of the work. On Monday forenoon the tackle, furniture, mattresses, and bedding were taken from the Worcester, and carried into New London by the libellant. Cement and sand were carried to the wreck, and Scott's men went to work closing the holes in the forward compartment from the inside. The sea was rough. There was a strong wind from the south-west, which became a gale at 4 o'clock in the afternoon. The Worcester "worried" or trembled upon the boulders, which wore a couple of additional holes in her bottom. Sharp, who was in charge of Mer-

ritt's men, made preparations to get anchors and cables laid to hold the Worcester easy on the rocks, but the cable got foul of the rocks, and there was some talk about the crew of the Worcester going ashore; but the wind abated, and they remained on the vessel. On Tuesday and the following days, till Saturday, the work of patching up the holes by the divers of Scott and the Merritt Company continued. Bags of cement mixed with sand were placed in the long break, and were braced in position. It was partly wedged upon the outside. The other holes were patched with planks which were clamped to the frame of the steamer. The water was then pumped out by the aid of 10 steam pumps. The steam-boat was pulled off the reef on the evening of Sunday, January 19th, was towed to New London, where the temporary repairs were still farther completed; and she was taken to New York January 26th for permanent repairs upon the dry-dock. She went under her own steam, but was accompanied by the I. J. Merritt. The equipment of the Merritt Wrecking Organization, which was in use, was worth \$80,000. The steamer I. J. Merritt was in use 14 days, and the barge Blanche, 17 days. The steamers Cyclops and Dalzell, and schooner Edgar Post, which carried some of the outfit to New London, were in use 30, 37, and 48 hours, respectively. It furnished 8 steam-pumps, 2 divers and their apparatus, 7 engineers, 19 wreckers, 1 carpenter, 2 firemen, 1 foreman, and 1 agent, with the usual outfit of cables, ropes, hose, and anchors. Scott's equipment was worth \$25,000 or more. The time of the steamers Alert, T. A. Scott, Jr., Cassie, and Chester amounted in all to 28½ days. The time of three lighters was 23 days. He furnished 4 divers and apparatus, 2 steam-pumps, 4 engineers, 2 firemen, and from 15 to 20 wreckers. His bills for the hire of vessels, materials purchased and used in repairs, sails used for patches, rope and anchors lost, amounted to \$1,339.52.

Bartlett's reef is a dangerous place for a large steamer to be stranded upon. The injuries which the Worcester received cost \$34,000 or \$35,000 to repair. During the rough weather of Monday the boulders ground two additional holes in her iron covering. If this weather had been repeated during the week that she lay upon the rocks, other damage would have been caused, and the difficulty and expense of getting her off proportionally enlarged. The reef is continually exposed to rough weather or storms in winter. It is not likely that an iron steamer would have gone to pieces, or have been broken in fragments; but the danger was that continued bad weather would have so increased the injuries that the expense of getting her off would have constantly increased, while her value was constantly diminishing. Both salvors and owners were fortunate in having favorable weather, which enabled the work to go on speedily and prosperously. Capt. Scott's opinion in regard to the prospects of success in the enterprise was a summary statement of the actual situation: "The chances were all owing to the weather. If the weather was good, we would get her off. If it was not, we wouldn't." Scott's steamer Alert struck upon the reef, and was compelled to undergo repairs for two days. The Merritt struck upon the rocks, but was got

off in about 20 minutes. The libel *in rem* was brought, by agreement of the two salvors, by Capt. Scott, for the benefit of himself and the Merritt Wrecking Organization; and by like agreement a single judgment is to be rendered for the joint services, and the court is not to divide the amount between them. The claimant has paid the Merritt Wrecking Organization \$10,000 upon account, and Capt. Scott \$1,500 upon account.

The services in saving the cargo were valuable, but were, in consequence of the exceptionally fine weather on Sunday, without danger,—were easily and quickly rendered. For these services the sum of \$1,218 should be paid the libellant, of which \$218 has been paid, leaving the sum of \$1,000 due.

An important element which enters into the determination of the amount due upon the libel *in rem* is the fact that each salvor is the owner of a valuable plant, which is constantly ready for service, and equipped with a crew which is constantly under pay. The calls for salvage service are occasional. The necessity of expenditure for wages and repairs is continuous. The City of Worcester had the prompt benefit of a large plant, which was itself in some danger of injury. In *Coast Wrecking Co. v. Phoenix Ins. Co.*, 13 Fed. Rep. 133, Mr. Justice BLATCHFORD said:

“Not only is the service in the particular case to be regarded, but the compensation is to be looked at, as it may induce aid by competent salvors to other property in distress; and the equipment of the Coast Wrecking Company, with steamers and pumps and wrecking material and skilled men, and its readiness to act on a moment's notice, must be considered, involving, as that does, large investments and expenses which go on as well while there is no employment.”

For services in saving the City of Worcester the salvors are entitled to \$31,753.52, of which the sum of \$11,282 has been paid, leaving the sum of \$20,471.52 unpaid and due. In the libel *in rem* against the City of Worcester, let there be a decree against the claimant for the sum of \$20,471.52 and costs of suit; and, in the libel *in personam*, let there be a decree against the respondent for the sum of \$1,000 and costs of suit.



BYWATER *et al.* v. A RAFT OF PILES.

(District Court, D. Washington. June 17, 1890.)

## 1. SALVAGE—SUBJECT—RAFT ADRIFT.

A raft of timber found drifting with the tide on deep water in a harbor, and out of the control of the owners, is a subject of salvage.

## 2. SAME—WHO ARE SALVORS—ACTIONS.

Persons finding a raft so situated, who secure it for the owners, render a valuable service, for which a claim of salvage is enforceable in admiralty,

(*Syllabus by the Court.*)

In Admiralty.

*R. S. Greene and L. T. Turner*, for libelants.

*J. C. Haines*, for claimants.

HANFORD, J. The libelants in this cause claim compensation for salvage services rendered in arresting, towing to a place of safety, and securing a raft of piles found adrift and derelict in Seattle harbor. The claimants, who are owners of the piles, deny that the property is a subject of salvage under maritime law; deny that it was in peril at the time of being taken in charge of by the libelants; and deny that the facts make a case within the jurisdiction of a court of admiralty. The material facts of the case are that the raft in question had been moored by its owners, the claimants in this case, at a wharf owned by them situated in the southern part of Seattle bay. That on the morning of a pleasant day in June, in some manner, it got loose and went adrift, and between 8 and 9 o'clock in the morning was discovered by one of the libelants about one mile north of the wharf to which it had been moored, and something over one mile from the eastern shore of the bay, drifting on an ebb-tide towards the harbor entrance. There was at the time a light breeze from the south-west, and the water was smooth. The libelant Elliott was owner of a small steam-tug called the Violet, and the other libelants were at the time connected with this vessel as master, engineer, and deck-hand, constituting her entire crew, and the tug was then employed as a general jobbing boat, doing towing and like service on Seattle bay and the neighboring waters, and earning on an average \$25 to \$30 per day; the usual rates for services such as this boat had capacity to render, when employed by the hour, being \$2.50 per hour. When the libelants discovered the raft, the tug was in her berth at the wharf, with steam up, and ready to accept any offer of employment that might be made to her, and they immediately went to the raft, and brought it in, and secured it to a wharf opposite to which it had drifted on the eastern shore of the bay; in doing which, between two and three hours' time was consumed. The raft was quite valuable, worth at least \$2,200, and was at the time of being so taken charge of by the libelants out of the control of its owners, and in apparent imminent danger of being lost, although the real danger was but slight, and in rescuing it the libelants incurred no danger to themselves, and suffered no hardships, more than

is incident to their usual and every-day employment. In towing the raft and mooring it the libelants used lines provided by themselves from the tug of the value of \$13, which have not been returned to them. One of the claimants discovered the departure of the raft very soon after the libelants had found it, and he immediately started in pursuit of it, and appeared and claimed it as soon as the libelants had moored it, and requested the libelants to tow it back to the place from whence it had drifted, which they were unable to do, the tug not having power enough to move so heavy a raft against the current. In the evening of the same day a tug of greater power employed by the claimants towed the raft back to their wharf.

It is indisputable that the libelants did render a service of some value to the claimants in arresting and holding this raft, and a service of such a nature that public policy commends it, and dictates that a suitable reward be granted for it, although the reward should not be such as to impose any considerable burden upon the claimants. The service was voluntary on the part of the libelants, and at the outset they undertook to do and undergo whatever might be necessary in order to save valuable property for whatever reward or compensation a court of conscience might see fit to allow, be it much or little. The service so rendered comes fairly within the definition of a salvage service. Upon the argument it was denied that the case is one of salvage, and authorities were cited by counsel on both sides, and from the language of the several opinions there appears to be a conflict between them on this point. But the facts in the different cases were so different as to afford abundant ground to distinguish between them; and most of them are maintainable on true principles, and harmoniously with the decisions by Judge BETTS in *A Raft of Spars*, 1 Abb. Adm. 485, and by Judge LOWELL in *Fifty Thousand Feet of Timber*, 2 Low. 64, and by Judge PARDEE in *Muntz v. A Raft of Timber*, 15 Fed. Rep. 555, 557. These three cases are the nearest in point of any that have been cited, and were well considered, and decided in the light of all preceding rulings bearing upon the question, and I feel safe in following them.

The case decided by Judge TANEY, (*Tome v. Four Cribs of Lumber*, reported in Taney's Decisions, on page 533,) was one in which salvage was claimed for arresting lumber rafts floating down the Susquehanna river. The lumber had been made up into cribs and rafts, designed expressly to be in that form transported to market by being floated down the river; and it was the constant practice of lumber-men to use the river for floating similar rafts; and Judge TANEY, as I think, very properly held that it was the right of owners of such property to subject it to such risks as might be incident to that mode of transportation, and that it would be a hardship upon them to permit unauthorized persons to deprive the owners of possession of valuable property, and subject them to liability for salvage by interfering with such rafts when found afloat on the stream. I certainly think that justice would require me to hold that an unauthorized interference with logs or lumber while floating down any of the rivers of this state, according to the customary mode of transport-

ing such property, would render the person interfering liable for damages as a trespasser, rather than entitled to a reward as a salvor. But in case of a large raft adrift in deep water, and not confined to any particular channel, nor certain to follow any fixed course, and especially in the harbor of a busy commercial city, a different rule is necessary; any person who finds such a raft so situated, and secures it for the owner, renders a valuable service to him, and to all persons interested in keeping the harbor clear of obstructions.

I deem it unnecessary to review or comment on the other cases cited by counsel for the claimant. It is enough to say that they are not in point, and, if they were, they are not of such binding authority as to require me to disregard the better reasons favoring the opposite conclusion.

As to the amount to be awarded, I consider the case similar to the one decided by Judge BETTS, as regards the merits of the services. In that case the property, a raft of spars, was of much less value than the property in this case, but it was in greater peril. The labor performed in towing it to a place of security was about the same as in this case, but the salvors had to watch and protect the spars for several days thereafter. No such service was necessary in this case. In that case Judge BETTS awarded \$50. In this case, in consideration of the ropes used and lost in the service, and all the facts, I award to the libelant Frank Elliott, owner of said tug, \$30, and to each of the other libelants \$5; making a total of \$45.

## SOUTHWESTERN TRANSP. CO. v. PITTSBURG COAL CO.

(District Court, E. D. Louisiana. June 3, 1890.)

## ADMIRALTY PRACTICE—CROSS-LIBEL.

In a suit for salvage by the crew and owners of a tug for saving a fleet of coal barges which had been loosened from their moorings and scattered by the wind, a counter-claim for the wrongful mooring of the tug to the outer barge of the fleet, whereby the accident occurred which exposed the barges to the danger from which the tug saved them is not the proper subject of a cross-libel.

In Admiralty.

*Farrar, Jonas & Kruttschnitt*, for libelant.

*Jos. P. Hornor & Son*, for respondent.

BILLINGS, J. In this case there is a libel for salvage by the owners and crew of the steam-tug *Alarm*, *in personam* against the owners of numerous coal barges and of the coal contained in them. There is also a cross-libel. The case is submitted on a plea to the jurisdiction of this court as to the matters contained in the cross-libel, which was not pressed, it being not questioned that *The Belfast*, 7 Wall. 624, 637, controls this case, and maintains the jurisdiction. There was also a motion argued and submitted to vacate the order which had been made by the court herein under admiralty rule 53, requiring the libelants to give security for the amount claimed in the cross-libel, and staying proceedings.

The question upon this motion is whether the counter-claim arises out of the same cause of action for which the original libel was filed. The original libel was filed by the owners and mariners of the *Alarm* for salvage earned in salving a fleet of coal barges, which were loosened from their moorings and scattered by the wind, and then saved by the *Alarm* and her crew. The counter-claim contained in the cross-libel is for a wrongful mooring of the *Alarm* to the outer barge of the coal barges, whereby, by reason of the height of the tug above the surface of the water, she was exposed to the force of the hurricane, and caused the unmooring or loosening from their moorings of the entire fleet of coal barges, and their exposure to all the danger for the rescue from which salvage is claimed in the libel. That the cross-libel sets up a claim which would, if proved, constitute a defense to the original libel, seems to be settled by the following authorities: *The Clara and The Clarita*, 5 Ben. 375, 386; *The Sampson and The Iola*, 4 Blatchf. 31; *The Robert Dixon*, 4 Prob. Div. 121; and *The Cargo ex Capella*, L. R. 1 Adm. & Ecc. 356. In this last case, which was where the claim in the libel was for a collision, both vessels were found to be in fault. The master and crew of one of the vessels claimed salvage. Dr. Lushington rejected their claim upon the principle that no man could profit by his own wrong.

To apply the rule deduced from these cases to the case before the court: The libel is for salvage. The counter-claim is for a wrong connected with the salvage in this way: It caused all necessity for salvage. The facts which support the counter-claim would defeat the libel, but this is not

necessarily because they arise from the same cause of action. The cause of action in a suit to recover salvage is the saving of property exposed to danger under such circumstances as entitle a party to compensation. The cause of action in the cross-libel is the destruction of property of the cross-libelant at the same time, and under the same circumstances, *i. e.*, with the same facts, as were the time, circumstances, and facts in connection with which the alleged saving was effected. The property saved and the property destroyed are not the same. The result would be in favor of the same party in both cases; not because the causes are the same, or spring out of the same cause of action, but because the facts which would disprove meritorious saving of certain property would establish wrongful destruction of other property. When the claim of the libelant and the counter-claim of the cross-libelant arise out of contract, as for instance, when the origin of each is a contract of affreightment,—one suing for non-delivery and the other suing for the freight money,—it is easy to apply the fifty-third rule. This was done by the court in *Vianello v. The Credit Lyonnais*, 15 Fed. Rep. 637. The cause of action was a commutative contract, different stipulations of which formed the basis of the claim and counter-claim, and these stipulations were parts of a whole. But the basis of the respective claims here involve an identity as to time, as to the character of the alleged act of mooring, but they are not identical as to the things themselves which were the objects saved and destroyed. One claim is for a tort. Torts to involve or spring out of the same cause of action must be with reference to the same wrong. I think rule 53 in admiralty was intended by the supreme court to make a cross-libel in admiralty proper in the same class of cases in which a cross-bill for relief in equity will lie. The limitations in such cases are stated by the court in *Rubber Co. v. Goodyear*, 9 Wall. 788. At page 809 the court says:

"A cross-bill is brought \* \* \*, or to obtain complete relief to all the parties as to the matters charged in the original bill. It should not introduce any distinct matter. It is the auxiliary to the original suit, and a graft and dependency upon it. If its purpose be different from this, it is not a cross-bill, though it may have a connection with the same general subject."

See, also, *Cross v. De Valle*, 1 Wall. 5, where a bill had been filed to have a conditional devise operative because of the alienage of certain parties, and the heirs at law sought by a cross-bill to have their rights determined to the same property, and the court held the cross-bill would not lie.

The matters set up in the cross-libel in this case would clearly not be proper matters for a cross-bill for relief in equity. In these cross-pleadings the courts seem to adhere with absolute uniformity to the principle laid down by Lord COKE. *Idem non similis*. See *The Theresa Wolf*, 4 Fed. Rep. 152.

Nor is there any denial of a right in requiring the defendant to resort to an original libel. After he has instituted his suit, it may be for the purposes of trial, at least, consolidated with this suit; and, if judgments

are obtained in both cases, equity will furnish a method to enable either party to obtain a set-off. The only disadvantage to the defendant is that he will lose the right to insist upon a bond if his suit is *in personam*. But this result would be wrought by a rule which was not intended in such a case to secure to a defendant that right.

The motion to vacate the order requiring a bond, and staying libellant's proceedings, is allowed.

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### THE STROMA.<sup>1</sup>

NAPIER SHIPPING Co. v. PANAMA R. Co.

(District Court, S. D. New York. May 15, 1890.)

**WHARVES—DAMAGES TO VESSEL FROM OBSTRUCTION—LIABILITY OF WHARFINGER.**

A wharfinger is not liable for injuries occasioned to a vessel, while mooring, by reason of recent obstructions in the water along-side the dock caused by the sinking of a dredge, when the circumstances are as well known to the agents of the vessel as to the wharfinger, and they, and not the wharfinger, undertake to dock the ship in a manner to avoid the apprehended obstructions.

In Admiralty.

*Butler, Stillman & Hubbard*, for libellant.

*Coudert Bros.*, for respondent.

BROWN, J. The libellant, as owner of the steamer *Stroma*, seeks to recover damages received by the steamer while moored along-side the respondent's pier at Colon, Panama, on December 31, 1888. With the fall of the tide the steamer settled upon the point of a spindle, which was the upper end of a derrick attached to a sunken dredge. The spindle penetrated the steamer's side so as to cause her to fill with water and sink. The case has been elaborately and exhaustively presented to the court. No case is cited, however, in which a wharfinger has been held liable under circumstances like the present, nor does the case seem to me to fall within the recognized principles on which wharfingers are held liable. They are bound to exercise care and diligence as to the safety of their premises, so that ships that come to their wharves on their invitation shall not be damaged by unsuspected obstructions, and, in case of danger, to give due notice thereof. In the present case the dredge had sunk in the slip several weeks before. Mr. Andrews, the local agent of the steamer, saw the dredge sink. From that time until the *Stroma* went along-side at the outer end of the pier, no vessel had been permitted by the respondent to go to the pier on that side of the slip. Work was proceeding for the removal of the dredge, and several buoys had been set to indicate the place of its several parts. Mr. Andrews' office was in the immediate

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

vicinity, and he could not have failed to observe that no vessels had been moored on that side of the slip since the dredge sank. There is some difference in the accounts given by him and by Mr. Abello, the respondent's agent, as to the conversation between them in reference to the Stroma's coming to the dock. There is no question, however, that the privilege for her to do so was sought by Mr. Andrews, and that he proposed that she should go to the seaward end of the dock. Mr. Abello testifies that he first declined permission on account of the wreck, and that Mr. Andrews then proposed to go outside of the wreck, to which Mr. Abello says he finally assented.

It is not necessary to determine whether either is exact as to the precise language used in this conversation; but it is clear that each had practically the same means of knowledge, and that each had substantially the same knowledge about the place of the wreck, the buoys placed there, and the liability to danger. The case is not, therefore, one of a vessel coming to a usual wharf without notice or suspicion of danger, nor of the opening of a wharf for the public accommodation, with the implied invitation to vessels to use it as a safe place. *Heissenbuttel v. Mayor*, 30 Fed. Rep. 456; *Smith v. Havemeyer*, 36 Fed. Rep. 927; *The C. P. Harris*, 33 Fed. Rep. 295; *The Moorcock*, 14 Prob. Div. 64-70. Mr. Andrews knew of the obstruction of the dredge sunk in that immediate vicinity. The permission given, whatever the exact words used, was a permission to moor outside of the sunken wreck, and Mr. Andrews could not have understood it otherwise. As I have said, Mr. Andrews had the same knowledge as Mr. Abello where the wreck was, and of the buoys placed there. It was he, not the respondent or its agents, that undertook to put the ship in position, and did so; and the risk of so placing the steamer as to be outside of the wreck was therefore assumed by the libellant, and not by the respondent. There was no concealment and no misrepresentation and no negligence on the part of the respondent; nor did they have any hand in mooring the steamer where she was placed. Mr. Andrews had all the notice that was needed, or that could have been given, by the nature of the permission obtained, by having seen the dredge sink, and by the exclamations of caution given by those on the dock in reference to the buoys and the sunken dredge at the very time when the steamer was approaching and taking her position. Under such circumstances, the grounds of the wharfinger's liability fail, and the libel should therefore be dismissed, with costs.

THE SEMINOLE.<sup>1</sup>

## FARNHAM v. THE SEMINOLE.

(District Court, E. D. New York. May 22, 1890.)

## 1. MARITIME LIEN—WAIVER—LACHES.

One who claimed to have a lien on a vessel for wages, but who had been a witness in, and was consequently chargeable with knowledge of, a controversy over her ownership, and the fact that the vessel was in custody pending such suit, but who held his claim back until after the delivery of the vessel in pursuance of the decree of the court in the possessory action, was held, by his delay under such circumstances, to have waived his lien on the boat.

## 2. ADMIRALTY—FACTS JUDICIALLY KNOWN—HOW BROUGHT BEFORE COURT.

Facts judicially known to the court, which do not appear in the libel, may be brought before the court in an exceptive allegation attached to exceptions.

In Admiralty. On exceptions to libel for wages.

*Charles E. Le Barbier*, for libellant.

*Albert A. Wray*, for claimant.

BENEDICT, J. This is an action to enforce a lien upon the sharpie *Seminole* for wages asserted to have been earned by the libellant, under the employment of one William Leonard, as pilot and ship-keeper from the 5th day of July, 1889, to the 25th day of January, 1890. To this libel the claimant has excepted upon the ground, among others, that the claim of the libellant is stale. Certain facts judicially known to the court seem to require a dismissal of the libel upon the ground above stated, such facts compelling the conclusion that the libellant, by delay under the circumstances, has waived any lien that he may have had upon the sharpie for the services set forth in the libel. The facts referred to are as follows: The sharpie *Seminole* was in the custody of the marshal of this district from January 17, 1890, to March 28, 1890, in an action of possession, wherein the question arose whether one William Leonard, who is set forth in this libel as owner of the sharpie, and employer of the libellant, or one Lynch, was entitled to the possession of the sharpie. On the trial of the action the present libellant was a witness in court, and is chargeable with knowledge of the controversy involved in the action, and of its result, and the fact that the sharpie was in the custody of the marshal in that action. A decree was entered in the action on the 21st day of March, 1890; and on the 28th day of March, 1890, in pursuance of the decree in that action, the sharpie was delivered by the marshal to the custody of Lynch. The libellant, although now claiming to have then had a lien upon the sharpie, held his claim back until after the delivery of the sharpie to Lynch in pursuance of the decree of this court in the possessory action. But, as soon as the sharpie was so delivered, he filed this libel, and caused her to be seized again. I entertain no doubt that he should be held, by his delay under such circumstances, to

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.



have waived any lien against the sharpie that he might have had, arising out of any facts set forth in the present libel. But the case is now before the court upon exceptions, and the facts above referred to as judicially known to the court do not appear in the libel. I do not see, therefore, how, upon the exceptions alone, as they stand, the libel can be dismissed. I am, however, of the opinion that a claimant may, in an exceptive allegation attached to exceptions, bring before the court facts judicially known to the court. In this case, for instance, I think the claimant may set forth in the manner suggested the facts that the sharpie was in the custody of this court under process in the possessory action; that the libelant was a witness in that action, and cognizant of the proceedings; that, in that action, Lynch was adjudged to be entitled to the possession of the sharpie; that, under such decree, possession of the sharpie was delivered to Lynch; and that this libel was not filed until after possession had been so delivered. These being facts which appear from the records of the court, and of which the court can take judicial notice without other proof than the record, I see no reason why it will not be the duty of the court, upon presentation of these facts in such a form, to dismiss the libel without compelling the claimant to await a formal trial of the cause before presenting them to the court. I think, therefore, that the claimant may be permitted now to set forth these facts in an exceptive allegation; and upon the filing of such an allegation the libel will be dismissed, with costs.

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THE SCOTLAND.<sup>1</sup>

OLSEN *v.* THE SCOTLAND.

(District Court, S. D. New York. May 27, 1890.)

**SEAMEN—LIABILITY OF SHIP TO CARE FOR INJURED.**

A sailor, in boarding his ship at Antwerp, fell and dislocated his shoulder. Although he soon afterwards informed the master of the accident, he received no attention at the time, and was not put ashore at Flushing, or at the Downs, as he requested, at both of which places the vessel stopped, but was taken on the voyage to New York, where, on going to the hospital, resection was found necessary in order to reduce the dislocation, to his permanent injury. *Held*, that the master had failed in the ordinary maritime obligation to provide for the seaman's hurts while in the service of the ship, and that the vessel was liable for the damages, which were fixed at \$1,250.

In Admiralty. Action to recover damages for personal injuries.

*Wing, Shoudy & Putnam* and *Mr. Burlingham*, for libelant.

*Goodrich, Deady & Goodrich*, for claimant.

**BROWN, J.** The libelant shipped as able seaman in January last at the port of Antwerp. While mounting the ladder to go aboard with a

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

bag of clothes on his back, he lost his balance, fell into the water, and, as he claims, dislocated his left shoulder. At the muster of the men soon after, the libelant did not appear. He complained that his shoulder was out of joint, and that it gave him great pain, unless his arm was held still in a favored position. He testifies that he explained this to the captain a few hours after he got on board, but was answered very roughly, and without further attention; that afterwards, when the vessel stopped two days at Flushing, and again subsequently at the Downs, where the vessel was detained two weeks by bad weather, he requested to be put ashore for treatment, and that the captain did not make any examination of his arm until two or three days after they had got to sea, when he declared that it was an old wound, and that he could do nothing for it. Some liniment was given him, and he was set at light work. On arrival at New York, some two months afterwards, he went to the hospital, where experienced surgeons were unable to put the arm in place. Subsequently an operation by resection was performed, a portion of the fibrous deposit in the socket was removed, about an inch of the upper portion of the bone sawed off, and the arm thus put in place. The surgeons who performed the operation estimated that the wound or displacement might have occurred at any time between six weeks and six months before the operation. An eminent surgeon for the defense judged, from the description given by the operators, that the displacement could not be less than a year old. The defense is that there was no neglect in treatment on the part of the ship, and that the displacement was not occasioned by the fall, but was a previous injury. In the discordant testimony of the surgeons, who are perhaps equally eminent, superior weight is, I think, due to him who speaks from observation of the case itself, rather than to him who speaks from a mere description of it; particularly when, as here, the description was not made by the witnesses with a view to enable another person to judge of the age of the injury. It is scarcely credible that the libelant should have been able to palm himself off as an able seaman, even if he had sought to do so, and to obtain a month's advance of wages, if this dislocation was an old injury, and his left arm was dangling from the shoulder, mainly helpless or kept at his breast, and subject to pain if not held in a precise position. It is equally improbable that a person in that condition should attempt to mount a ladder with a large bag on his shoulder. Witnesses in his behalf testify, as he does himself, that prior to this fall he was able-bodied, and his arm sound. The master and the steward testify that they examined his shoulder a few hours after he came on board, and from the tenor of their testimony it is plain that the master regarded the shoulder when he examined it, whatever the date was, as dislocated. He made no attempt, however, to set the arm himself, and he denies that the libelant asked to be put ashore. If he examined the arm within a few hours of the fall, and believed the dislocation was an old wound, and not the result of the libelant's fall, it is strange that no resentment should have been expressed at the libelant's palming himself off as an able seaman; and, if not at once sent ashore, that he was

not at least disrated in the log from the wages of an able seaman, for his palpable fraud and incapacity.

In view of all the circumstances, I must sustain the libelant's version of the case, and hold that it was the duty of the master when fully notified of this injury, as he was, to afford the libelant such reasonable treatment for the resetting of the limb as circumstances afforded. There was abundant opportunity for this, both at Flushing and at the Downs. The obligation of the master in this respect was an obligation wholly independent of their relation as fellow-servants in navigating the ship. It was the ordinary maritime obligation to provide for the seaman's cure of hurts while in the service of the ship. *The City of Alexandria*, 17 Fed. Rep. 390, 395, and cases there cited; *The Chandos*, 4 Fed. Rep. 645; *The City of Carlisle*, 39 Fed. Rep. 807, 816; *Scarff v. Metcalf*, 107 N. Y. 211, 216, 13 N. E. Rep. 796; *The Vigilant*, 30 Fed. Rep. 288. The neglect of this duty was negligence for which the ship is liable.

In consequence of the neglect and the delay in proper treatment, the libelant has not only suffered great pain, and will be unable to do much of any work for at least six or eight months; but his arm will never recover its full strength, nor be able to be raised above a horizontal line from the shoulder. Notwithstanding the roughness of the master at first, and his great mistake in the treatment of the libelant in respect to his arm, the case affords such other evidence of the master's inherent kindness and consideration for the defendant, as respects other misfortunes of the libelant during the voyage, that no punitive damages should be given, but only such as may fairly compensate the libelant for his actual loss through the delay in proper treatment. I allow him \$1,250, and costs.

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ORISON v. THE SYRACUSE.

(Circuit Court, E. D. New York. July 1, 1890.)

In Admiralty. On appeal from district court. See 35 Fed. Rep. 367.

*Carpenter & Mosher*, for libelant Orison.

*Owen & Gray*, for the Syracuse.

BLATCHFORD, Justice. In this case let a decree be entered for the libelant for \$910.22, with interest from April 10, 1889, and for his costs in this court to be taxed.

**CORNELL STEAM-BOAT Co. v. THE CITY OF BROCKTON.****OLD COLONY STEAM-BOAT Co. v. THE J. C. HAETT.**

(*Circuit Court, E. D. New York. July 1, 1890.*)

In Admiralty. On appeal from district court. See 37 Fed. Rep. 897.

*Robert D. Benedict*, for the Cornell Steam-Boat Company.  
*Shipman, Barlow, Larocque & Choate*, for the City of Brocton.

BLATCHFORD, Justice. I concur in the views of the district judge, fully expressed in his opinion in these cases. The new proofs taken in this court do not vary the case favorably to the City of Brockton. Decrees will be entered in accordance with my findings.

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